

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

IN THE MATTER OF PROTESTED APPLICATION)
56226, FILED TO CHANGE THE MANNER AND)
PLACE OF USE OF THE WATERS OF THE)
TRUCKEE RIVER HERETOFORE DECREED IN THE)
ORR DITCH DECREE, STOREY COUNTY, NEVADA.)

RULING
4116

GENERAL

I.

Application 56226 was filed on April 24, 1991, by the Town of Fernley, to change the manner and place of use of 280.78 acre feet,¹ a portion of the waters heretofore decreed and set forth under Claim No. 3 of the Orr Ditch Decree.² The Town of Fernley wishes to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use and to change the place of use to the Fernley Utilities water service area. The point of diversion would remain at Derby Dam, located within the N $\frac{1}{2}$ SW $\frac{1}{4}$ Section 19, T.20N., R.23E., M.D.B.&M.³

II.

Application 56226 was timely protested by the U.S. Bureau of Reclamation (Bureau) on the grounds that:

The granting of this application could have detrimental effects on the operation of the Newlands Project by:

1. Reducing the amount of water available to project water users.

¹ The original quantity of water requested to be changed under Application 56226 was 282.26 acre feet. During the hearing, the Applicant withdrew Parcel No. 6, in the amount of 1.48 acre feet, leaving the amount under Application 56226 to be 280.78 acre feet.

² Final Decree in United States v. Orr Water Ditch Co., In Equity, Docket No. A-3 (D. Nev. Sept. 4, 1944).

³ Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993.

2. Reducing the conveyance efficiency of the project.
3. Other possible impacts of the proposed change in manner of use and place of use of project water.

The Bureau of Reclamation requests that Application 56226 be denied.⁴

III.

Application 56226 was also timely protested by the Pyramid Lake Paiute Tribe of Indians (Tribe) on the grounds that:

1. Pursuant to federal reclamation law, 43 U.S.C. § 389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531 et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; and (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery.

3. Granting or approving the above referenced application by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicants do not have vested rights to use the waters of the Truckee River on the proposed places of use described in their applications.

4. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened

⁴ Exhibit No. 25, Public Administrative Hearing before the State Engineer, May 25, 1993.

Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

5. On information and belief, said application involves the transfer of an alleged water right that was never perfected in accordance with federal and state law. Such an alleged water right cannot and should not be transferred.

6. On information and belief, said application involves the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said application should be denied because it would increase the consumptive use of water within the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.

8. On information and belief, said application involves the proposed transfer of alleged water rights from land that is not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

9. The application should not be approved because the applicants have not entered into a repayment contract with the United States.

10. The application should not be approved because the proposed use of the Newlands Reclamation Project's water rights is not authorized by federal law.

11. The application should not be approved because the proposed place of use is not within the authorized service area or boundaries of the Newlands Reclamation Project.

12. The application violates the provisions of Nevada law which protect the endangered cui-ui.

13. The application should not be approved because the applicant has not obtained permission of use federal facilities for the transportation of the water it is seeking to obtain and transfer.

14. On information and belief, the water right that is the subject of the application was obtained from a Newlands Project water user who has violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project. The Truckee-Carson Irrigation District also has violated and is continuing to violate those rules and regulations. Approval of the application therefore would violate the Order, Judgement and Decree entered in the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973).

15. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of the Operating Criteria and Procedures for the Newlands Reclamation Project; and (iii) it will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the above referenced application be denied and that an order be entered for such relief as the State Engineer deems just and proper.⁵

IV.

On January 15, 1993, a Pre-Hearing Conference was held in the matter of protested Application 56226. The Truckee-Carson Irrigation District (TCID) requested and was granted the status of an intervenor.⁶

V.

An administrative hearing before the State Engineer was held on May 25, 1993.⁷

⁵ Exhibit No. 26, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁶ Transcript pp. 35-56, Pre-Hearing Conference before the State Engineer, January 15, 1993.

⁷ Exhibit No. 1, Public Administrative Hearing before the State Engineer, May 25, 1993.

FINDINGS OF FACT

I.

In addressing change applications, the Orr Ditch Decree sets forth the procedure to accomplish changes in the point of diversion, manner and place of use.

