

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

IN THE MATTER OF APPLICATIONS)
47840, 48423, 48424, 48467,)
48468, 48647, 48666, 48667,)
48668, 48672, 48673, 48825,)
48828, 48865 (GROUP 3) (14 OF)
THOSE TRANSFER APPLICATIONS)
OTHERWISE KNOWN AS THE)
"ORIGINAL 25" TRANSFER)
APPLICATIONS))

RULING ON REMAND

4591

GENERAL INTRODUCTION

I.

FILING OF APPLICATIONS AND PROTESTS

Applications 47809, 47822, 47830, 47840, 48422, 48423, 48424, 48465, 48466, 48467, 48468, 48470, 48471, 48647, 48665, 48666, 48667, 48668, 48669, 48672, 48673, 48767, 48825, 48827, 48828, 48865, 48866 (27 applications in total)¹ were filed to change the place of use of water decreed under the Truckee and Carson River Decrees, the decrees which adjudicated the waters of those rivers.² The applications³ represent requests to change the place of use of

¹ The protestant Pyramid Lake Paiute Tribe's original appeal to the Federal District Court included applications in what the State Engineer has identified as Group 1 consisting of 58 applications, Group 2 consisting of 44 applications, and Group 3 consisting of 27 applications (129 applications in total). In U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1219 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that the Pyramid Lake Paiute Tribe was precluded on appeal from challenging the forfeiture or abandonment of water rights for 104 of the subject transfer applications because it failed to protest the transfers before the State Engineer on these grounds. Based on the court's ruling, the 27 applications in Group 3 became the "original 25" transfer applications after excluding Applications 47822 and 47830 which were not protested on those grounds.

² Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) ("Orr Ditch Decree"); and Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) ("Alpine Decree").

³ State of Nevada Exhibit Nos. 11 and 12, public administrative hearing before the State Engineer, June 24, 1985. These exhibits are contained in the previous Record on Review filed with the Federal District Court in November 1985. The individual applications (book records) were re-introduced during the course of the 1996-1997 administrative hearings and designated with new exhibit numbers in the Record on Review on Remand. (RORR is used to identify the Record on

portions of the water rights decreed and contracted for use within the Newlands Reclamation Project ("Project").

The original 25 applications, also identified herein as the Group 3 transfer applications, were timely protested by the Pyramid Lake Paiute Tribe of Indians ("PLPT") on various grounds, including the following:

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

7. 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.

The PLPT requested that the applications be denied for these reasons among others.

II.

UNITED STATES INTERVENTION

Early in the transfer case proceedings, the United States Department of Interior, Bureau of Reclamation, petitioned the State Engineer to intervene as an unaligned party in interest.⁴ Intervention was granted on the grounds that there were federal interests in the proceedings that justified standing as a party.⁵

III.

1985 PREVIOUS HEARING ON GROUP 3 TRANSFER APPLICATIONS

A public administrative hearing in the matter of the Group 3 transfer applications was first held before the State Engineer on

Review on Remand.)

⁴ DOI Exhibit No. 1, public administrative hearing before the State Engineer, November 26-29, 1984. Previous Record on Review filed with the Federal District Court in November 1985.

⁵ RORR Vol. 1, Tab 1. State Engineer's Ruling No. 3241, dated September 30, 1985. Transcript p. 23, public administrative hearing before the State Engineer, October 15-18, 1996 (U.S. allowed full party status for protecting federal interests and limited to that protection).

June 24, 1985, in Fallon, Nevada. The applicants and protestants made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties.⁶ The parties stipulated to incorporating the record of the administrative hearings on Groups 1 and 2 held on November 26-29, 1984, and February 4-5, 1985, into the evidentiary record of the administrative hearing on the Group 3 applications.⁷ On September 30, 1985, the State Engineer issued his ruling with regard to the 27 transfer applications overruling the PLPT's protests to the Group 3 transfer applications and approving all the subject applications.⁸

IV.

ALPINE II

An appeal of the State Engineer's Ruling No. 3241 was taken to the United States District Court and the Ninth Circuit Court of Appeals resulting in what is commonly known as the Alpine II decision.⁹ The Alpine II Court held that:

1. Nevada water law applied to the dispute arising from the State Engineer's approval of the transfer applications;
2. the finding of the State Engineer that the transfers did not threaten to prove detrimental to the public interest was supported by substantial evidence;
3. the decrees did not determine whether particular Newlands Project properties are entitled to receive Project water, that

⁶ Transcript, public administrative hearing before the State Engineer, June 24, 1985. Previous Record on Review filed with the Federal District Court in November 1985.

⁷ Transcript Vol. I, p. 11, public administrative hearing before the State Engineer, June 24, 1985. Transcript Vol. I, p. 12, public administrative hearing before the State Engineer, February 4, 1985. Previous Record on Review filed with the Federal District Court in November 1985.

⁸ RORR Vol. 1, Tab 1. State Engineer's Ruling No. 3241, dated September 30, 1985.

⁹ U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217 (9th Cir. 1989) ("Alpine II").

right being based on contracts and certificates issued by the Secretary of the Interior or the Truckee-Carson Irrigation District ("TCID");

4. the State Engineer's finding that the Alpine Decree disposed of the fact that the farmers were not using water on the exact acreage for which they had contracted was not supported by that decision;

5. it was appropriate for the State Engineer to adjudicate the issues of perfection, abandonment and forfeiture;

6. the State Engineer cannot transfer water rights that have not been put to beneficial use;

7. questions regarding the would-be transferors alleged forfeiture or abandonment of the water rights they proposed to transfer could no longer be raised as an objection to the State Engineer's approval of transfer applications where the objector failed to raise forfeiture or abandonment issues in proceedings before the State Engineer; and

8. remanded the case to the U.S. District Court to evaluate the merits of the State Engineer's ruling that Nevada's statutory forfeiture provisions do not apply and his findings under Nevada's common law of abandonment that the transferor landowners had not indicated an intent to abandon their water rights.

V.

FEDERAL DISTRICT COURT DECISION ON REMAND

On remand, the U.S. District Court affirmed the State Engineer's approval of the Group 3 transfer applications and held with respect to the issues of perfection, abandonment and forfeiture that the State Engineer was correct. That decision was appealed to the Ninth Circuit Court of Appeals resulting in the "Alpine III" decision.¹⁰

¹⁰ U.S. v. Alpine Land and Reservoir Co., 983 F.2d 1487 (9th Cir. 1992) ("Alpine III").

VI.

ALPINE III

In Alpine III, the Ninth Circuit Court of Appeals rejected the District Court's validation of the State Engineer's ruling. The Court reiterated its holding that water rights that have not been put to beneficial use are not available for transfer and instructed the fact finder on remand to determine whether the specific water rights sought to be transferred are rights to "water already appropriated" as the Court had construed that phrase. The Court held that the proper inquiry as to intent to abandon was not the Project water users as a whole, but rather the intent of the transferor property owners. As to forfeiture, the Court held that under Nevada law the forfeiture statute does not apply to water rights that vested before March 22, 1913, or were initiated in accordance with the law in effect prior to that date.

The Ninth Circuit Court of Appeals remanded the matter to the U.S. District Court to determine (1) whether the water rights appurtenant to the transferor properties at issue had been perfected; (2) whether the holders of the water rights sought to be transferred had abandoned their water rights; and (3) whether the specific water rights sought to be transferred, if said water rights vested after March 22, 1913, had been forfeited. If said rights vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to March 22, 1913, then the water rights are not subject to forfeiture under the provisions of Nevada Revised Statute § 533.060.¹¹

¹¹ Alpine III, 983 F.2d at 1496.

VII.

ORDER OF REMAND TO STATE ENGINEER

On October 4, 1995, the U.S. District Court issued an order remanding the transfer application cases¹² to the Nevada State Engineer for consideration of the issues of perfection, abandonment and forfeiture. The U.S. District Court did not require the State Engineer to re-open the evidentiary hearings, but rather ordered if the State Engineer decided additional evidence was required he should provide the parties the opportunity to present such evidence.

VIII.

GROUP 3 PERMITS CANCELLED, PROTESTS OR PERMITS WITHDRAWN

Several permits granted or protests filed on the original 25 water right applications are no longer in existence and for that reason were excluded from further consideration. Permit 48422 was cancelled by the State Engineer and no appeal was timely taken from that cancellation. The PLPT withdrew its protests to Applications 48767 and 48866. Permits 48470, 48471, 48665 and 48827 were withdrawn by the applicants leaving 18 transfer applications in Group 3 from the original 25 transfer applications for consideration by the State Engineer pursuant to the remand order.

IX.

APPLICATIONS UNDER CONSIDERATION IN THIS RULING

Pursuant to motions to consolidate Group 3 applications with applications in Group 7, the State Engineer excluded Applications 47809, 48465, 48466 and 48669 from being heard during the Group 3 hearings and held them aside to be heard later with the Group 7 applications.¹³ Therefore, only 14 of the 18 applications

¹² *Order Remanding Transfer Application Cases to Nevada State Engineer Pursuant to Minutes of the Court of Status Conference Held 4/13/95, U.S. v. Alpine*, D-184-HDM, dated October 9, 1995.

¹³ RORR Vol. 9, Tab 91. September 26, 1996, Notice of October 15-18, 1996, hearings.

remaining for review from the "original 25" Group 3 transfer applications are under consideration in to this ruling.

X.

1996 STATUS CONFERENCE

By notice dated January 10, 1996, the State Engineer informed the Group 3 applicants of a status conference to be held on February 5, 1996.¹⁴ The State Engineer had determined a status conference was warranted to discuss procedure in the resolution of the matter remanded by the Federal District Court. At the conference, the parties expressed their desire to re-open the evidentiary hearings and further agreed upon a process for the exchange of evidence and settlement conferences.¹⁵ At the status conference, applicants from Groups 4 through 7 (otherwise known as the "subsequent 190" transfer applications) also requested they be included in the pre-hearing briefing process so as not to be prejudiced when their cases came up for hearing by the early resolution of legal issues without their input.

XI.

