

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

IN THE MATTER OF APPLICATION )  
56226 FILED TO CHANGE THE )  
MANNER AND PLACE OF USE OF )  
THE WATERS OF THE TRUCKEE )  
RIVER, STOREY COUNTY, NEVADA. )

**RULING ON REMAND**

**4116 A**

**GENERAL**

**I.**

Application 56226 was filed on April 24, 1991, by the Town of Fernley to change the place and manner of use of 282.26 acre-feet annually, a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*.<sup>1</sup> The Application proposed to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use with the Fernley Utilities water service area.<sup>2</sup> The point of diversion remained at Derby Dam, located within the N½ SW¼ of Section 19, T.20S., R.23E., M.D.B.&M.<sup>3</sup>

**II.**

Application 56226 was timely protested by the United States Bureau of Reclamation (Bureau) and the Pyramid Lake Paiute Tribe of Indians (Tribe).

**III.**

An administrative hearing was held on May 25-26, 1993, after which the State Engineer issued State Engineer's Ruling No. 4116 (Ruling 4116). The Bureau and the Tribe appealed Ruling 4116 to the Federal District Court and the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals reversed the Federal District Court's decision affirming the State Engineer's decision and remanded the matter to the Federal District Court for further proceedings consistent with its opinion.<sup>4</sup> On June 24, 2005, the

---

<sup>1</sup> Final Decree, *United States v. Orr Water Ditch Co.*, In Equity, Docket No. A-3 (D. Nev. Sept. 4, 1944).

<sup>2</sup> State Engineer's Ruling No. 4116, dated May 27, 1994, official records in the Office of the State Engineer.

<sup>3</sup> Exhibit No. 2, public administrative hearing before the State Engineer, May 25, 1993, hereinafter the transcript of the hearing and the exhibits will be referred to solely by the transcript page number or the exhibit number.

<sup>4</sup> *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935 (2001).

Federal District Court granted the City of Fernley's Motion to Remand the matter to the Nevada State Engineer.<sup>5</sup>

### **FINDINGS OF FACT**

#### **I.**

The Federal District Court in its Order of June 24, 2005, held that the scheduling of further hearings before the State Engineer was to be at his discretion. The State Engineer finds an additional administrative hearing is not necessary.

#### **II.**

Application 56226 referenced 28 separate parcels of land as comprising the existing places of use. However, the Parcel identified as Parcel 13 was intentionally left blank and during the course of the administrative hearing the Applicant withdrew Parcel 6 from consideration leaving 280.78 acre-feet under consideration.

#### **III.**

In Ruling 4116, the State Engineer found that "[e]ach parcel of land is accompanied by a "contract" for a water right from the United States Department of Interior."<sup>6</sup> The State Engineer found in Ruling 4116 that the contracts for Parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 were all dated prior to March 22, 1913, and as such were not subject to the forfeiture provision of Nevada Water Law. The State Engineer found that the contracts for Parcels 1, 3, 8, 9, 10, 16 and 20 were all dated after March 22, 1913.

The State Engineer finds the evidence presented at the 1993 administrative hearing specifically provided the following as to various parcels and their related contract dates.<sup>7</sup>

|          |                   |
|----------|-------------------|
| Parcel 1 | August 6, 1917    |
| Parcel 2 | December 20, 1907 |
| Parcel 3 | April 12, 1917    |
| Parcel 4 | February 16, 1910 |

---

<sup>5</sup> Order, *U.S. V. Orr Ditch Water Co.*, Equity A-3-LDG, June 22, 2005.

<sup>6</sup> Ruling 4116 at 9.

<sup>7</sup> Exhibit No. 21.