The Orr Ditch Decree provides at page 88, that:²

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion, and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.⁸

The State Engineer finds that change Application 56226 is properly before him for consideration and decision.

II.

The protestant Tribe requested that evidence and testimony presented by the Tribe at the previous hearings on the Newlands Project applications be included in the record on Application 56226.⁹ This request was opposed by the Applicant on the grounds that it was not a party to any of the previous hearings.¹⁰ At the hearing, all parties attempted to make this record complete and independent of any previous hearings. The State Engineer finds that this record is complete and that the record of previous hearings will not be included in this record.

⁸ Recently, the Ninth Circuit Court of Appeals interpreted this controlling provision. The Court concluded that "the manner provided by law" means "[n]ot only state water law substance, therefore, but procedure as well governs Orr Ditch water rights." United States v. Orr Water Ditch Co., 914 F.2nd 1302, 1307-1308 (9th Cir. 1990).

⁹ Exhibit No. 8, Public Administrative Hearing before the State Engineer, May 25, 1993.

¹⁰ Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 25, 1993.

III.

The Bureau raised the issue of ownership of the water rights requested to be changed by Application 56226 and contended that the Applicant had failed to establish a claim of ownership of these rights.¹¹ The Bureau did not present any evidence or testimony that any other party owned these water rights. Later, the Bureau accepted the Town of Fernley's assertion that it had acquired these rights.¹²

The Applicant submitted evidence¹³ and testimony¹⁴ which shows the Town of Fernley paid the operation and maintenance fees for these water rights that are charged by TCID. The Applicant's testimony revealed that all of the water rights are owned by the Town of Fernley.¹⁵ Additionally, TCID, who keeps the ownership records for the water rights within the Newlands Project, certified to the State Engineer that deeds are on file for these water rights that transfer ownership to the Town of Fernley.¹⁶ The State Engineer finds that the owner of the water rights requested to be changed by Application 56226 is the Town of Fernley.

IV.

The protestant Tribe claims that some of the water rights requested to be changed by Application 56226 have been forfeited.⁵ A recent decision of the Ninth Circuit Court of Appeals provides

¹¹ Transcript p. 42, Public Administrative Hearing before the State Engineer, May 25, 1993.

¹² Post Hearing Brief filed by the U.S. Bureau of Reclamation, July 29, 1993.

¹³ Exhibit No. 24, Public Administrative Hearing before the State Engineer, May 25, 1993.

¹⁴ Transcript pp. 323-326, Public Administrative Hearing before the State Engineer, May 25, 1993.

¹⁵ Transcript p. 211, Public Administrative Hearing before the State Engineer, May 25, 1993.

¹⁶ Transcript p. 323-325, Public Administrative Hearing before the State Engineer, May 25, 1993.

guidance as to whether a water right is subject to forfeiture.¹⁷
The Court stated:

On remand, in order to determine whether a water right may have been forfeited, it first must be determined whether and when the right vested, and under which law appropriation was initiated. If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060.¹⁸

Previously, the State Engineer concluded that the water rights within the Newlands Project, as set forth in the Alpine Decree,¹⁹ "were not subject to Nevada's forfeiture statute because they had vested in the United States upon the creation of the Project in 1902, prior to passage of Nevada's forfeiture statute."²⁰ On appeal, the Ninth Circuit analyzed whether the water rights in the Newlands Project vested in 1902, and concluded that they did not.²¹ Rather, the Court held that, as a matter of Nevada law, "the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land."²² However, the Court did not analyze when the water rights in the Newlands Project were initiated.

The State Engineer must now determine if the appropriations of the water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913. When a right was initiated, that is its priority date, depends upon when the "first

¹⁷ United States v. Alpine Land & Reservoir Co., 983 F.2d 1487 (9th Cir. 1993).

¹⁸ United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1496 (9th Cir. 1993).

¹⁹ Final Decree in United States v. Alpine Land & Reservoir Co., Civil No. D-183 BRT (D. Nev. Oct. 28, 1980).

²⁰ United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1490 (9th Cir. 1993).

²¹ Id. at 1495-96.

²² Id. at 1496.

step" to appropriate the water was taken and is a matter of Nevada law.

The doctrine of relation back has long applied to water appropriations due to the very nature of a water right and the fact that perfecting the right may take time. The Nevada Supreme Court explained the doctrine of relation back in the following way.