EXCHANGE OF INFORMATION AND LEGAL BRIEFS

By notices dated February 12, 1996,¹⁶ and March 6, 1996,¹⁷ the State Engineer established a timetable for both Group 3 and Groups 4 through 7 for the filing of pre-hearing briefs on the legal issues of lack of perfection, abandonment and forfeiture, and for the service by the protestant PLPT on the applicants of a more definitive statement of its protest claims. In the more definitive statement the PLPT was to specifically identify parcel by parcel

¹⁴ RORR Vol. 1, Tab 2. January 10, 1996, Notice of Status Conference.

¹⁵ RORR Vol. 1, Tab 3. Transcript, Status Conference, public administrative hearing before the State Engineer, February 5, 1996.

¹⁶ RORR Vol. 1, Tab 5. February 12, 1996, Notice of Group 3 discovery schedule.

¹⁷ RORR Vol. 1, Tabs 7 - 10. March 6, 1996, Notices of Groups 4-7 discovery schedule.

the particular components of its protests as they relate to its claims of lack of perfection, abandonment and forfeiture, along with copies of any documentary evidence which supported its contentions. The notices further established a date by which the applicants were to provide the PLPT with any rebuttal¹⁸ evidence they had to refute the PLPT's claims of lack of perfection, abandonment or forfeiture. Finally, the notice established a timetable for holding conferences wherein the parties were to attempt to stipulate to any facts not in dispute, to attempt settlement of the protests, if possible, and to inform the State Engineer as to any recommendation any party had for the grouping of any of the referenced transfer applications for hearing.

XII.

STATE ENGINEER'S INTERIM RULING NO. 4411

On August 30, 1996, the State Engineer issued Interim Ruling No. 4411¹⁹ regarding some of the issues of law that had been addressed in the pre-hearing legal briefs and which pertained to matters the State Engineer determined could be ruled on as a matter of law at that time. Those issues included the following:

1. Is the PLPT through its protests to the transfer applications attempting to modify, relitigate or collaterally attack the Orr Ditch Decree and the Alpine Decree, and should the protest grounds of lack of perfection, forfeiture or abandonment be barred by the doctrine of *res judicata*?
2. Does the State Engineer have the authority to entertain these challenges?
3. Should the transfer applications have been filed at all?

¹⁸ The State Engineer notes that the use of the word rebuttal evidence in the February 12, 1996, and the March 6, 1996, notices has continued to present confusion throughout these proceedings. The use of the word rebuttal evidence was intended to mean any evidence to rebut/refute the PLPT's claims of lack of perfection, abandonment or forfeiture.

¹⁹ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996, official records in the office of the State Engineer.

4. Did the Nevada legislature's clarification of Nevada Revised Statute § 533.324 after the entry of Alpine II affect these cases?
5. Should the State Engineer apply a rule that a rebuttable presumption of abandonment is created when there is evidence of prolonged non-use of a water right submitted by the protestant, thereby, shifting the burden of going forward to the applicant?

State Engineer's Interim Ruling No. 4411 also addressed a multitude of motions for summary judgment and motions to dismiss.²⁰ Pursuant to Interim Ruling No. 4411, the State Engineer found, among other things, that he would not prejudge the evidence before the actual administrative hearing by granting the motions to dismiss or motions for summary judgment, and denied said motions. The State Engineer concluded that the PLPT was not precluded by the doctrine of *res judicata* from being heard on the issues of lack of perfection, abandonment and forfeiture and that it is within the State Engineer's authority to consider the issues of lack of perfection, abandonment and forfeiture as ordered by the Federal District Court. The State Engineer concluded he would not judge whether or not the applications should have been filed nor would he declare whether the applications were moot and dismiss said applications. Rather, the State Engineer concluded that he would act on the applications before him as ordered by the Federal District Court.

As to the issue of whether the Nevada legislature's clarification of Nevada Revised Statute § 533.324 affected these cases, the State Engineer concluded, based on the clarification of law, that the Alpine II Court misinterpreted Nevada law, and that the State Engineer believed it was his obligation to follow the law of Nevada which allows for the permitting of a change application on a water right that has not yet been perfected. The State Engineer concluded that the doctrine of the law of the case is a

²⁰ RORR Vol. 4, Tabs 41, 42, 43, 44, 45; Vol. 5, Tab 46; Vol. 6, Tabs 47, 48; Vol. 7, Tabs 55, 62; Vol. 8, Tabs 67, 68, 69, 71; Vol. 9, Tab 72.

procedural rule, a rule of policy, and will be disregarded when compelling circumstances call for a redetermination of the determined point of law on prior appeal, particularly where a clarification in the law has occurred overruling former decisions.

Finally, pursuant to Interim Ruling No. 4411, the State Engineer concluded that Nevada law does not shift the burden of going forward to the applicants upon the protestant's showing of an extended period of non-use. The State Engineer concluded, based on the Nevada Supreme Court case of Town of Eureka v. Office of the State Engineer²¹, that the PLPT has the burden of proving its case as to abandonment by clear and convincing evidence of acts of abandonment and intent to abandon.

XIII.

MOTION FOR PARTIAL RECONSIDERATION OF INTERIM RULING NO. 4411

On September 23, 1996, the PLPT filed a Motion for Partial Reconsideration of State Engineer's Interim Ruling No. 4411.²² The PLPT moved the State Engineer to reverse that part of Interim Ruling No. 4411 which concluded that Nevada Revised Statute § 533.324 precluded the need for perfection of the water rights that are the subject of the transfer applications prior to the transfer of said rights. The PLPT's motion for reconsideration will be considered below.

XIV.

1996-1997 HEARINGS

After all parties of interest were duly noticed by certified mail, the public administrative hearings regarding certain of the Group 3 transfer applications were re-opened and hearings were continued on October 15-18, 1996,²³ November 12-15, 1996,²⁴

²¹ Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948 (1992).

²² RORR Vol. 9, Tabs 81, 82.

²³ RORR Vols. 16-19, Tabs 177-180. Transcript, public administrative hearing before the State Engineer, October 15-18, 1996.

January 23-24, 1997,²⁵ and March 4, 1997,²⁶ at Carson City, Nevada, before representatives of the office of the State Engineer. At the pre-hearing status conference, the parties agreed that a "clean record" would be easier to follow. This meant that the exhibit numbers would begin again at Number 1, and that if any party wanted specific parts of the earlier proceedings to be highlighted they would identify that evidence or testimony and have it remarked for this record. While certain applicants argued this was a brand new hearing the State Engineer does not agree. It is a hearing on remand which means it is a continuation of the previous hearing, and the State Engineer cannot and will not ignore all that has taken place to date. Therefore, the State Engineer also took administrative notice of the records in the office of the State Engineer, including, the prior hearings and rulings in this matter and the various rulings of the Federal District Court and the Ninth Circuit Court of Appeals.²⁷

**GENERAL FINDINGS OF FACT APPLICABLE TO ALL APPLICATIONS
UNDER CONSIDERATION IN THIS RULING**

I.

BURDEN OF PROOF

The protestant and the applicants have been at loggerheads all through these proceedings as to who has the burden of proof and the burden of producing evidence as to the protestant's claims. More than a decade ago the protestant filed protests alleging that the applicants had either failed to perfect the water rights they were seeking to move by the transfer applications or had either

²⁴ RORR Vols. 20-23, Tabs 181-184. Transcript, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵ RORR Vols. 24-25, Tabs 185-186. Transcript, public administrative hearing before the State Engineer, January 23-24, 1997.

²⁶ RORR Vol. 26, Tab 187. Transcript, public administrative hearing before the State Engineer, March 4, 1997.

²⁷ RORR Vol. 16, Tab 177. Transcript p. 7, public administrative hearing before the State Engineer, October 15-18, 1996.

forfeited and/or abandoned said water rights making them unavailable for transfer pursuant to the change applications.

The protestant argues: (1) that the applicant must first prove it has a perfected and valid, i.e., not abandoned or forfeited, water right before it can seek to move said water right pursuant to the transfer applications; (2) it is only the applicants who are in possession of the evidence, and (3) the protestant cannot secure much of the evidence it needs to prove its claims. Many of the applicants take the position that they do not need to prove the protestant's case. It is the protestant who has alleged lack of perfection, forfeiture and abandonment and it must be the protestant who is to provide the evidence to support its claims.

The Nevada Supreme Court has held that because the "law disfavors a forfeiture the State bears the burden of proving by clear and convincing evidence a statutory period of non-use."²⁸ It is the policy of the Division of Water Resources, affirmed by the Nevada Supreme Court's decision in the Town of Eureka case, that whenever a private person files a protest claim or a petition alleging forfeiture or abandonment of a water right, it is the protestant's or petitioner's burden to produce the evidence and prove said claims. It is not the applicant's job to disprove the protestant's claims. The State Engineer finds that the burden of producing evidence and proving the protest claims of abandonment and forfeiture lies squarely on the protestant PLPT.

As to the protestant's claims of lack of perfection, it is important to at least note that most of the Project water rights that the applicants seek to transfer were acquired by the applicant's predecessors many years ago, in many instances in the period of time between 1902 and 1925. It is often impossible to find a person alive today that can recall from memory the irrigation status of these often very small (ex., 0.15 acre)

²⁸ Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948, 952 (1992).

parcels of land identified as the existing places of use some seventy, eighty or ninety years ago.

It is also important to note that in some instances these water rights are being transferred from parcels miles away from the applicant's proposed place of use and from lands that are not owned by the applicant. Therefore, it might be next to impossible for the applicants or the protestant to prove what happened on a 0.1 acre parcel of land in 1920, 1904 or nearly a century ago, particularly in light of the realities of the management of movement of water on the Project and the lack of mapping; thus, all the more reason to put the burden of proving lack of perfection on the protestant who alleges the same. The TCID has certified that every one of these applicants are transferring valid water rights. Rights determined to be valid based on nearly a century of record keeping that has not been demonstrated to be anything other than the most accurate and best record available. The State Engineer finds that if he were to allege a decreed water right was not perfected, the State would have the burden of proving that lack of perfection. There is no reason to treat the private petitioner or protestant any differently. The State Engineer finds the protestant has the burden of proving lack of perfection. It is not the applicants' burden to prove perfection of an adjudicated and decreed water right certified by the TCID to be a valid water right available for transfer just because a protestant alleges a lack of perfection claim.