Ruling  
Page 3

|           |   |
|-----------|---|
| Parcel 5  | December 20, 1907   |
| Parcel 7  | June 17, 1909   |
| Parcel 8  | July 30, 1915   |
| Parcel 9  | January 29, 1915  |
| Parcel 10 | August 6, 1917  |
| Parcel 11 | June 17, 1909   |
| Parcel 12 | June 17, 1909   |
| Parcel 14 | June 17, 1909   |
| Parcel 15 | April 29, 1907  |
| Parcel 16 | January 29, 1915  |
| Parcel 17 | February 16, 1910   |
| Parcel 18 | December 20, 1907 <sup>8</sup>  |
| Parcel 19 | July 30, 1915   |
| Parcel 20 | April 26 1946   |
| Parcel 21 | April 29, 1907  |
| Parcel 22 | April 29, 1907  |
| Parcel 23 | May 19, 1909  |
| Parcel 24 | June 17, 1909   |
| Parcel 25 | April 29, 1907  |
| Parcel 26 | February 16, 1910   |
| Parcel 27 | Unknown (see analysis below)  |
| Parcel 28 | September 21, 1910, for the 18.11 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19. No contract was provided covering the 0.649 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19. The State Engineer finds, since no contract was provided as to 0.649 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19, the State Engineer cannot rule on the protest issues of forfeiture and abandonment; therefore, that portion of the water right cannot be transferred under this application. |

---

<sup>8</sup> Transcript, pp. 152-153 .

As to Parcel 27, the Applicant provided two separate documents as its evidence of the contract date. Both documents refer to land in Lot 4 and the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 18, T.20N., R.25E., M.D.B.&M. A review of the water right application map<sup>9</sup> indicates that the existing place of use is a 3.08-acre parcel of land in the northwest corner of the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 18. Since the contract area identified as the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 18 is not relevant to the existing place of use, the location of Lot 4 within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 18 needed to be identified in order to determine if the contract documents provided relate to the existing place of use. A review of the General Land Office maps found in the Nevada Division of State Lands indicates that Lot 4 within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 18, T.20N., R.25E., M.D.B.&M. is located within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 18, which does not cover the same ground as the Parcel 27 existing place of use. The State Engineer finds no contract was provided as to this existing place of use and the State Engineer cannot rule on the protest issues of forfeiture and abandonment; therefore, the water right cannot be transferred under this application.

The State Engineer finds that the contracts for Parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26 and the portion of 28 referenced above all pre-date March 22, 1913, and therefore, are not subject to the forfeiture provision of Nevada Water Law. The State Engineer found above as to Parcel 27 and a portion of Parcel 28 that no contract was provided covering the existing place of use and the State Engineer could not rule on the protest issues of forfeiture and abandonment; therefore, the water rights cannot be transferred under this application. The State Engineer finds that Parcels 1, 3, 8, 9, 10, 16, 19, and 20 all have contracts that post-date March 22, 1913, and are subject to the forfeiture provision of Nevada Water Law.

#### IV.

#### Forfeiture

**Parcel 1** – The contract date is August 6, 1917. In Ruling 4116, the State Engineer found that the Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicated from aerial photographs that in 1949, 1973 and

---

<sup>9</sup> Exhibit No. 3.

1977 the land use on this parcel was described as bare land prepared for cultivation. The land use in 1984 was described as bare land and in 1991 as buildings, roads and bare land. The State Engineer noted that the Tribe's witness testified that the "farm unit was most likely in disrepair. It wasn't organized or prepared for cultivation." However, the State Engineer was not satisfied in how this determination was made nor was the State Engineer satisfied with the evidence the Tribe provided as to the indication of land use status on the composite map, which indicated the land was not irrigated from 1984 through 1989. As noted, by the time the Application was filed in 1991, the land use was described as bare land, buildings and roads.<sup>10</sup> The State Engineer in Ruling 4116 found that there was some question about the irrigation of the bare land in 1991 but by 1992 there was little doubt that the land on which the building stood could not be irrigated.