When any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it.²³

Accordingly, even though the water was not placed to beneficial use at the time that the first step was taken to secure the water right, so long as the appropriator exercises due diligence, the perfection of the right relates back to the earlier date, the priority date.²⁴ The state law requirements of "due diligence" and "relation back" apply to reclamation projects.²⁵

In this case, the individual farmers could not begin to irrigate lands within the Truckee Division of the Newlands Project until the United States obtained water rights for the Project on July 2, 1902, and completed construction on the Truckee Canal and Derby Dam in 1905.²⁶ In its analysis regarding the vesting of water rights, the Ninth Circuit distinguished between the water rights obtained by the United States for the Newlands Reclamation Project in 1902, and the water rights appurtenant to particular

²³ Ophir Mining Co. v. Carpenter, 4 Nev. 534, 543-44 (1869).

²⁴ United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877 (D. Nev. 1980); 2 R. Beck, Waters and Water Rights § 14.03(d)(1) at 195-97 (1991); Black's Law Dictionary 1158 (5th ed. 1979) (relation back is the "principle that an act done today is considered to have been done at an earlier time").

²⁵ 4 R. Beck, Waters and Water Rights § 36.04(b) at 193 n.118 (1991).

²⁶ Nevada v. United States, 463 U.S. 110, 116 (1983).

tracts of land.²⁷ While this distinction proved important as to when the water rights vested, this distinction has no importance as to the priority date of water rights in the Truckee Division of the Newlands Project because of the relation back doctrine. The State Engineer finds that the relation back doctrine applies in this situation and the first step taken in the appropriation of the water rights in the Truckee Division of the Newlands Project occurred on July 2, 1902.

Additional evidence further bolsters this finding. Beginning in 1905, any person who wanted to initiate a water right in Nevada was required to obtain a permit from the Nevada State Engineer. Act of March 1, 1905, ch. 46, § 3, 1905 Nev. Stat. 67. The water rights that are the subject of Application 56226 were not initiated by an application to the Nevada State Engineer. Instead, all of the water rights requested to be changed under Application 56226 were initiated in accordance with the Reclamation Act, as evidenced by the documents submitted to the United States Department of Interior by the original water right holder.²⁸ Therefore, the State Engineer finds that the appropriation of the water rights requested to be changed under Application 56226 was initiated in accordance with the law in effect prior to March 22, 1913.

V.

The Applicant assigned reference numbers to each parcel of land comprising the existing place of use of the water rights that are the subject of Application 56226.²⁹ Each parcel of land is accompanied by a "contract" for a water right from the United States Department of the Interior.²⁸ The contracts for the water

²⁷ United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1495 (9th Cir. 1993).

²⁸ Exhibit No. 21, Public Administrative Hearing before the State Engineer, May 25, 1993.

²⁹ Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 25, 1993. The Applicant assigned numbers from 1 through 28, and number 13 was intentionally left blank. Also, the water right appurtenant to parcel 6 was withdrawn at the hearing.

rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 were dated prior to March 22, 1913.³⁰ The contracts for the water rights appurtenant to parcels 1, 3, 8, 9, 10, 16, 19 and 20 were dated after March 22, 1913.³⁰ The protestant Tribe claims that the water rights whose contracts were dated after March 22, 1913, are subject to forfeiture.³¹ No claim of forfeiture is made for those water rights whose contracts were dated prior to March 22, 1913. While not agreeing with this criterion for determining eligibility for forfeiture, the State Engineer finds that the water rights appurtenant to parcels 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28 are not subject to forfeiture.

VI.

Of those parcels of land whose water right contracts were dated after March 22, 1913, three parcels have been irrigated at some time during the years 1984 through 1989. Evidence shows that 75% of parcel numbers 8 and 19 and 100% of parcel 20 were irrigated during this period.³² The State Engineer finds that a continuous five year period of non-use has not occurred for the water rights appurtenant to parcels 8, 19 and 20.

VII.

Of those parcels of land whose water right contracts were dated after March 22, 1913, the protestant Tribe alleges that parcels 1, 3, 9, 10, and 16 have not been irrigated for a significant period of time.³³ Therefore, the Tribe feels that the water rights appurtenant to parcels 1, 3, 9, 10, and 16 should be

³⁰ Exhibit No's. 20-9 and 21, Public Administrative Hearing before the State Engineer, May 25, 1993.