II.

AGREED UPON EXCHANGE PROCESS - PROTESTANT

At the February 1996 status conference, the parties to the Group 3 hearings agreed upon a process for moving forward with these cases, said process being set forth in the February 12, 1996, notice.²⁹ Since it is impossible for the protestant to sustain all

²⁹ RORR Vol. 1, Tab 5. February 12, 1996, Notice of Group 3 discovery schedule.

three of its protest claims of lack of perfection, forfeiture and abandonment as to each parcel, the State Engineer ordered the protestant to provide the applicants by May 21, 1996, a more definitive statement in which the protestant was to identify parcel by parcel whether it was ultimately pursuing a claim of lack of perfection, forfeiture or abandonment as to each parcel, and to provide its documentary evidence to support said claim(s). In response, by July 22, 1996, the applicants agreed to supply the protestant with any evidence they had to refute the protestant's claims.

While the parties agreed upon this process, all appeared in some way to disregard said agreement. On or about May 21, 1996, the protestant served some documents on the applicants. However, it was not until October 3, 1996, twelve days before the hearings were to convene, that the protestant served a summary of contentions wherein it identified the specific claims it was going to continue to assert against each parcel in each transfer application.

The protestant argues it can allege alternative theories as to means by which an applicant can lose their water rights and repeatedly argued that the State Engineer had put the protestant under an onerous burden for producing the evidence in its more definitive statement. The State Engineer finds that the protestant did not comply with the spirit of the order for a more definitive statement and further finds that the protestant's cries of onerous burden are disingenuous. These protest claims were first part of the proceedings held in 1985. The protestant provided little evidence at those 1985 hearings to support its contentions. However, on remand, the protestant has been given another opportunity to present its case. But now, over 11 years later, the protestant claims it was under an onerous burden to produce the evidence to support its claims. The State Engineer does not agree. The State Engineer further finds it was reasonable at this juncture, particularly since it is impossible to sustain all three

claims of lack of perfection, forfeiture and abandonment, to require the protestant to refine its generalized/alternating theory claims making these claims specific based on evidence that can sustain them. A water right that is not perfected is not subject to the doctrines of loss through forfeiture or abandonment.

III.

AGREED UPON EXCHANGE PROCESS - APPLICANTS

Some of the applicants either did not provide the protestant with any rebuttal/refuting evidence at all or in other cases new evidence was presented at the administrative hearings. The protestant objected to the allowance of any evidence that was not exchanged according to the policy established in the February 12, 1996, notice. The protestant also presented evidence at the hearings, which the State Engineer allowed into the record, that it had not provided to the applicants in compliance with the agreed upon process, and further, changed its position as to contract dates at the administrative hearing.

Some of the applicants did not provide any evidence to refute the protestant's claims, rather taking the apparent position that if the protestant cannot prove its claims, there is no reason for the applicant to provide any evidence. These applicants have taken a tactical position not contemplated by the agreed upon process. Both the applicants and the protestant presented evidence for the first time at the administrative hearing that had not been exchanged in advance.

The State Engineer finds that the process before him is that of an administrative hearing, not a civil trial, and that when presented with relevant evidence he must consider it if the other party is not unjustly prejudiced by the late presentation of said evidence. The State Engineer finds that no party was prejudiced by the consideration of said evidence since no party asked for the opportunity to recess for review of the evidence.

IV.
EQUITY

Testimony was presented that at different times during the life of the Project transfers in places of use on the same farm were processed by the U.S., but that for the greater portion of time transfers were not allowed on either the same farm or to different farms. In the early 1900's transfers were not approved, but rather, people filed for new water rights.³⁰ However, in 1947, the U.S. Department of Interior approved a transfer on the same farm unit/contract area through the application for a permanent water right process, but, in the mid-1960's transfers were again prohibited.³¹ Yet, farmers (with apparent acquiescence by the United States) continued to transfer water as farm technology changed and they leveled fields and filled in sloughs.

After the Alpine Decree in 1980, and after the United States Supreme Court's 1983 decision in Nevada v. U.S., the Court for the first time affirmed ownership of the water rights in the Project users. Subsequently, the users were instructed by the United States to file these transfer applications to put water rights on those lands being irrigated for which no water contracts had been issued. By following those instructions there now exists the possibility of the users losing their water rights. Judge Noonan in a concurring opinion in Alpine II³² stated that "[t]raditional equitable principles govern whether the strict requirements of Nevada water law are to be relaxed with regard to a present application." The Judge indicated that on remand (to the Federal District Court) that it may be that a determination must be made

³⁰ RORR Vol. 26, Tab 187, p. 1795. Transcript, public administrative hearing before the State Engineer, March 4, 1997. RORR Vol. 31, Tab 227. Exhibit No. 49 (Exhibit 1 attached to Exhibit No. 49), public administrative hearing before the State Engineer, October 15-18, 1996.

³¹ RORR Vol. 26, Tab 187, pp. 1789-1795. Transcript, public administrative hearing before the State Engineer, March 4, 1997.

³² Alpine II, 878 F.2d at 1229.

whether each individual transfer application can be upheld in equity.

Some applicants argue that the U.S. and the PLPT should be estopped from alleging a failure on the part of the water users to comply with State law because they were following the United States' instructions with regard to activities taking place on the Project. They allege that the United States misrepresented ownership of the water rights and induced investments and reliance on the U.S. procedure and not State law, and that equitable principles mandate that no one be allowed to take advantage of that mistake, or that the Project landowners should not bear the entire burden of the mistake.

It was argued that during the time between 1902, the initiation of the Project, and 1983, it was believed that (and the U.S. insisted) the United States owned the water rights, the transfers at issue here were allowed and water was beneficially used at the proposed places of use. Further, that after the United States Supreme Court's decision in Nevada v. U.S.³³ the Bureau of Reclamation encouraged the filing of the change applications to formalize transfers already made; therefore, the U.S. and the PLPT should be estopped from asserting forfeiture or abandonment at the existing places of use until after the 1983 Supreme Court decision. The State Engineer finds, while he strongly believes equity should provide for some relief in some of these cases, a decision as to whether equitable relief should be granted is to be provided by a court of law, since the State Engineer has no equitable powers.

V.

LANDS TO WHICH WATER RIGHTS ARE APPURTENANT

Water rights on particular parcels of land within the Newlands Project are governed by underlying documents identified as

³³ Nevada v. U.S., 463 U.S.110, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983).

agreements, contracts and certificates.³⁴ Certain applicants argue that the water right is appurtenant to the entire parcel of land described in a contract.³⁵

Some of the "Agreements" submitted into evidence were grants by private persons of their pre-Project vested water rights to the United States in exchange for Project water for lands then presently under cultivation and irrigation.³⁶ Other "Agreements" described obtaining a water right for the **total irrigable** area of the entire ownership susceptible of being served water.³⁷

A "Certificate of Filing Water Right Application" provided that the person had filed for a certain number of **irrigable** acres and the supply furnished was limited to the amount of water beneficially used on said **irrigable** land.³⁸ In an "Application For Permanent Water Right - For all lands except entries under the reclamation law" the applicant applied for a permanent water right

³⁴ Alpine II, 878 F.2d at 1221. RORR Vol. 30, Tab 207 (Exhibit No. 27); RORR Vol. 31, Tab 223 (Exhibit No. 44); RORR Vol. 31, Tab 224 (Exhibit No. 45); RORR Vol. 31, Tab 237 (Exhibit No. 59); RORR Vol. 32, Tab 245 (Exhibit No. 67); RORR Vol. 32, Tab 251 (Exhibit No. 73); RORR Vol. 32, Tab 258 (Exhibit No. 80); RORR Vol. 32, Tab 268 (Exhibit No. 90); RORR Vol. 33, Tab 279 (Exhibit No. 101); RORR Vol. 33, Tab 294 (Exhibit No. 116); RORR Vol. 34, Tab 305 (Exhibit No. 127); RORR Vol. 34, Tab 316 (Exhibit No. 138); RORR Vol. 34, Tab 326 (Exhibit No. 148); RORR Vol. 35, Tab 337 (Exhibit No. 159); RORR Vol. 35, Tab 347 (Exhibit No. 169); RORR Vol. 38, Tab 371 (Exhibit No. 194).

³⁵ It should be noted that the State Engineer in this ruling uses the term "contract" to generically describe the various different kinds of documents that were introduced into evidence to demonstrate the dates water rights were obtained for the various parcels of land. It should also be noted that there have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by owner's names and later issued serial numbers to the contract owner's Homestead Entries. The State Engineer does not believe a serial number can be used to relate any contract to the date which the contract was obtained.

³⁶ RORR Vol. 30, Tab 207. Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

³⁷ RORR Vol. 31, Tab 223. Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997.

³⁸ RORR Vol. 30, Tab 207. Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

for the irrigation of and to be appurtenant to all of the **irrigable** area **now or hereafter developed** within the tract of land described. The description of the tract of land identified a total number of acres of which a certain portion were then classed as **irrigable**.³⁹

In a "Water-Right Application - Homesteads Under The Reclamation Act" and in a "Water-Right Application For Lands in Private Ownership And Lands Other Than Homesteads Under The Reclamation Act" the applicant applied for a permanent water right for the irrigation of and to be appurtenant to a certain number of **irrigable** acres as shown on plats approved by the Secretary of the Interior within the tract of land described. The description of the land identified a total number of acres of which a certain portion were then classed as **irrigable**.⁴⁰

Testimony provided at the 1985 hearings and the evidence provided in the contracts indicate that just by reference to the contracts a person cannot identify the location of either the **irrigable** or **non-irrigable** acres within any particular section of land. Rather, other information available in the TCID engineering department would further locate those lands, i.e., the TCID water right maps would generally reveal areas designated as not having water rights.⁴¹ Further evidence and testimony provides that there were hand drawn colored maps prepared over the decades by the Reclamation Service (also known as the U.S. Bureau of Reclamation) and/or the TCID showing the location of the **irrigable** acreage

³⁹ RORR Vol. 31, Tab 223. Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997.