The Ninth Circuit Court of Appeals specifically addressed this parcel of land in its decision and was concerned that without any evidence to the contrary being introduced the State Engineer had concluded that the Tribe had failed to prove non-use by clear and convincing evidence and had used an evidentiary standard of proof beyond a reasonable doubt rather than the clear and convincing evidence standard necessary for forfeiture, which is evidence that is beyond a mere preponderance.<sup>11</sup> Based on the Ninth Circuit decision, the State Engineer finds for the seven-year period from 1984 through the filing of the Application in 1991 no water was placed to beneficial use on Parcel 1 subjecting it to a determination of forfeiture.

**Parcel 3** - The contract date is April 12, 1917. In Ruling 4116, the State Engineer found that the Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949 the land use on this parcel was described as bare land prepared for cultivation. In 1973 the land use was described as a farm road. In 1977 the land use was described as irrigated land, and in 1984 and 1991 as a farm road. The State Engineer found that the apparent contradiction from farm road to irrigated land could be explained if Parcel 3 was not properly located in

---

<sup>10</sup> Exhibit Nos. 20-5 and 20-12.

<sup>11</sup> 256 F.3d at 947.

the interpretation of the aerial photographs. The State Engineer indicated that a witness for the Applicant, who was familiar with the area, testified that Parcel 3 lies adjacent to the farm road, not on the farm road and that Parcel 3 was irrigated in 1984.<sup>12</sup>

Exhibit 20-12 is photographs taken during the Tribe's field investigation and shows a farm road. However, in reviewing the transcript, Mr. Ed Brush, who was the ditch water master for the Fernley area for many years, indicated that when he laid a map over the area he did not believe the existing place of use was a road, but rather was an area right off the road. Additional evidence provided by the Tribe was based on information from what is known as the composite map, which is a map prepared by the U.S. Bureau of Reclamation and this information indicates that the existing place of use was not irrigated.<sup>13</sup>

The State Engineer finds he is going to place more weight on the evidence provided by the Tribe and finds that the existing place of use was a farm road and not irrigated from 1973 through the time the Application was filed in 1991, which is an 18-year period of time and subjects the water right to a determination of forfeiture.

**Parcel 8** – The contract date is July 30, 1915. In Ruling 4116, the State Engineer found that the Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949, 1973, 1977, 1984, and 1991 the land use on this parcel was described as irrigated land, road and canal. The Tribe's evidence further indicates that 75% of the existing place of use was irrigated and 25% was not; however, there is no evidence that specifically identified or quantified that portion of the existing place of use that is not irrigated.<sup>14</sup> In Ruling 4116, the State Engineer found that the Tribe had not proven a continuous five-year period of non-use had occurred and therefore, the water right was not subject to a determination of forfeiture.

The State Engineer finds that the Tribe has not proven non-use as to any specifically identifiable or quantifiable portion of Parcel 8 and a substantial portion of the

---

<sup>12</sup> Transcript, pp. 244-252.

<sup>13</sup> Exhibit No. 20-8.

<sup>14</sup> Exhibit Nos. 20-5 and 20-8.

water right was used during the entire period of time; therefore, the water right is not subject to a determination of forfeiture.

**Parcel 9** –The contract date is January 29, 1915. In Ruling 4116, the State Engineer found buildings occupied the existing place of use since at least 1977 and that a period of non-use in excess of five years had occurred with respect to Parcel 9. The State Engineer finds the existing place of use was occupied by buildings from 1977 through the time the Application was filed in 1991, which is a 14-year period of time and subjects the water right to a determination of forfeiture.

**Parcel 10** - The contract date is August 6, 1917. In Ruling 4116, the State Engineer found that the land use history for Parcel 10 was very similar to that of Parcel 1. The State Engineer found that in 1949, 1973 and 1977 the land use was described as bare land prepared for cultivation. In 1984 the land use was described as bare land and in 1991 it was described as a building. However, in Ruling 4116, the State Engineer found in the same manner as he did in reference to Parcel 1. Referencing the concern of the Ninth Circuit Court of Appeals, the State Engineer addresses additional information provided by the Tribe. The composite map indicates that from 1984 through 1989 the existing place of use was not irrigated.<sup>15</sup> Noting there is no evidence to the contrary, the State Engineer finds no water was placed to beneficial use for irrigation on Parcel 10 for the seven-year period from 1984 through the filing of the application in 1991 subjecting the water right to a determination of forfeiture.