³¹ Post Hearing Brief filed by the Pyramid Lake Tribe of Indians, August 16, 1993.

³² Exhibit No. 20-8, Public Administrative Hearing before the State Engineer, May 25, 1993.

³³ Exhibit No's. 20-6 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

declared forfeited. As stated earlier, the State Engineer does not believe that these water rights are eligible for forfeiture. Assuming arguendo that forfeiture applies to these water rights, the following sets forth the standard of proof for forfeiture and analyzes the evidence and testimony supporting the allegation of forfeiture for each of these parcels.

The Nevada Supreme Court has held that there must be clear and convincing evidence that the statutory period of non-use has occurred.³⁴ The Court required this higher standard of proof because the law disfavors forfeitures.³⁴

Parcel 1 was described as being "bare land, prepared for cultivation" for the years 1949, 1973, and 1977, based on aerial photographs taken those years.³⁵ This may be interpreted as cultivated land that happened to be lying fallow with no crop, at those times when the aerial photographs were taken.³⁶ Parcel 1 was again described as "bare land" in 1984, based on the infrared aerial photographs taken on June 19 and 20, 1984, by the Bureau. The Tribe's witness testified that "the farm unit most likely was in disrepair. It wasn't organized or prepared for cultivation..."³⁷ However, there is no evidence or testimony showing how that determination was made. The State Engineer has difficulty making a finding of continuous non-use with evidence that the land was prepared for cultivation in 1949, 1973 and 1977. Cultivation is generally associated with irrigation.³⁴ In addition, there was no evidence of non-use for the years between those years the aerial photographs were taken. The State Engineer finds that the testimony and evidence presented for the years through 1984 do not

³⁴ Town of Eureka v. Office of the State Engineer of Nevada, 108 Nev, 826 P.2d 948 (1992).

³⁵ Exhibit No. 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

³⁶ Transcript pp. 90-91, Public Administrative Hearing before the State Engineer, May 25, 1993.

³⁷ Transcript p. 91, Public Administrative Hearing before the State Engineer, May 25, 1993.

prove by clear and convincing evidence that a continuous five year period of non-use has occurred.

In support of its allegation of forfeiture, the protestant Tribe refers to a composite map prepared by the Bureau.³² This map was prepared to show lands with surface water rights as of 1984 that were irrigated one or more years from 1984 through 1989. The interpretation of the composite map concluded that parcel 1 was not irrigated in any of those years.³² However, there is no evidence or testimony on the record indicating how the Bureau prepared the composite map or how the map was interpreted. Several questions come to mind related to the determination that parcel 1 was not irrigated: 1. Were aerial photographs taken each of the six years and if so, were they interpreted by a qualified person? 2. Was parcel 1 inspected on the ground each year? 3. Were any of the years classified as dry years, in which the irrigator did not receive his full water entitlement? If so, can a water right be forfeited for non-use if the parcel was not delivered water? 4. What is the resolution of the aerial photographs? Some of the parcels of land in Application 56226 are less than 0.2 acre in area. Lacking answers to these questions, the State Engineer finds that the Tribe failed to provide clear and convincing evidence that parcel 1 was not irrigated for the years 1984 through 1989.

In 1991, parcel 1 was described as "bare land, buildings, and roads."³⁵ The photograph taken in May, 1993, supports this land description and shows no evidence of irrigation.³⁸ While there is some question about irrigation of the bare land in 1991 and 1992, there is little doubt that the land on which the buildings stand could not have been irrigated since 1991, when the buildings were first observed. The State Engineer finds that the portion of parcel 1 on which the buildings stand was not irrigated in 1991, 1992, and 1993, which is short of the statutory five years, required for forfeiture.

³⁸ Exhibit No. 20-12, Public Administrative Hearing before the State Engineer, May 25, 1993.

Parcel 3, in 1949, was described as being "Bare land, prepared for cultivation." In 1973, 1984, and 1991, the land was described as "Farm road."³⁵ However, in 1977, the land was described as being irrigated.³⁵ This apparent contradiction can be explained if parcel 3 was not located properly in the interpretation of the aerial photographs taken in 1949, 1973, 1984 and 1991. The Applicant's witness, who is familiar with this area, testified that parcel 3 lies adjacent to the farm road, not on the farm road.³⁹ He also testified that parcel 3 was irrigated in 1984.⁴⁰ The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 3.