⁴⁰ RORR Vol. 31, Tab 224, and RORR Vol. 31, Tab 237. Exhibit Nos. 45 and 59, public administrative hearing before the State Engineer, October 1996 through March 1997.

⁴¹ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 76, public administrative hearing before the State Engineer, February 4, 1985.

within the Project.⁴² These maps were produced around 1913, 1925⁴³, 1960⁴⁴ and 1981 with colors on the maps indicating the various kinds of water rights and water righted lands, ex., green depicts areas having vested water rights (areas in irrigation prior to the inception of the Project in 1902).

A recent opinion from the Supreme Court of Washington held in the context of a water rights adjudication, that an irrigation district's water right is not appurtenant to **irrigated** acreage, but rather the **irrigable** acreage.⁴⁵ The State Engineer finds that the water rights contracted for in the Project are not appurtenant to the entire parcel of land described in any particular contract.

VI.

LOCATION OF LANDS COVERED BY WATER RIGHTS

A substantial portion of the controversy in this matter appears to revolve around the PLPT's complaint that it cannot tell from the water right agreements/contracts/certificates issued by the Reclamation Service, the Bureau of Reclamation or the TCID the

⁴² RORR Vol. 26, Tab 187. Transcript pp. 1797-1817, 1845-1847, public administrative hearing before the State Engineer, March 4, 1997.

⁴³ RORR Vol. 26, Tab 187. Transcript pp. 1804-1806, public administrative hearing before the State Engineer, March 4, 1997.

⁴⁴ "The colored water right maps were developed in the mid-1960's utilizing the Property and Structure Maps (P & S Maps) as base maps and compiling information from BOR irrigable acreage maps, topographic maps, farm unit survey maps, soil reclassification maps, seeped and alkaline area maps, etc. Colors were employed to illustrate the location of water right acreages within each $\frac{1}{4}$ section. These Colored Water Right Maps have been continually updated as ownership changes, water right transfers, new water right contracts, etc. affected water right locations." RORR Vol. 31, Tab 244. Exhibit No. 66 Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, second p. 2 in exhibit. A $\frac{1}{4}$ section refers to a 40 acre subdivision of a complete section of land containing approximately 640 acres. A full section is divided into quarters (NW $\frac{1}{4}$) and further divided into quarter quarters (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of said section.

⁴⁵ In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin; State of Washington, Dept. of Ecology v. Acquavella, et al., 1997 WL 197268 (Wash.). The Court further held that although an irrigation district's water right is legally appurtenant to the land on which the water is applied, the right can be shifted to any land in the district on which the water can be beneficially used, on any irrigable acreage.

specific location of the areas with water rights within an identified section of land. Testimony was provided in the 1984-1985 hearings that the water righted area of an existing place of use can be found on the water rights maps found in the TCID offices, and that the State⁴⁶ and the Bureau of Reclamation also have copies of those maps.⁴⁷ It was indicated that those maps were prepared by starting with the original contracts on a particular piece of property and then the old land classifications and soil classifications were reviewed, since a person could only apply for water rights on irrigable land. Further, testimony indicated that the Bureau of Reclamation was planning to hire an independent contracting firm to confirm the TCID's water right records and maps.⁴⁸

During the 1980's, three independent engineering companies were hired by the United States to investigate the water rights on the Newlands Project. Years of work and substantial financial resources went into those cumulative reviews of the records of the TCID and the Bureau of Reclamation.

A February 1980 report, known as the "Criddle Report", prepared by Clyde-Criddle-Woodward, Inc. for the Bureau of Indian Affairs was intended to be a determination of the water righted acreage on the Newlands Project using aerial photos and various water right documents made available by the TCID.⁴⁹ In September 1984, Intermountain Professional Services, Inc. entered into a

⁴⁶ The State Engineer assumes the witness was referring to the State Engineer's office.

⁴⁷ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 314, public administrative hearing before the State Engineer, November 28, 1984.

⁴⁸ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript pp. 314-318, public administrative hearing before the State Engineer, November 28, 1984.

⁴⁹ "Criddle Report" Review, prepared by Intermountain Professional Services, Inc., dated January 31, 1985, p. 2, official records in the office of the State Engineer.

contract with the Bureau of Reclamation for a review of the Criddle Report.⁵⁰ The review was to include the production of a set of accurate maps on mylar showing the locations and amount of water righted land as identified in the Criddle Report.⁵¹ Intermountain was to analyze the source documents (copies of the contracts and certificates and the Property and Structure Maps) as provided to Mr. Criddle by the TCID, and was to then derive an independent number of water righted acres from the contracts and certificates and from the Property and Structure Maps.⁵²

During the course of its analysis, Intermountain reviewed 1721 water right contracts and applications covering 2584 land divisions. Since Intermountain's analysis was limited to the documents Mr. Criddle used in his report, Intermountain did not reach definitive conclusions about the actual water righted acres in the Newlands Project.⁵³ Intermountain concluded its review by proposing suggestions for further research, including further research for all water right contracts and applications and updating maps.⁵⁴

By letter dated October 31, 1984, the United States Department of Interior, Bureau of Reclamation, wrote to then State Engineer Peter G. Morros, and requested that he review the water rights maps of the TCID and advise whether they accurately and correctly depicted the status under Nevada law of water rights on the Newlands Project.⁵⁵ However, subsequently, in recognition of the

⁵⁰ "Criddle Report" Review, prepared by Intermountain Professional Services, Inc., dated January 31, 1985, p. 3, official records in the office of the State Engineer.

⁵¹ "Criddle Report" Review, Id. at 3.

⁵² "Criddle Report" Review, Id. at 3.

⁵³ "Criddle Report" Review, Id. at 21.

⁵⁴ "Criddle Report" Review, Id. at 25-30.

⁵⁵ Official records in the office of the State Engineer.

difficulty of responding to that request, the Bureau of Reclamation contracted with Chilton Engineering to perform a water rights investigation.⁵⁶

On August 22, 1984, Chilton Engineering, Chartered entered into a contract with the United States Bureau of Reclamation to study the water rights on the Newlands Project. The original scope of the work included a complete review and compilation of all water righted acreages, ownerships and locations within the Newlands Project.⁵⁷ In Milestone 1, Chilton was to tabulate by ¼ ¼ sections the water righted acreage according to the TCID colored water right maps⁵⁸ and the Intermountain Study, and to tabulate by ¼ ¼ sections the discrepancies between the sources, and to prepare an estimate of costs to investigate and analyze all discrepancies.

In May 1985, the Bureau of Reclamation directed Chilton to proceed with Milestone 2 to investigate all discrepancies found by Milestone 1 to the point where the differences between the TCID colored water right maps and the Intermountain Study source document column were resolved or no resolution was found.⁵⁹ In Milestone 2, Chilton Engineering resolved all but 110.4 acres of the discrepancies. Chilton found through its research that the records on file at the TCID office in Fallon together with the Bureau of Reclamation ledgers covering the period from 1903 to 1928 were complete and comprehensive enough to document the reasons for all but a fraction of the discrepancies.⁶⁰

⁵⁶ Letter from Douglas Olson, Project Manager to Peter G. Morros, State Engineer, dated December 31, 1986, official records in the office of the State Engineer.

⁵⁷ RORR Vol. 31, Tab 244. Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, second p. 1 in exhibit. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1986.

⁵⁸ RORR Vol. 31, Tab 244. Report on Milestone 2, Id. at 1-2.

⁵⁹ RORR Vol. 31, Tab 244. Report on Milestone 2, Id. at 3.

⁶⁰ RORR Vol. 31, Tab 244. Report on Milestone 2, Id. at 5.

Chilton Engineering also reached the conclusion that the TCID colored water right maps are the **best evidence** of the documented location of water rights within the Newlands Project.⁶¹ Milestone 4 would have produced a map showing the physical location of water rights within the $\frac{1}{4}$ $\frac{1}{4}$ sections⁶² according to the records available at the TCID. However, it was Chilton's conclusion that a great deal of time and effort went into the preparation of the maps and that the **TCID colored water right maps substantially conform to the original areas documented to have water rights.**⁶³

Based on Chilton's work, the United States Bureau of Reclamation concluded that the TCID water right records **are the most accurate available, and should be used to determine water righted acreage on the Newlands Project,** and the United States Bureau of Reclamation agreed with Chilton that further investigations were not warranted.⁶⁴

The 1988 Operating Criteria and Procedures ("OCAP") for the Project provides that the TCID maps dated August 1981 through January 1983 should be used as the basis for determining lands with valid water rights eligible for transfer. The State Engineer finds there is no valid reason for using any other maps as to the location of the irrigable lands within a water righted parcel. The maps that were accepted in the OCAP, are those which are used by the State Engineer in his review of the transfer applications, and are cumulative work prepared from the records of the TCID which were found to be substantially accurate.

The State Engineer finds that the TCID maps are the best

⁶¹ RORR Vol. 31, Tab 244. Report on Milestone 2, Id. at 6.

⁶² Historically, the location of water rights within the Newlands Project had been defined by the irrigable areas inside ownership parcels or farm units. RORR Vol. 31, Tab 244. Report on Milestone 2, Id. at 28.

⁶³ RORR Vol. 31, Tab 244. Report on Milestone 2, Id. at 28-29.

⁶⁴ Letter from Douglas Olson, Project Manager, to Peter G. Morros, State Engineer, dated December 31, 1986, official records of the office of the State Engineer.

evidence that exists as to the location of water righted lands within the Project and at some point the parties must accept the evidence as it stands. The evidence is not of the quality one would hope, but to the State Engineer's knowledge it is the best evidence that exists. The Newlands Reclamation Project was the first reclamation project in the United States and the sophisticated mapping techniques of today did not exist.