**Parcel 16** – The contract date is January 29, 1915. In Ruling 4116, the State Engineer noted that from 1973 through 1991 the existing place of use was occupied by a building. However, the State Engineer further indicated that the 1993 photograph<sup>16</sup> showed a fairly new building that could not have been constructed as long as twenty years ago and there is no evidence or testimony on the record whether the building observed in 1973, 1977, 1984 and 1991 is the same as that in the 1993 photograph. The State Engineer indicated that the Applicant's witness indicated that as ditch master for the Truckee-Carson Irrigation

---

<sup>15</sup> Exhibit No. 20-8.

<sup>16</sup> Exhibit No. 20-12.

District he personally turned irrigation water onto Parcel 16 during the period of 1984 through 1986.<sup>17</sup> However, upon additional questioning the ditch master did not confirm he turned water specifically onto Parcel 16.<sup>18</sup> The composite map indicates that from 1984 through 1989 the existing place of use was not irrigated.<sup>19</sup> Noting it does not matter if the building in the 1993 photograph is a new building or not, the evidence indicates some building occupied the existing place of use for a substantial period of time. Noting there is no evidence to the contrary, the State Engineer finds no water was placed to beneficial use for irrigation on Parcel 16 for the 18-year period from 1973 through the filing of the application in 1991 subjecting the water right to a determination of forfeiture.

**Parcel 19** – The contract date is July 30, 1915. In Ruling 4116, the State Engineer found that the Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949, 1973, 1977, 1984, and 1991 the land use on this parcel was described as irrigated land, road and canal. The Tribe’s evidence further indicates that 75% of the existing place of use was irrigated and 25% was not; however, there is no evidence that specifically identified or quantified that portion of the existing place of use that is not irrigated.<sup>20</sup> In Ruling 4116, the State Engineer found that the Tribe had not proven a continuous five-year period of non-use had occurred and therefore, the water right was not subject to a determination of forfeiture.

The State Engineer finds that the Tribe has not proven non-use as to any specifically identifiable or quantifiable portion of Parcel 19 and a substantial portion of the water right was used during the entire period of time; therefore, the water right is not subject to a determination of forfeiture.

**Parcel 20** – The contract date is April 26, 1946. In Ruling 4116, the State Engineer found that 100% of Parcel 20 was irrigated from 1984 through 1989; therefore, a continuous five-year period of non-use had not occurred and the water right was not subject to forfeiture. The composite map indicates that from 1984 through 1989 the existing place of

---

<sup>17</sup> Transcript, pp. 239-243, 245.

<sup>18</sup> Transcript, p. 244.

<sup>19</sup> Exhibit No. 20-8.

<sup>20</sup> Exhibit Nos. 20-5 and 20-8.

use was irrigated.<sup>21</sup> The State Engineer finds the Application was filed in 1991 and the existing place of use was irrigated in 1989; therefore, the Tribe has not proven a five-year period of non-use prior to the filing of the Application and affirms the earlier decision that the water right is not subject to forfeiture.

## V.

### Abandonment

The State Engineer has already found that Parcels 1, 3, 9, 10, and 16 are subject to a determination of forfeiture; therefore, it is unnecessary to review those parcels for a determination if they are also subject to a declaration of abandonment. The State Engineer has already found that the Tribe has not proven that Parcels 8, 19 or 20 are subject to a declaration of forfeiture as it has not proved its case as to non-use; therefore, it is unnecessary to review those parcels for a determination if they are also subject to a declaration of abandonment. The State Engineer has already found that Parcel 27 and the northern portion of Parcel 28 cannot be transferred under this application as the relevant contract document was not provided and as such no determination could be made on the protest issues of forfeiture and abandonment.

The parcels that will be reviewed as to abandonment are Parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, and a portion of 28.