Parcel 9 was described as having buildings on it in 1977, 1984, and 1991.³⁵ The photograph taken in 1993, shows the buildings and no sign of irrigation.³⁸ The existence of these buildings on the property precludes irrigation. The State Engineer finds that a period of non-use, greater than five years, has occurred with respect to parcel 9.

The land use history for parcel 10 is similar to that of parcel 1. "Bare land prepared for cultivation" was observed in 1949, 1973, and 1977. "Bare land" was observed in 1984, and a building was observed in 1991.³⁴ The photograph taken in 1993, shows homes in what appears to be a subdivision.³⁸ The State Engineer finds, in the same manner as for parcel 1, that the evidence prior to 1991 is not clear and convincing that irrigation did not take place. The State Engineer further finds that parcel 10 has not been irrigated in 1991, 1992, and 1993, which represents a period of non-use that is insufficient to declare a forfeiture.

In the years 1973, 1977, 1984 and 1991, a building was observed on parcel 16.³⁴ The 1993 photograph shows a fairly new building that could not have been constructed as long as twenty

³⁹ Transcript pp. 249-252, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁴⁰ Transcript p. 244, Public Administrative Hearing before the State Engineer, May 25, 1993.

years ago.³⁸ 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 Applicant's witness testified that, as ditch water master for TCID, he personally turned irrigation water onto parcel 16, during the period 1984 through 1989 (later clarified as 1984 through 1986).⁴¹ The State Engineer finds that the record lacks clear and convincing evidence that a five year period of non-use occurred with respect to parcel 16.

VIII.

The protestant Tribe asserts that those water rights in Application 56226, whose contracts were dated prior to March 22, 1913, have been abandoned.⁵ The Nevada Supreme Court held that abandonment is the voluntary relinquishment of a water right by the owner, with the intention of forsaking and deserting it.⁴² The Tribe presented evidence⁴³ and testimony⁴⁴ that some of the lands to which these water rights are appurtenant, have not been irrigated for a significant period of time. The Tribe feels that a prolonged and unexplained non-use creates a rebuttable presumption of an intent to abandon.⁴⁵ However, the Ninth Circuit Court of Appeals found that although the longer the period of non-use, the greater the likelihood of abandonment, there was no support for a rebuttable presumption under Nevada law.⁴⁶

⁴¹ Transcript pp 239-243, 245, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁴² In re Waters of Manse Spring and its Tributaries, 60 Nev. 280, 286-290, 108 P.2d 311 (1940).

⁴³ Exhibit No. 20, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁴⁴ Transcript pp. 89-100, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁴⁵ Post-hearing brief filed by the Pyramid Lake Paiute Tribe of Indians, August 16, 1993.

⁴⁶ United States v. Alpine Land and Reservoir Co., 983 F.2d 1487, 1494 (9th Cir. 1993).

Permanent improvements, such as farm buildings, roads and canals, have been constructed on some of the parcels.⁴⁷ The Tribe feels that prolonged non-use coupled with the existence of permanent improvements establishes abandonment of the water rights.⁴⁵ However, the Tribe presented no evidence or testimony related to the intent to abandon these water rights.

Since the Town of Fernley has owned the water rights at issue here, it has kept the rights in good standing, evidenced by paying the TCID assessments^{13,14} and filing appropriate ownership documentation with TCID.¹⁵ The TCID Project Manager testified that the assessments are current.⁴⁸ There is no evidence on the record indicating that any previous owner failed to pay the assessments or in any way displayed an intent to abandon or forsake these water rights. The State Engineer finds that there is insufficient evidence and testimony on the record to indicate an intent to abandon these water rights.

IX.

The protestant Tribe alleges that the water right appurtenant to parcel 16 has never been perfected and therefore, under Nevada law cannot be changed.^{5,49} The Tribe relied upon aerial photographs taken in 1949, 1973, 1977, 1984, 1990 and 1991, to make this allegation. Mr. Edwin Brush, who was the ditch water master for TCID from 1955 to 1987, testified that he personally turned water from the ditch onto parcel 16.⁵⁰ The State Engineer finds that parcel 16 was irrigated and the water right appurtenant to parcel 16 was perfected by putting the water to beneficial use.