Another issue as to the location of land covered by water right contracts arises in the context of the aerial photography used by the protestant's witnesses for making land use determinations on the existing places of use from 1948 through the filing of the applications in 1984. The protestant witnesses reviewed aerial photographs of the Project for the years 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 (no photographs were introduced into evidence) at various scales as summarized below:

1948 March	- black and white, approximate scale 1" = 400'
1962 Sept.	- black and white, approximate scale 1:20,000
1972 June	- color infrared, approximate scale 1:34,000
1973 August	- color infrared, approximate scale 1:12,000
1974 May, June	- color infrared, approximate scale 1:12,000
1975 May	- color infrared, approximate scale 1:12,000
1977 Sept., Oct.	- black and white, approximate scale 1" = 400'
1980	- color infrared, approximate scale 1:58,000 enlarged to 1" = 600'
1984 June	- color infrared, approximate scale 1:24,000 ⁶⁵

Except for the 1948 and 1977 photographs, which utilized a much better scale, using only these aerial photographs for land use determinations, particularly with respect to some of the very small parcels of land (ex. 0.1 acre) was often a guess as to what was actually taking place on the ground. The first problem was that in many instances there was no clear determination as to where the legal description of the existing place of use on the transfer application map actually fell on the aerial photographs.

⁶⁵ RORR Vol. 27, Tab 195. Exhibit No.15, public administrative hearing before the State Engineer, October 15-18, 1996.

For example, the protestant's witnesses who used the photographs to make land use determinations did not definitively pinpoint where the section line fell. They did not determine whether it was located on the north side of a highway, in the middle of a highway, along a fence line or the shoulder of the road. Such distinctions in attempting to make land use determinations for some parcels of land as small as 0.1 of an acre are critical.

Furthermore, just attempting to accurately locate a parcel of land as small as some of those at issue here on aerial photographs of the scale of some of those used by the protestant's witnesses pointed out the difficulty of using those photographs to make land use determinations as critical as those being made in these cases. For example, assume an aerial photograph of a scale of 1:20,000, which means that 1 foot on the photograph equals 20,000 feet (or approximately 3.78 miles) on the ground, or 1 inch on the photograph equals 20,000 inches on the ground. Also assume that the parcel of land you are looking for is 0.15 acres square. Taking that 0.15 acres and multiplying it by the 43,560 ft² found in an acre equals 6,534 ft² or 80.83 feet on a single side of the 0.15 acre parcel. Measuring the 80.83 feet on an aerial photograph of the scale of 1:20,000 means we are looking to specifically locate a piece of land that is 0.00404 of a foot or 0.05 inches long on the photograph. This means we are looking for a parcel of land the size of a dot made from the lead of a mechanical pencil.

If that small of a parcel could actually be exactly located, attempting to make a determination of the land use on that parcel from the aerial photograph is extremely difficult, if not impossible. The State Engineer finds that in many instances using mostly unrectified aerial photographs like those used here has far too great a margin of error to allow the use of those photographs for land use determinations on parcels of land as small as many of those in these cases.

The State Engineer finds, in light of the fact that there is a significant margin of error in the aerial photographs, that the exact location of the existing place of use under any transfer application on an aerial photograph was not sufficiently demonstrated to the satisfaction of the State Engineer to be accurate, and that the scale of many of the photographs is far too small for making land use determinations as critical as those being made here, the protestant's evidence as to land use descriptions from those aerial photographs will be given weight which recognizes the possibility of a fairly significant margin of error. Therefore, the State Engineer finds that the greatest weight as to land use determinations will be given to those descriptions provided by the applicants at the 1985 hearings.

VII.

EXISTENCE OF UNDERLYING CONTRACT

The issues remanded to the State Engineer were lack of perfection, forfeiture or abandonment and those remanded issues did not include whether or not an underlying contract existed. The State Engineer finds that the issue of whether or not an underlying contract exists is barred as it was not an issue raised on appeal to the Federal District Court and was not included as an issue remanded to the State Engineer by the Federal District Court, particularly as part of the role the United States played in these proceedings was to assure that an underlying water right contract existed for each parcel of land. Furthermore, even if a contract was not specifically introduced into evidence, the TCID contract file is readily identifiable from serial numbers found on either the transfer application or its accompanying map, and the TCID certification as to each transfer application provides the contract serial number for the relevant contract.⁶⁶

⁶⁶ There have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by owner's names. They also used serial numbers issued to the contract owner's Homestead Entries. RORR Vol. 31, Tab 244. Report on Milestone 2, Resolution of Differences Newlands Project

VIII.
CONTRACT DATES

At the first administrative hearing regarding these Group 3 transfer applications held in June 1985, the TCID introduced what is identified as Applicants' Exhibit CC. Testimony indicated that Exhibit CC contained all the original contracts and agreements for all the existing places of use under these transfer applications.⁶⁷ A review of Exhibit CC during the 1996-97 hearings revealed that Exhibit CC does not in fact contain contracts covering every single parcel of land under the transfer applications.

During the 1996-97 hearings, evidence was introduced by the United States and by applicants of other contracts with different contract dates covering some of the same parcels of land as described by a contract found in Exhibit CC or covering land for which Exhibit CC did not contain a contract.⁶⁸ The protestant alleges that if Exhibit CC does not contain a copy of a contract then none exists for that parcel and the transfer application should be denied. The State Engineer does not agree.

The State Engineer finds that if Exhibit CC contains a contract for the relevant parcel of land he will use the contract in Exhibit CC as the best evidence as to the date of an underlying contract unless evidence convinces him to use another contract date. In recognition that Exhibit CC appears to be incomplete, if Exhibit CC does not contain a contract for a particular parcel, the supplemental contracts provided by the Bureau of Reclamation will be taken as the best evidence of a particular contract date unless

Water Rights, Chilton Engineering, Chartered, August 30, 1985, p. 40. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996.

⁶⁷ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 80, public administrative hearing before the State Engineer, June 24, 1985.

⁶⁸ RORR Vols. 16, 18, Tabs 177, 179. Transcript pp. 156-159, 400-404, public administrative hearing before the State Engineer, October 15-18, 1996.

evidence convinces him to use another contract date. If a conflict arises between a date provided in Exhibit CC in 1985 and a contract provided by the Bureau of Reclamation during the 1996-97 hearings, the State Engineer will accept the contract date in Exhibit CC as the appropriate contract date, as that was the contract provided by the TCID in 1985, unless evidence is provided otherwise by any party proving a different and apparently correct contract date. While the United States provided the additional contract documents it took no position as to which document would be the correct underlying contract.

The State Engineer further finds that if an applicant can provide convincing evidence that neither the Exhibit CC contract or any contract provided by the United States is the correct contract, and the applicant has evidence of the relevant contract relating to a specific parcel of land, the State Engineer will find that documentation to be the best evidence of the contract date. If no copy of an underlying water right contract is provided, the State Engineer finds that the serial number provided for in the application, its supporting map, or the TCID certification will indicate the TCID contract file, but nothing will be in the evidentiary record to indicate the contract date or for the State Engineer to rule on the protest issues.

IX.

INTENT TO ABANDON

Upon the passage of the Reclamation Act of 1902, the Secretary of the Interior withdrew 232,800 acres in western Nevada known as the Newlands Reclamation Project.⁶⁹ "The Project was designed to irrigate a substantial amount of this land with water from the Truckee and Carson Rivers, thereby turning wasteland into farmland."⁷⁰ In 1913, in an attempt to settle the dispute between the Pyramid Lake Paiute Tribe and the Project landowners to the

⁶⁹ Alpine II, 878 F.2d at 1220.

⁷⁰ Alpine II, 878 F.2d at 1220.

waters of the Truckee River, the United States initiated what became known as the Orr Ditch litigation.⁷¹ The court entered a final decree in that litigation in 1944;⁷² however, the litigation was not ultimately put to rest until the United States Supreme Court in 1983 rejected a collateral attack by the United States in the Nevada v. U.S. case.⁷³

The Orr Ditch Decree confirmed under Claim No. 3 the right of the **United States** to divert, with a priority of July 2, 1902, through the Truckee Canal 1500 cubic feet per second of water flowing in the Truckee River for the irrigation of 232,800 acres of land in the Newlands Project.⁷⁴ No specific places of use or lands were identified as having a water right in the decree, except for the 232,800 acres identified as "the Project". The 1944 Orr Ditch Decree only mentions a water right belonging to the **United States**, no mention is made about the individual farmers within the Newlands Project owning the water rights.

In fact, in the Orr Ditch litigation the Special Master treated the United States' water right as if it were a type of implied federal reserved water right not subject to the rules of due diligence in application of the water to beneficial use, and not subject to the concepts of loss through the doctrines of forfeiture and abandonment. For example, the Special Master notes that the 1500 cubic feet per second as referenced in Claim No. 3 was a quantity which was claimed in notices posted and recorded by the government about the time of the beginning of construction of the dam and canal, and that the withdrawal of lands for reclamation carried with it by implication the reservation of unappropriated

⁷¹ Nevada v. U.S., 103 S.Ct. at 2910.

⁷² Final Decree, U.S. v. Orr Water Ditch Co., Equity A-3 (D.Nev. 1944).

⁷³ Nevada v. U.S., 463 U.S.110, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983); Alpine II 878 F.2d at 1220.

⁷⁴ Orr Ditch Decree at 10.

water required for irrigation.⁷⁵ The Special Master also found that the government had a right to withdraw its unappropriated water at will and hold it withdrawn as long as it desired and was not bound by any law of relation or rule of diligence.⁷⁶

In 1925, the United States initiated a separate case to adjudicate the waters of the Carson River⁷⁷ which concluded with the entry of a final decree in 1980.⁷⁸ The Alpine Decree confirmed the right of the **United States** to divert and store the entire flow of the Carson River as it reaches Lahontan Dam for distribution to the individual farmers on the Project and for other uses.⁷⁹

Applicants argue that prior to 1983 and the United States Supreme Court's ruling in Nevada v. U.S.⁸⁰ all parties harbored the mistaken belief that the water was owned by the United States.⁸¹ It was only after the decision in Nevada v. U.S. that the Project users were made aware that they held title to the water rights and immediately began the process of complying with state law to correct the water right records and have them match the irrigated

⁷⁵ Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, pp. 42-44 (1925).

⁷⁶ Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, pp. 31-33 (1925).

⁷⁷ U.S. v. Alpine Land and Reservoir Co., 697 F.2d 851, 853 (9th Cir. 1983) ("Alpine I").