The State Engineer finds the standard for reviewing whether a water right in the Newlands Project is subject to a declaration of abandonment has been established in a series of cases in the *U.S. v. Alpine* cases commonly known as *Alpine IV*, *V* and *VI*, which provide the following:<sup>22</sup>

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. A water right holder's non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the

---

<sup>21</sup> Exhibit No. 20-8.

<sup>22</sup> *U.S. v. Alpine*, 27 F. Supp. 2d 1230 (D. Nev. 1998), 291 F.3d 1062 (9<sup>th</sup> Cir. 2002), 340F.3d 903 (9<sup>th</sup> Cir. 2003).

likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada Water Law, but a prolonged period of non-use may raise an inference of an intent to abandon.

3. Abandonment is a question of fact to be determined from all the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, the Applicant must have provided other evidence to show there was no intent to abandon the water right to avoid a declaration of abandonment.

**Parcel 2** -- The contract date is December 20, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949 the land use was described as bare land prepared for cultivation. The land use was described in 1973 as a building, and farm road and in 1977, 1984 and 1991 as a building.<sup>22</sup> Exhibit No. 20-12 shows that a house surrounded by mature residential landscaping occupies the existing place of use, and

---

<sup>22</sup> Exhibit No. 20-5.

Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989.

The State Engineer finds no water was placed to beneficial use on Parcel 2 for the 18-year period from 1973 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigation. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment. The State Engineer finds the water right appurtenant to Parcel 2 is subject to a declaration of abandonment.

**Parcel 4** – The contract date is February 16, 1910. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as irrigated land. The land use was described in 1973 as bare land prepared for cultivation. In 1977 the land use was described as a building and irrigated field, and in 1984 and 1991 as buildings and a paved street.<sup>23</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989.

The State Engineer finds no water was placed to beneficial use on Parcel 4 for the seven-year period from 1984 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigated agriculture. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment. The State Engineer finds the water right appurtenant to Parcel 4 is subject to a declaration of abandonment.

**Parcel 5** – The contract date is December 20, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by

---

<sup>23</sup> Exhibit No. 20-5.

the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949 the land use was described as irrigated land. The land use was described in 1973, 1977, 1984 and 1991 as a football field and bare land.<sup>24</sup> Exhibit No. 20-12 shows the area described as bare land is being in an area that is fenced off for the football field and is a weed covered non-irrigated area, and Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989. The Applicant's witness indicated he delivered water to the existing place of use between 1984 and 1989;<sup>25</sup> however, the State Engineer questions how water from the Truckee-Carson Irrigation District canal system would have been used to irrigate a football field as furrows are not typically found in football fields.

The State Engineer finds no water was placed to beneficial use on Parcel 5 for the 18-year period from 1973 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigated agriculture. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment. The State Engineer finds the water right appurtenant to Parcel 5 is subject to a declaration of abandonment.

**Parcel 7** – The contract date is June 17, 1909. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949 and 1973 the land use was described as bare land prepared for cultivation. The land use was described in 1977 as irrigated land, and in 1984 and 1991 as a farmyard.<sup>26</sup> Exhibit No. 20-12 shows the area described

---

<sup>24</sup> Exhibit No. 20-5.

<sup>25</sup> Transcript, p. 244.

<sup>26</sup> Exhibit No. 20-5.

as a farm yard to be an area where apparently horses are kept as one can see old bathtubs that are often used for water troughs for horses and other signs of horses are present (manure and the land is trampled bare). However, Exhibit No. 20-8 indicates that the composite map shows the existing place of use was 50% irrigated from 1984 through 1989. Therefore, the Tribe's own evidence is contradictory as to the land use on the existing place of use.