⁴⁷ Exhibits 20-5 and 20-7, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁴⁸ Transcript p. 326, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁴⁹ Exhibit No. 20-6, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁵⁰ Transcript pp. 239-243, Public Administrative Hearing before the State Engineer, May 25, 1993.

X.

The protestant Tribe contends that granting Application 56226 would impair the value of its Truckee River water rights because the Tribe is entitled to all of the unappropriated Truckee River water.⁵ The question of the availability of unappropriated water is not at issue. Application 56226 seeks only to change water already appropriated under the Orr Ditch Decree. The State Engineer finds that approval of Application 56226 would not cause the Newlands Project to exceed the quantity of water provided for in the Orr Ditch Decree. The State Engineer further finds that there would be no impairment of any existing rights on the Truckee River as a result of the approval of Application 56226.

XI.

The protestant Tribe feels that approval of Application 56226 would be detrimental to the public welfare in that it would jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout and adversely affect the recreational value of Pyramid Lake.⁵ The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species in the lower reaches of the Truckee River and Pyramid Lake. However, Application 56226 seeks only to change the manner of use and place of use of water already appropriated under the Orr Ditch Decree. Therefore, the State Engineer finds that the Newlands water rights set forth under the Orr Ditch Decree would not be exceeded if Application 56226 were approved.

The Ninth Circuit Court of Appeals addressed the Tribe's public interest argument.⁵¹ The Court stated:

The Tribe's public interest argument cannot be regarded as anything short of an attempted collateral attack on the Orr Ditch decree. "[E]veryone involved in Orr Ditch contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." Nevada v. United States, 463

⁵¹ United States v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1224 (9th Cir. 1989).

U.S. at 143, 103 S.Ct. at 2924. The Engineer found that the proposed transfers would not cause the Project to exceed the overall maximum water consumption provided for in the Orr Ditch and Alpine decrees, and the record supports this finding. Indeed, the Engineer found that these proposed transfers "cumulatively represent[] a reduction in diversion from the existing places of use which results in less demand on project water."

By establishing the maximum aggregate amount of water to which the Project was entitled, the Orr Ditch decree necessarily embodies an evaluation of the competing public interests in supplying Project farmers with sufficient water to grow their crops, and Pyramid Lake with sufficient water to benefit indigeneous[sic] fishes. Because the Tribe has asserted no threat to the public interest apart from those considered in the Orr Ditch decree's water rights allocation, the Engineer's conclusion that the transfers do not conflict with the Tribe's water rights satisfies both the public interest aspect and the conflicting rights aspect of section 533.370(3). Moreover, the Engineer's conclusion that the proposed transfers did not threaten to harm the lake's fishes is supported by substantial evidence.

The State Engineer finds that Application 56226 is not unlike those applications considered by the Ninth Circuit Court of Appeals except that, Application 56226 seeks also to change the manner of use to municipal. Therefore, the State Engineer finds that the approval of Application 56226 does not threaten to prove detrimental to the public interest.

XII.

The protestant Tribe feels that these applications cannot be approved because they involve the change "from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands."⁵ However, the Tribe does not present any legal basis for this assertion. Nevada water law allows the eligibility for changing the place of use based on the impracticability to irrigate the existing place of use, however, it does not limit changes only to those that meet the eligibility.⁵² In addition, the Ninth Circuit Court of Appeals affirmed the fact that the State Engineer is not precluded by

⁵² NRS 533.040.

statute from granting a change application where it is not impracticable to use the water at the present site.⁵³ Therefore, the State Engineer finds that Application 56226 cannot be denied on the basis of the practicability to irrigate the existing place of use.

XIII.