⁷⁸ Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) ("Alpine Decree"); U.S. v. Alpine Land and Reservoir Co., 503 F.Supp. 877 (D.Nev. 1980) ("Alpine"), *substantially aff'd*, 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

⁷⁹ Alpine Decree at 151-152.

⁸⁰ Nevada v. U.S., 463 U.S. at 125.

⁸¹ RORR Vol. 1, Tab 11, p. 52. Brief of Applicants on Applications Nos. 47809, 48424, 48465, 48466, 48647, 48669, 48672, 48673, 48828 and 48866 with respect to issues involving perfection, abandonment and forfeiture including issues involving the priority date of perfected water rights and related issues.

lands as surveyed by more modern mapping techniques.⁸² The very essence of an adjudication is the determination not only of the limit and extent of water rights claims, but also who owns the water rights.

The United States Supreme Court discussed the Reclamation Act in conjunction with the western doctrine of appropriative rights in the 1937 case of Ickes v. Fox.⁸³ In that case, the Supreme Court "emphatically stated that although the government diverted, stored and distributed the water, the ownership of the water or water rights did not vest in the United States. 'Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners'"⁸⁴ "Thus any property right of the government in the irrigation works is separate and distinct from the property right of the landowners in the water right itself."⁸⁵ "In Nebraska v. Wyoming, (citation omitted) the Court reiterated the Fox analysis, once more defeating the government's claim to project water rights."⁸⁶

The United States refused to accept the Supreme Court's holdings in Fox and Nebraska and continued to assert it owned the water rights in the Newlands Project.⁸⁷ The State Engineer finds that even though Ickes v. Fox and Nebraska v. Wyoming held that the government did not own the water rights, by the very fact that three pages in the Alpine decision⁸⁸ were taken up with the analysis of whether the U.S. or the landowners owned the water

⁸² Id. at 54.

⁸³ Ickes v. Fox, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937).

⁸⁴ Alpine, 503 F.Supp. at 879.

⁸⁵ Id. at 879.

⁸⁶ Alpine, 503 F.Supp. at 880.

⁸⁷ Alpine, 503 F.Supp. at 880.

⁸⁸ Alpine, 503 F.Supp. at 879-881.

rights in the Project, the issue as to ownership of the water rights in the Newlands Project was unresolved until the lower court's decision in 1980, and the resulting appeal in 1983. Because of this, the State Engineer finds, for the purpose of determining abandonment of water rights, a person could not have had the intent to abandon a water right they did not know they owned until the Supreme Court's 1983 decision in Nevada v. U.S., since both the Orr Ditch and the Alpine Courts had said that the United States, not the Project farmers, owned the water rights. Further, since the United States was not held to be bound by any rules of due diligence and was treated as if it had an implied reserved water right, the concept of abandonment was not even considered relevant to the water rights in the Project until the decision that the farmers owned the water rights and the PLPT filed protests alleging abandonment.

X.

FILLING IN AND LEVELING WITHIN SAME FARM UNIT

During the hearings, testimony and evidence indicated that in some cases the proposed places of use included swales that were filled in or sand dunes that were leveled. The existing places of use from which water is being transferred includes highways, roads, drains and farmsteads. During the 1996-97 hearings, the PLPT used a series of aerial photographs and satellite images to illustrate the nature of the land underlying the existing places of use for each parcel of land involved in each transfer application. The PLPT focused all of its testimony and evidence on the existing place of use and provided nothing as to the proposed place of use. However, it was clear to the State Engineer upon review of the images⁸⁹ that in some cases the proposed places of use were being irrigated at the time the aerial photographs were taken.

⁸⁹ All parties viewed the aerial photographs and satellite images while the PLPT's witnesses explained how they oriented themselves from the transfer application map to the aerial photographs and interpreted the nature and culture of the particular parcel. However, the PLPT did not offer the photographs into evidence in the Record on Review on Remand.

The State Engineer finds that if the lands being stripped of water rights were simultaneously replaced by irrigated lands where swales were filled in or sand dunes were leveled within the irrigable area of the same farm unit or contract area then neither forfeiture nor abandonment applies.

XI.

PERFECTION OF PRE-STATUTORY VESTED WATER RIGHTS

"Irrigation development had been proceeding for decades in Nevada before the legislature provided any method by which an appropriative right could be acquired. The greater portion of the water rights in the State had been acquired prior to that time ... and such rights were uniformly recognized by the courts as vested rights."⁹⁰ "Such nonstatutory appropriations were made by actually diverting the water from the source of supply, with intent to apply the water to a beneficial use, followed by application to such beneficial use within a reasonable time."⁹¹

"Prior to the approval of the Newlands Project, approximately 30,000 acres of land had been irrigated for many years from the Carson River."⁹² "In the early stages of the Newlands Project the United States acquired by contract the vested water rights to 29,884 acres of land with priority dates ranging from 1865 to 1902."⁹³ These rights were conveyed by private landowners to the United States in exchange for the government's promise to deliver a full season supply from Project water to these farms.⁹⁴

⁹⁰ W.A. Hutchins, *THE NEVADA LAW OF WATER RIGHTS* 12 (1955), citing to Ormsby County v. Kearney, 37 Nev. 314, 352, 142 Pac. 803 (1914).

⁹¹ Id.

⁹² RORR Vol. 31, Tab 244. Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, p. 38. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996.

⁹³ Alpine, 503 F.Supp. at 881.

⁹⁴ Id. at 881.

The Alpine Decree, in a tabulation of vested rights acquired by contract, identifies 30,482 "former **irrigated**" acres with priority dates ranging from 1865 to 1902.⁹⁵ Testimony was provided that at the time the Project was turned over to the TCID in 1926⁹⁶ for operation and maintenance there were 20,145 acres of vested water rights on land within the Project and those lands had been **put to use and irrigated** back in the 1800's.⁹⁷ Based on the fact that the Alpine Decree identifies and tabulates vested water right acreage as "former irrigated acreage", the State Engineer finds that challenges to lack of perfection of said vested water rights could have and should have been raised in the decree courts. Many of the PLPT's protest claims of lack of perfection as to pre-Project vested water rights were dropped during the pendency of these proceedings, and if they were not dropped, the State Engineer finds that those pre-statutory vested water rights exchanged for Project water rights were perfected as a matter of fact and law pursuant to the Orr Ditch and Alpine decrees.

XII.

CANALS, DRAINS, DITCHES, ROADS, ETC.

Testimony was provided that according to the Reclamation Service's regulations irrigable acreage within a contract area was determined by taking the total acreage and reducing this total acreage by the areas taken up by railroads, canals, laterals, drains, waste ditches, rights-of-way, along with reductions for various reasons, such as steepness of the land, type of soil, seep or waterlogged areas or lands which were too high in elevation to

⁹⁵ Alpine Decree at 151-152.

⁹⁶ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. TCID actually took over operation of the Project in 1927, but pursuant to a contract dated December 18, 1926. Transcript p. 368, public administrative hearing before the State Engineer, November 28, 1984.

⁹⁷ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 69, public administrative hearing before the State Engineer, February 4, 1985.

be served water from the existing Project facilities.⁹⁸ For example, evidence indicated that an oversight was made and no deduction taken in accordance with the uniform practice from the defined irrigable acreage for the right of way for the G-line canal when the plats showing the irrigable area were approved on a particular farm unit.⁹⁹ The G-line canal should have been excluded from the defined irrigable acreage of the farm unit which confirms that the practice was to exclude those areas.

The State Engineer finds that if all or a portion of the existing place of use is covered by a railroad, road, canal, drain, lateral, waste ditch, house, other structure or right-of-way and the TCID by its certification indicates that area is within the irrigable area of the parcel, the irrigable area must include the area covered by the structure. Since the Reclamation Service regulations excluded such structures from the irrigable area, the structure must not have existed at the time of the contract. If the colored water right maps include the area now encompassing the lands taken up by said canal, drain, etc. those structures must have come into existence after the date of the contract. The State Engineer further finds that if a dirt lined supply ditch is within the irrigable area of an existing place of use, water was beneficially used on the parcel of land covered by the dirt lined ditch. Dirt lined ditches within a farm were not excluded from the irrigable area under the Reclamation Service regulations and it is the State Engineer's understanding that the Bureau of Reclamation required these areas to be water righted.

⁹⁸ RORR Vol. 28-29, Tab 204. Transcript pp. 69-70, public administrative hearing before the State Engineer, February 4, 1985. See TCID Exhibit Y in Vol. II, previous Record on Review filed with the Court in November 1985.

⁹⁹ RORR Vol. 40, Tab 380. Exhibit No. 203, public administrative hearing before the State Engineer, March 4, 1997.

**GENERAL CONCLUSIONS OF LAW APPLICABLE TO ALL APPLICATIONS
UNDER CONSIDERATION IN THIS RULING**

I.

**PERFECTION AS A MATTER OF LAW OF THE SPECIFIC QUANTITY
OF WATER DECREED FOR THE NEWLANDS PROJECT
IN THE ORR DITCH DECREE**

An argument was raised in the pre-hearing briefs that the issuance of the Orr Ditch Decree is as a matter of law a determination that the water rights of the Project have been perfected; thus, any challenges to the lack of perfection of said rights are barred by the doctrine of *res judicata*. In most instances a decree is a determination of perfection as a matter of fact and as a matter of law; however, the history of the Orr Ditch Decree, as refined by the Ninth Circuit Court of Appeals decisions in these transfer cases and the United States Supreme Court decision in Nevada v. U.S., has injected great uncertainty as to what was actually accomplished by the Orr Ditch Decree. While the Orr Ditch Decree itself appears to have determined that the water right was perfected as a matter of law, later court decisions have brought that determination into question.

The Special Master in the Orr Ditch Court treated the United States water right for the Project as a type of implied federal reserved water right when he indicated that the withdrawal of lands for reclamation carried with it by implication the reservation of unappropriated water required for irrigation.¹⁰⁰ As such, perfection was not an issue. When the United States withdraws land from the public domain and reserves it for a federal purpose it impliedly reserved unappropriated water to the extent necessary to accomplish the reservation and the water right **vests** on the date of the reservation.¹⁰¹

The Special Master noted that the United States was not

¹⁰⁰ Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, p. 44 (1925).