The State Engineer finds since the evidence indicates the land was irrigated in 1977 and that at least 50% of the land was still irrigated from 1984 through 1989, and since there is a contradiction in the Tribe's own evidence a finding of abandonment is not proper. The State Engineer finds the existing place of use is not covered by a farm yard, but rather is bare ground as demonstrated by the Tribe's own evidence in the picture provided in Exhibit No. 20-12. The State Engineer finds there is no evidence as to any specifically identifiable or quantifiable portion of the existing place of use not being irrigated; therefore, the Tribe has not proved non-use as to any specifically identifiable or quantifiable ground. The State Engineer finds there is evidence of payment of the assessments for the water right. The State Engineer finds the water right appurtenant to Parcel 7 is not subject to a declaration of abandonment.

**Parcel 11** – The contract date is June 17, 1909. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949 and 1973 the land use was described as bare land prepared for cultivation. The land use was described in 1977 and 1984 as irrigated land, and in 1991 as a building and farmyard.<sup>27</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was irrigated from 1984 through 1989. The Application was filed in 1991; therefore, the Tribe has not proved even five continuous years of non-use. The State Engineer finds with the only evidence being that a

---

<sup>27</sup> Exhibit No. 20-5.

house was there in 1991, the same year the application was filed, and the payment of assessments, the Tribe has not proven an extended period of non-use or an intent to abandon the water right.

**Parcel 12** – The contract date is June 17, 1909. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as bare land prepared for cultivation. The land use was described in 1973 as a farm road, but in 1977 it was described as irrigated, with it again being described as a farm road in 1984 and 1991.<sup>28</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989. There is no evidence to the contrary and a farm road is a use inconsistent with irrigation.

The State Engineer finds no water was placed to beneficial use on Parcel 12 for the seven-year period from 1984 through the filing of the application in 1991. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment when the land use is inconsistent with irrigation. The State Engineer finds the water right appurtenant to Parcel 12 is subject to a declaration of abandonment.

**Parcel 14** – The contract date is June 17, 1909. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949, 1973 and 1984 the land use was described as bare land prepared for cultivation. The land use was described in 1977 and

---

<sup>28</sup> Exhibit No. 20-5.

1991 as irrigated land.<sup>29</sup> Exhibit No. 20-8 indicates that the composite map shows that 60% of the existing place of use was not irrigated from 1984 through 1989.

The State Engineer finds since the Tribe's evidence is contradictory with one piece of evidence indicating the land was irrigated right up until the time the Application was filed. The State Engineer finds there is not clear and convincing evidence of non-use or an intent to abandon the water right. The State Engineer finds there is evidence of payment of the assessments for the water right and there is evidence of land use consistent with irrigation. The State Engineer finds the water right appurtenant to Parcel 14 is not subject to a declaration of abandonment.

**Parcel 15** – The contract date is April 29, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as irrigated land. The land use was described in 1973, 1977, 1984 and 1991 as a building.<sup>30</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989. There is no evidence to the contrary and a building is a use inconsistent with irrigation.

The State Engineer finds no water was placed to beneficial use on Parcel 15 for the 18-year period from 1973 through the filing of the application in 1991. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment when the land use is inconsistent with irrigation.

---

<sup>29</sup> Exhibit No. 20-5.

<sup>30</sup> Exhibit No. 20-5.

The State Engineer finds the water right appurtenant to Parcel 15 is subject to a declaration of abandonment.

**Parcel 17** – The contract date is February 16, 1910. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as irrigated land. The land use was described in 1973 as bare land prepared for cultivation. In 1977 the land use was described as irrigated, and in 1984 and 1991 as bare land.<sup>1</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989. There is no evidence to the contrary, but bare land is not a use inconsistent with irrigation. The State Engineer finds assessments have been paid. The State Engineer finds the Tribe’s only evidence is non-use for a five-year period and since the land use is not inconsistent with irrigation and assessments have been paid the Tribe has failed to provide clear and convincing evidence of abandonment.

**Parcel 18** - The contract date is December 20, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as irrigated land. The land use was described in 1973, 1977, 1984 and 1991 as a football field and bare land.<sup>31</sup> Exhibit No. 20-12 shows the area described as bare land is within an area fenced off for the football field and is not an irrigated area, and Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989.