The protestant Bureau feels that the approval of Application 56226 could result in a lower quantity of water flowing to the groundwater basin in the Fernley area.⁴ Under present irrigation practices in the Fernley area, the Bureau's witness estimated that each acre of irrigated land returns approximately 1.5 acre feet of the applied 4.5 acre feet, directly to the groundwater aquifer.⁵⁴ According to the Bureau's witness, none of this water would recharge the groundwater aquifer if irrigation ceases and the water is used for municipal purposes.⁵⁴ The State Engineer finds that the Bureau did not consider the fact that approximately half of the water diverted for municipal use in the Fernley area, flows to the wastewater treatment facility, whose effluent is discharged directly to the groundwater basin via rapid infiltration basins.⁵⁵ The State Engineer further finds that the Bureau failed to consider that at a conveyance efficiency of 60%, an additional 3 AF/AC is lost to the groundwater aquifer from transmission losses. The State Engineer finds that the flow of water to the groundwater resource in the Fernley area would not be significantly diminished as a result of changing the manner of use from irrigation to municipal.

XIV.

The protestant Bureau contends that approval of Application 56226 would result in a reduction of the conveyance efficiency of

⁵³ United States v. Alpine Land & Reservoir Co., 878 F.2d at 1217, 1227. (9th Cir. 1989).

⁵⁴ Transcript pp. 159-160, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁵⁵ Transcript pp. 273-276, Public Administrative Hearing before the State Engineer, May 25, 1993.

delivery of water within the Newlands Project.⁴ The Bureau did not have any quantitative evidence to support this contention but was very concerned about the proposed year-round diversions, especially during the non-irrigation season.⁵⁶ However, the Bureau has failed to consider that the Truckee Canal has been used for over 90 years for year round delivery of water to Lahontan Dam on the Carson River. A check of the stream flow records collected by the United States Geological Survey reflects that the Truckee Canal rarely transports less than 25 cfs.⁵⁷ The State Engineer finds that the diversion of water for municipal use as proposed under Application 56226 would not lessen the efficiency of the Truckee-Carson Irrigation District in the delivery of water.

XV.

The Town of Fernley by agreement with TCID, has paid assessments to TCID for all the Newlands Project water rights it acquired, including those rights requested to be changed under Application 56226.^{13,14} The State Engineer finds that approval of Application 56226 will not adversely affect the cost of water for other water users within the district.

XVI.

In many stream systems, a portion of the water diverted for irrigation finds its way back to the stream as return flow. The return flow is then available for diversion by downstream users. When the manner of use is changed from irrigation to municipal, often there is no return flow back to the stream. To account for this lack of return flow, the Alpine Decree¹⁹ allows only the consumptive use portion or 2.99 acre feet per acre to be changed to municipal use.

The Orr Ditch Decree² contains no such limitation on the quantity of water allowed in a change of manner of use. However, in many cases, the return flow, in a change to municipal use in the

⁵⁶ Transcript pp. 189-190, Public Administrative Hearing before the State Engineer, May 25, 1993.

⁵⁷ See U.S.G.S. gage, Truckee Canal at Wadsworth Station No. 10351300.

Truckee Meadows, is available to downstream users because the treated wastewater effluent is discharged back into the Truckee River system. The State Engineer has approved changes to municipal use, allowing the entire duty to be changed, because there is no reduction in the quantity of water available to downstream users.

In determining whether the consumptive use portion or the entire duty of 4.5 acre feet per acre may be changed under Application 56226, the State Engineer must evaluate the impact on the downstream flow of water. The first step is to examine the fate of the return flow off of irrigated land described in Application 56226 as the existing place of use. This land was irrigated with water diverted through the Truckee Canal. The return flow from this land did not flow back into the system and was never available to downstream users.⁵⁸ Under Application 56226, where the Town of Fernley would divert water for municipal use, the return flow would also not return to the Truckee Canal, but instead, would be discharged to the groundwater via the rapid infiltration basins.⁵⁵ The State Engineer finds that the change to municipal use of the entire duty of 4.5 acre feet per acre, presents no adverse impacts on the downstream users.

XVII.

The protestants Bureau and Tribe believe that Application 56226 should be denied because the Town of Fernley has not complied with Public Law 101-618, in that the Town has not requested approval from the Secretary of the Department of the Interior.^{4,5} The State Engineer recognizes the Secretary's authority and responsibility under Public Law 101-618, however, the State Engineer has no authority to enforce the provisions of Public Law 101-618. The State Engineer finds that his approval of Application 56226 in no way releases the Town of Fernley from its responsibility to comply with all applicable federal, state, and local requirements.