¹⁰¹ U.S. v. Jesse, 744 P.2d 491 (Col. 1987).

constrained by the doctrine of due diligence in placing the water to beneficial use, but also noted that the Government proceeded with due diligence to construct the Derby Dam, Truckee Canal and Lahontan Reservoir, and that if the enterprise had been a private one the right to the water diverted for storage and irrigation would have been complete,¹⁰² i.e., the water right was perfected. Under these conditions the State Engineer would find that the water right for the entire Project was perfected as a matter of law pursuant to the decree even though the decree only established an agreed upon maximum aggregate amount of water to which the United States (now Project farmers) was entitled for the development of the Project.¹⁰³

But then, the Ninth Circuit Court of Appeals in the Alpine III decision proclaimed there are two sets of water rights on the Project, a concept with which the State Engineer strongly disagrees. One set the amalgamation of water rights obtained by the United States for the entire Project and the other set those rights appurtenant to the particular tracts of land.¹⁰⁴ This decision of the Ninth Circuit Court of Appeals is internally inconsistent and illogical as the decision also indicates there is no appropriation of water until water is actually put to beneficial use, but fails to consider how the United States could have perfected water rights under Nevada law absent the United States itself having a place to put that water to beneficial use. All water rights associated with the Project had to either be established under Nevada law or they are the implied reserved water rights noted by the Special Master.¹⁰⁵ However, even though the

¹⁰² Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, pp. 33, 45 (1925).

¹⁰³ Alpine II, 878 F.2d at 1224.

¹⁰⁴ Alpine III 983 F.2d at 1495.

¹⁰⁵ California v. U.S., 438 U.S. 645, 665 (1978).

Special Master treated the United States' water right for the Project as a federal reserved right, the Reclamation Act itself provides that water for reclamation projects is appropriated pursuant to state law.

In Prosole v. Steamboat Canal Co.,¹⁰⁶ the Nevada Supreme Court considered the issue of who was the appropriator and owner of the water as between a diverter and a conveyor of the water and the owner of the reclaimed lands upon which the water was applied to beneficial use. The Court held that no water right was created by the mere diversion of water from a public watercourse. An appropriation was only accomplished by the act of diversion coupled with the act of application to a beneficial use.¹⁰⁷ It necessarily follows from the principle established by Prosole that no water right was created by the mere diversion and storage of water by the United States and that under Nevada law the appropriation is not accomplished until the water is put to beneficial use. Since the United States Supreme Court in Nevada v. U.S. has now said that the water rights belong to the farmers and not the United States, it appears to have disregarded the Orr Ditch Decree Court's determination that the water rights for the Project are implied reserved rights which means that nearly 40 years after the fact the Court changed the rules of the game and perfection was made an issue.

Under the 1944 Orr Ditch Decree, the United States was granted the right to divert up to 1500 cubic feet per second (cfs) of water from the Truckee River at Derby Dam; however, physical canal constraints limit diversions to a capacity of approximately 900 cfs and the maximum amount of water ever diverted since the installation of the present gage is 967 cfs.¹⁰⁸ The Orr Ditch

¹⁰⁶ Prosole v. Steamboat Canal Co., 37 Nev. 154 (1914).

¹⁰⁷ Id. at 159-60.

¹⁰⁸ Water Resources Data for Nevada, published by the U.S. Geological Survey for gaging station #10351300.

Decree determined a right of diversion for a quantity to be fully perfected in the future, but did not determine perfection of the entire decreed quantity as a matter of fact, except as to those pre-statutory vested water rights exchanged for Project rights as previously discussed. As a matter of fact, the entire 1500 cfs quantity of water was not perfected as the entire quantity has never been placed to beneficial use or diverted from the Truckee River.

In conducting a water rights adjudication, the trial court generally determines several elements when confirming existing rights, two of which are: (1) the amount of water that has been put to beneficial use, and (2) the priority of water rights relative to each other.¹⁰⁹ However, if a right being determined pursuant to an adjudication was a right still in the diligence phase of development, as reflected in Nevada Revised Statute § 533.115, the claimant's proof of claim must show the date when the water was first used for irrigation, the amount of land reclaimed the first year, the amount reclaimed in subsequent years, and the area and location of the lands which are **intended to be irrigated**.

From the historical records it appears that the 1500 cubic feet per second water right from the Truckee River for the Project was a quantity set aside for the Project to be fully developed in the future. The Ninth Circuit Court of Appeals has already rejected the State Engineer's determination that water rights within the Project had vested in the United States upon the creation of the Project in 1902 prior to the passage of Nevada's forfeiture statute, and concluded that the water rights in the Project did not vest in the year 1902.¹¹⁰ Rather, the Court held as a matter of Nevada law "the rights could become vested in the

¹⁰⁹ In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin; State of Washington, Dept. of Ecology v. Acquavella, et al., 1997 WL 197268 (Wash.).

¹¹⁰ Id. at 1495-96.

individual landowners only upon becoming appurtenant to a particular tract of land,"¹¹¹ i.e., that the right vests only upon beneficial use of the water on the land. Therefore, the State Engineer finds that the water rights for the Project were not perfected as a matter of law in the Orr Ditch Decree.

II.

PERFECTION AS MATTER OF LAW UPON OBTAINING A CONTRACT

Another argument presented was that the water rights were perfected once a person obtained a contract. Testimony was provided that the last new water right contract in the Project was approved by the United States in the 1960's. Prior to that, if someone sought a new water right, the Bureau of Reclamation instructed them to develop the land, put it into production, then the Bureau of Reclamation determined irrigability and productivity constituting Bureau approval of the irrigation of the water righted land.¹¹² Based on the Bureau of Reclamation regulations, which the State Engineer must assume the Bureau followed while it operated the Project through 1926, the Bureau required that in order to obtain a water right a person was to perfect the water right before the Bureau determined irrigability and productivity. The State Engineer finds that the evidence supports the conclusion that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected. No evidence was provided as to whether this policy was followed after the TCID took over operation of the Project.

¹¹¹ Id. at 1496.

¹¹² Transcript Vol. III, pp. 458-459, public administrative hearing before the State Engineer, November 28, 1984. RORR Vol. 26, Tab 187, p. 1857, public administrative hearing before the State Engineer, March 4, 1997.

III.

PLPT'S MOTION FOR RECONSIDERATION OF A PORTION OF
INTERIM RULING NO. 4411

In the pre-hearing legal briefs, the State Engineer was presented with the argument that after the Ninth Circuit Court of Appeals' decision in Alpine II¹¹³ (that the State Engineer may not grant an application to transfer a water right that has not been put to beneficial use) the Nevada Legislature re-affirmed that Nevada law does allow for the transfer of a water right before perfection on the transferor place of use, indicating that the Ninth Circuit was mistaken in its interpretation of Nevada law.¹¹⁴ After the Court's decision in Alpine II, the Nevada Legislature added Nevada Revised Statute § 533.324 to clarify that as used in Nevada Revised Statute § 533.325¹¹⁵ "water already appropriated" **includes** water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended beneficial use before an application to change the point of diversion, place or manner of use is made. In other words, that an unperfected water right can be changed under Nevada law.

The State Engineer in Interim Ruling No. 4411 concluded that he could not ignore the fact that the Nevada Legislature clarified Nevada law post-Alpine II and concluded that Nevada law does allow for the transfer of a water right prior to perfection of said right. In response to that portion of Interim Ruling No. 4411 the PLPT filed a motion for reconsideration.¹¹⁶

¹¹³ Alpine II, 878 F.2d at 1226.

¹¹⁴ There is nothing in the Reclamation Law or the Alpine Decree on this issue, except that the Reclamation Law provides that water is appropriated pursuant to state law.

¹¹⁵ NRS § 533.325 provides that any person who wishes to change the point of diversion, place or manner of use of water already appropriated, shall, before performing any work in connection with such change, apply to the State Engineer for a permit to do so.

¹¹⁶ RORR Vol. 9, Tabs 81, 82.

The protestant PLPT argues that the State Engineer's conclusion that Nevada Revised Statute § 533.324 applies to transfers of Newlands Project water rights is contrary to the language of Nevada Revised Statute § 533.324 and contrary to its legislative history, that on its face the statute only applies to "permitted" water rights and Newlands Project water rights are not permitted water rights. The PLPT argues that as the statute is clear on its face, the plain meaning controls, and it is inappropriate to look beyond the statute to its legislative history.

On its face, the statute indicates that "water already appropriated" **includes** a permit. If the statute were only applicable to permitted water rights the legislature would not have used the term "includes" to indicate a permit among other types of rights. Use of the word "includes" indicates that the purpose was to show that unperfected permitted rights which have not been applied to the intended beneficial use are also included among other types of water rights which are available to be changed.

If the statute is not clear on its face, the Revisor's Note to Nevada Revised Statute § 533.324 indicates that the legislature declared that it had examined the past and present practice of the State Engineer with respect to the approval or denial of applications to change the point of diversion, manner of use or place of use of water and found that those applications have been approved or denied in the same manner as applications involving water applied to the intended beneficial use before the application for change had been made. The legislature declared that its intent by the act was to clarify the operation of the statute thereby promoting stability and consistency in the administration of Nevada water law.

The State Engineer testified during the legislative hearings that it was his belief that the law would not apply to other than permitted water rights, as certificated rights, decreed rights and claims of pre-statutory water rights were already presumed to have

gone to beneficial use and could be changed under the current definition of "water already appropriated".¹¹⁷ The State Engineer submitted a briefing paper during the legislative process indicating that he has interpreted "water already appropriated" to mean **all** water rights, including permits.¹¹⁸ The State Engineer specifically addressed the Alpine II decision and the transfer applications filed within the TCID. The PLPT's legal counsel testified that if the law were enacted it would clearly reverse the decision that "water already appropriated" means water that had already been put to beneficial use.¹¹⁹ Yet, the law was enacted.

The Nevada legislature specifically addressed, and in its addition of Nevada Revised Statute § 533.324, clarified the court's decision in Alpine II as to Nevada law. The State Engineer's Interim Ruling No. 4411 merely stated that the Alpine II Court was mistaken as to Nevada law. This, however, does not provide that all unperfected pre-statutory water rights can be the subject of a change application. There is still another step in the analysis which incorporates the concepts of due diligence and relation back in the perfection of a pre-statutory water right.