---

<sup>31</sup> Exhibit No. 20-5.

The State Engineer finds no water was placed to beneficial use on Parcel 18 for the 18-year period from 1973 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigated agriculture. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment. The State Engineer finds the water right appurtenant to Parcel 18 is subject to a declaration of abandonment.

**Parcel 21** – The contract date is April 29, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as irrigated land. The land use was described in 1973 as bare land prepared for cultivation. In 1977, 1984 and 1991 the land use was described as a building.<sup>32</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989.

The State Engineer finds no water was placed to beneficial use on Parcel 21 for the 14-year period from 1977 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigated agriculture. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment when the land use has been in a use inconsistent with irrigation for an extended period of time. The State Engineer finds the water right appurtenant to Parcel 21 is subject to a declaration of abandonment.

**Parcel 22** – The contract date is April 29, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no

---

<sup>32</sup> Exhibit No. 20-5.

evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949, 1973, 1984 and 1991 the land use was described as bare land prepared for cultivation. In 1977 the land use was described as irrigated land and a farm road.<sup>33</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was irrigated from 1984 through 1989 and testimony was provided by the water master that he delivered water to the existing place of use.<sup>34</sup>

The State Engineer finds there is no evidence of an extended period of non-use of the water right, there is no evidence of a use inconsistent with irrigation, there is evidence of the payment of assessments and the water right is not subject to a declaration of abandonment.

**Parcel 23** – The contract date is May 19, 1909. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949 and 1973 the land use was described as bare land prepared for cultivation. The land use was described in 1977, 1984 and 1991 as a building.<sup>35</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989.

The State Engineer finds no water was placed to beneficial use on Parcel 23 for the 14-year period from 1977 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigated agriculture. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment when the land use has been

---

<sup>33</sup> Exhibit No. 20-5.

<sup>34</sup> Transcript, p. 244.

<sup>35</sup> Exhibit No. 20-5.

in a use inconsistent with irrigation for an extended period of time. The State Engineer finds the water right appurtenant to Parcel 23 is subject to a declaration of abandonment.

**Parcel 24** – The contract date is June 17, 1909. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949, 1973 and 1984 the land use was described as bare land prepared for cultivation. In 1977 the land use was described as irrigated land and in 1991 as buildings.<sup>36</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was irrigated from 1984 through 1989.

The State Engineer finds there is no evidence of an extended period of non-use of the water right, there is no evidence of a use inconsistent with irrigation until 1991, which is the same year the application was filed, there is evidence of the payment of assessments and the water right is not subject to a declaration of abandonment.

**Parcel 25** – The contract date is April 29, 1907. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as bare land prepared for cultivation. In 1973, 1977, 1984 and 1991 the land use was described as a building and farmyard.<sup>37</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989. Exhibit No. 20-12 shows several older mobile homes surrounded by large equipment and trucks.

---

<sup>36</sup> Exhibit No. 20-5.

<sup>37</sup> Exhibit No. 20-5.

The State Engineer finds no water was placed to beneficial use on Parcel 25 for the 18-year period from 1973 through the filing of the application in 1991. The State Engineer finds the existing place of use is occupied by a use inconsistent with irrigated agriculture. The State Engineer finds the only evidence as to a lack of intent to abandon the water right is the payment of assessments, which the Ninth Circuit Court of Appeals has held is insufficient to avoid a declaration of abandonment when the land use has been in a use inconsistent with irrigation for an extended period of time. The State Engineer finds the water right appurtenant to Parcel 25 is subject to a declaration of abandonment.

**Parcel 26** – The contract date is February 16, 1901. In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 “Historical Land Use for the Places Applied for Transfer,” which indicates from aerial photographs that in 1949 the land use was described as irrigated land. In 1973 and 1977 the land use was described as irrigated land, canals and farm road. In 1984 and 1991 the land use was described as a bare land prepared for cultivation, canals and farm road.<sup>38</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was not irrigated from 1984 through 1989.