⁵⁸ Transcript p. 315, Public Administrative Hearing before the State Engineer, May 25, 1993.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter.⁵⁹

II.

The State Engineer is prohibited by law from granting a permit under an application to change where:⁶⁰

- A. The proposed change, if within an irrigation district, adversely affects the cost of water for other holders of water rights in the district;
- B. The proposed change lessens the district's efficiency in its delivery or use of water;
- C. The proposed change conflicts with existing rights;
or
- D. The proposed change threatens to prove detrimental to the public interest.

III.

The Orr Ditch Decree sets forth the procedure and authority for applications to change the point of diversion, place and manner of use of decreed waters of the Truckee River.

IV.

The owner of the water rights requested to be changed under Application 56226 is the Town of Fernley.

V.

None of the parties to this action made any claim that the water rights whose contracts were dated before March 22, 1913, are subject to forfeiture. The parcels affected are 2, 4, 5, 7, 11, 12, 14, 15, 17, 18, 21, 22, 23, 24, 25, 26, 27 and 28. While not agreeing with this rationale for the reasons more fully set forth below, the State Engineer concludes that the water rights appurtenant to these parcels are not subject to forfeiture.

⁵⁹ NRS 533.325 and Orr Ditch Decree, p. 88.

⁶⁰ NRS 533.370.

VI.

The contracts for the water rights appurtenant to parcels 8, 16, 19 and 20, were dated after March 22, 1913. Based on the evidence and testimony on the record, the State Engineer concludes that these parcels were irrigated during the alleged period of non-use. Therefore, even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VII.

The evidence and testimony supporting the allegation of forfeiture of water rights appurtenant to parcel numbers 1, 3 and 10 do not meet the "clear and convincing" standard. Therefore, the State Engineer concludes that even if the forfeiture statute were found to apply, the water rights appurtenant to these parcels can not be declared forfeited.

VIII.

There is clear and convincing evidence on the record indicating that parcel 9 has not been irrigated for a period of time greater than five years. If the forfeiture statute were found to apply to the water right appurtenant to parcel 9, then this water right should be declared forfeited. However, for reasons stated below, the State Engineer concludes that the forfeiture statute does not apply to these water rights.

IX.

The State Engineer concludes that none of the water rights at issue here are subject to forfeiture under NRS 533.060. This includes the water rights whose contracts were dated after March 22, 1913. The water rights requested to be changed by Application 56226 were not initiated by permits issued by the State Engineer, which was required under the Nevada Water Law, in effect after March 22, 1913. Instead, the State Engineer concludes that these water rights were initiated under the Reclamation Act of 1902.

X.

The record in this proceeding contains no evidence that there was ever an intent to abandon any of the water rights requested to

be changed under Application 56226. Evidence shows that the operation and maintenance changes have always been paid and are current.

XI.

The State Engineer concludes that the water right appurtenant to parcel 16 was perfected.

XII.

There is no evidence on the record that approval of Application 56226 will impair the value of any other existing rights or threaten to prove detrimental to the public interest.

XIII.

The State Engineer concludes that approval of Application 56226 will not result in a lower quantity of water flowing to the groundwater in the Fernley Area.

XIV.

Since water has historically been transported through the Truckee Canal on a nearly continuous basis for over 90 years, the State Engineer concludes that said diversions by the Town of Fernley would not lessen the efficiency in the delivery of water to other users within TCID.

XV.

The State Engineer concludes that as long as the Town of Fernley pays the appropriate charges, the approval of Application 56226 will not adversely affect the cost of the water for other water users within TCID.

XVI.

The entire duty of 4.5 acre feet per acre may be changed to municipal use under Application 56226 with no impacts on any existing rights.

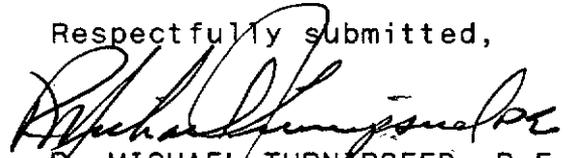
XVII.

The State Engineer does not have the authority to enforce the requirements of federal law, including Public Law 101-618.

RULING

The protests to the granting of Application 56226 are herewith overruled and Application 56226 is approved in the amount of 280.78 acre feet, subject to existing rights and the payment of statutory fees.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 27th day of

May, 1994.