The State Engineer finds the Tribe’s evidence is contradictory in that some evidence shows a portion of the this land was still in cultivation right up to 1991 when the Application was filed. The State Engineer finds there is not clear and convincing evidence as to non-use of the water right on any specifically identifiable or quantifiable portion of the existing place of use; therefore, the Tribe has not proved its claim of abandonment as to any specifically identifiable or quantifiable portion of the existing place of use. The State Engineer finds the water right appurtenant to Parcel 26 is not subject to a declaration of abandonment.

**Parcel 28** – The contract date is September 21, 1910, for the 18.11 acres in the NW¼ SE¼ of Section 19. No contract was provided covering the 0.649 acres in the SW¼ NE¼

---

<sup>38</sup> Exhibit No. 20-5.

of Section 19. The State Engineer has already found that since no contract was provided as to 0.649 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 19, the State Engineer cannot rule on the protest issues of forfeiture and abandonment; therefore, that portion of the water right cannot be transferred under this application.

In Ruling 4116, the State Engineer found that the Town of Fernley had kept the water rights in good standing as evidenced by the payment of assessments to the Truckee-Carson Irrigation District and there was no evidence that the previous owner had failed to pay the assessments. The Tribe provided evidence in Exhibit No. 20-5 "Historical Land Use for the Places Applied for Transfer," which indicates from aerial photographs that in 1949, 1973 and 1977 the land use was described as irrigated land. In 1984 the land use was described as irrigated land and bare land and in 1991 the land use was described as buildings, paved street and bare land.<sup>39</sup> Exhibit No. 20-8 indicates that the composite map shows the existing place of use was irrigated from 1984 through 1989.

The State Engineer finds there is not clear and convincing evidence of an extended period of non-use prior to the filing of the change application. The State Engineer finds there is evidence of payment of assessments and through at least 1989 the land use was not inconsistent with irrigation, and that the water right appurtenant to the portion of Parcel 28 under consideration is not subject to a declaration of abandonment.

## **CONCLUSIONS**

### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>40</sup>

### **II.**

#### **Forfeiture**

The State Engineer concludes the Tribe proved the water rights appurtenant to Parcels 1, 3, 9, 10 and 16 are subject to a declaration of forfeiture.

---

<sup>39</sup> Exhibit No. 20-5.

<sup>40</sup> NRS chapters 533.

**III.**

**Abandonment**

The State Engineer concludes the Tribe proved the water rights appurtenant to Parcels 2, 4, 5, 12, 15, 18, 21, 23, and 25 are subject to a declaration of abandonment.

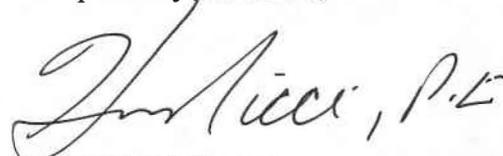
**IV.**

The State Engineer concludes the Tribe did not prove the water rights appurtenant to Parcels 7, 8, 11, 14, 17, 19, 20, 22, 24, 26 and a portion of 28 are either forfeited or abandoned and they may be transferred under Application 56226.

**RULING**

The protests to Application 56226 are granted in part and overruled in part. The Applicant withdrew the water right appurtenant to Parcel 6 from consideration. The water rights appurtenant to Parcels 1, 3, 9, 10 and 16 are declared forfeited. The water rights appurtenant to Parcels 2, 4, 5, 12, 15, 18, 21, 23, and 25 are declared abandoned. The water rights appurtenant to Parcel 27 cannot be transferred under this application, but there is no declaration of forfeiture or abandonment. The water right appurtenant to the 0.649 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 19 in Parcel 28 cannot be transferred under this application, but there is no declaration of forfeiture or abandonment. Ruling 4116 is hereby amended to allow the transfer of water rights appurtenant to 46.149 acres of land totaling 207.67 acre-feet to be perfected under the new use.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT/jm

Dated this 20<sup>th</sup> day of

April, 2006.