In any analysis of a change in place of use of a pre-statutory (pre-1905) water right the issue does arise of whether or not the right has been perfected. As to water rights decreed by a court in an adjudication, the State Engineer generally presumes that right has been perfected. However, in this case the protestant raised the issue that all of these rights (which were contracted for out of the United States' decreed right) may not have been perfected. In cases where the protestant can prove the water right was not perfected the concepts of good faith, due diligence and relation back will be considered.

¹¹⁷ Assembly Committee on Government Affairs, March 24, 1993.

¹¹⁸ Briefing paper submitted by R. Michael Turnipseed, P.E., State Engineer to the 1993 Nevada State Legislature, dated March 16, 1993.

¹¹⁹ Assembly Committee on Government Affairs, March 24, 1993.

The doctrine of relation back and its related concept of due diligence are common law doctrines applicable to pre-statutory water rights in Nevada. The doctrine of relation back provides that:

[w]hen 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 the 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. If, however, the work be not prosecuted with reasonable diligence, the right does not so relate...¹²⁰

Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the work a *bona fide* intention to complete it within a reasonable time.¹²¹

As reflected in the Nevada statutes, when a project or integrated system is comprised of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.¹²² If these waters had been appropriated under the Nevada statutory scheme for appropriating water, Nevada Revised Statute § 533.380(1)(a) requires that the construction of the work must be completed within five years after the date of approval of the permit, and Nevada

¹²⁰ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

¹²¹ Id. at 546.

¹²² NRS § 533.395(5) (work on a portion of the project may be considered diligence as to the whole project). Application for Water Rights, 731 P.2d 665 (Colo. 1987) (court concluded that work was being pursued with reasonable diligence from project's inception in 1952 through current state of the then still unfinished project, a period of 35 years).

Revised Statute § 533.380(1)(b) requires that the application of the water to its intended beneficial use must be made within ten years after the date of approval of the permit. The statute provides that for good cause shown the State Engineer may extend the time in which the construction work must be completed or the water applied to its intended beneficial use.¹²³

The State Engineer concludes that the Alpine II Court misinterpreted Nevada law when it stated that all water rights in Nevada must be perfected prior to transfer; however, the State Engineer further concludes that all unperfected water rights are not available to be transferred. If the protestant proves a water right was not perfected prior to the filing of one of the transfer applications, the issue becomes whether that particular water right is still within the diligence phase of development. If it is within the diligence phase, the unperfected water right can be moved. If it is not within the diligence phase, the unperfected water right is not available for transfer as it does not comport with the common law concepts of due diligence and relation back. The State Engineer further finds this is an area where equity perhaps should act. Everyone had operated for years under the belief, as set forth by the Special Master, that the concept of due diligence was not applicable to the "United States" water right for the Project. If there was no requirement of diligence placed on the United States and if everyone was operating under the belief until 1983 that the water right belonged to the United States, no farmer even had an inkling that he or she would be subject to a due diligence requirement.

IV.

DATES WATER RIGHTS IN THE NEULANDS PROJECT WERE INITIATED

The State Engineer earlier held that water rights within the Project were not subject to Nevada's forfeiture statute because they had **vested** in the United States upon the creation of the

¹²³ NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

Project in 1902 prior to the passage of Nevada's forfeiture statute.¹²⁴ On appeal, the Ninth Circuit analyzed whether the water rights in the Project vested in 1902 and concluded that they did not.¹²⁵ Rather, the Court held 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."¹²⁶ In other words, that the right vests only upon beneficial use of the water on the land.

As to forfeiture, the Alpine III Court held that the forfeiture law found in Nevada Revised Statute § 533.060 does not apply to water rights that vested before March 22, 1913, **or were initiated in accordance with the law in effect prior to that date.** However, the Court did not analyze whether 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,¹²⁷ depends upon when the "first step" to appropriate the water was taken and is a matter of Nevada law. The Alpine court found that the water rights on the Newlands Project covered by approved water right applications and contracts have a priority date of July 2, 1902.¹²⁸ Whether or not the water right for the Project belongs to the United States or the farmers, the Orr Ditch Decree held that the water right for the Project has a priority date of July 2, 1902, which by itself and by the definition of priority found in the decree means that the water right was initiated on July 2, 1902, i.e., the first step taken to appropriate the water was on July 2, 1902. Therefore, by that definition alone the water right

¹²⁴ U.S. v. Alpine Land and Reservoir Co., 983 F.2d at 1490.

¹²⁵ Id. at 1495-96.

¹²⁶ Id. at 1496.

¹²⁷ Orr Ditch Decree at 86.

¹²⁸ Alpine, 503 F.Supp. at 879.

for all Project users was initiated in accordance with the law in effect prior to March 22, 1913.

In its analysis regarding the vesting of water rights, and as discussed in General Finding of Fact IX , the Ninth Circuit Court of Appeals distinguished between the water rights obtained by the United States for the Project in 1902 and the water rights appurtenant to particular tracts of land.¹²⁹ While this distinction of two separate water rights proved important to the Court as to when the water rights vested, i.e., were perfected, this distinction has no importance as to the date all water rights in the Project were initiated because of the relation back doctrine.

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.¹³⁰ The water rights that are the subject of these transfer applications were not originally initiated by application to the Nevada State Engineer. "Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the government's first reclamation project now known as the Newlands Project."¹³¹ The United States appropriated and was decreed a 1902 water right for use on the entire Project and every single water right on the Project at issue here was obtained pursuant to a contract with either the Bureau of Reclamation or the TCID and uses the United States' 1902 decreed appropriation. All the project farmers share proportionally in shortages during any water short year which means they are all

¹²⁹ U.S. v. Alpine Land and Reservoir Co. 983 F.2d at 1495.

¹³⁰ Act of March 1, 1905, ch. 46, §3, 1905 Nev. Stat. 67.

¹³¹ Orr Ditch Decree at 10; Alpine Decree at 1.

taking their water from the same base water right.¹³² If they were not all using the same water right they would not share pro rata in the shortages, but rather the strict priority system would be applied and during water short years the junior appropriators would receive no water during the irrigation season and the senior appropriators would receive a full season supply.

In the Alpine decision the Court notes that the United States argued that under the doctrine of relation back the priority date for the water rights of the Project is July 2, 1902, and the parties in stipulating to the 1902 priority date, "agreed that the first steps were taken to secure these rights in 1902."¹³³ Even though the stipulation was in relation to duty, if it was agreed years ago that the first steps taken to secure (to initiate) these rights were in 1902, it must remain true today that the first steps taken to initiate the Project water rights were in 1902. Therefore, again, the water right was initiated in accordance with the law in effect prior to March 22, 1913. You cannot change the realities of the water right for the Project just because other intervening issues provide cause for re-evaluation. Water rights in Nevada are real property and the date the water right was initiated, the priority date, is one of the most essential elements in the prior appropriation system.

The State Engineer concludes that all water rights requested for transfer pursuant to these transfer applications are changes of the 1902 water right decreed to the United States and all rights emanating therefrom were initiated in accordance with the law in effect prior to March 22, 1913. Therefore, the State Engineer finds the water rights are not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

¹³² RORR Vol. 31, Tab 227. Exhibit No. 49, public administrative hearing before the State Engineer, October 15-18, 1996.

¹³³ Alpine, 503 F.Supp. at 885.

**SPECIFIC APPLICATIONS UNDER CONSIDERATION
IN THESE REMAND HEARINGS**

APPLICATION 47840

FINDINGS OF FACT

I.

Application 47840 was filed on March 15, 1984, by Roger Mills to change the place of use of 160.65 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 692-A, 694-A, 738-A, 695-A, 732-A, 729-A, 94, 704-A, 714-5¹³⁴, 700-A-1, 700-B-1, 188-15-A, 188-A-1, 188-A-1-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.¹³⁵ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

Parcel 1 - 2.30 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 8, T.18N., R.28E. - (94)¹³⁶
Parcel 2 - 2.09 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.26, T.19N., R.29E. - (692-A)
Parcel 3 - 1.09 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.26, T.19N., R.29E. - (694-A)
Parcel 4 - 0.93 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.35, T.19N., R.29E. - (694-A)
Parcel 5 - 0.63 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.35, T.19N., R.29E. - (694-A)
Parcel 6 - 0.95 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.35, T.19N., R.29E. - (738-A)
Parcel 7 - 5.00 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.35, T.19N., R.29E. - (738-A)
Parcel 8 - 3.20 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.36, T.19N., R.29E. - (738-A)
Parcel 9 - 0.76 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.36, T.19N., R.29E. - (738-A)
Parcel 10 - 1.15 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.27, T.19N., R.29E. - (695-A)
Parcel 11 - 1.87 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.34, T.19N., R.29E. - (729-A)
Parcel 12 - 1.34 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.34, T.19N., R.29E. - (729-A)
Parcel 13 - 2.15 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.34, T.19N., R.29E. - (732-A)

¹³⁴ The State Engineer notes that the Book Record entered as Exhibit No. 2, public administrative hearing before the State Engineer, October 15-18, 1996, indicates serial 715-5, which is a typographical error, as the original application and the application map identify serial number 714-5.

¹³⁵ RORR, Vol. 27, Tab 189. Exhibit No. 2, public administrative hearing before the State Engineer, October 15-18, 1996. File No. 47840, official records in the office of the State Engineer.

¹³⁶ 94 and the other numbers in this column refer to the contract serial numbers relative to each parcel identified on the application map entered as Exhibit No. 4, public administrative hearing before the State Engineer, October 15-18, 1996. RORR Vol. 27, Tab 191.

Parcel 14 - 0.90 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.28, T.19N., R.29E. - (700-B-1)
Parcel 15 - 0.52 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.28, T.19N., R.29E. - (700-A-1)
Parcel 16 - 0.37 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.33, T.19N., R.29E. - (188-15-A)
Parcel 17 - 2.48 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.33, T.19N., R.29E. - (188-A-1)
Parcel 18 - 2.08 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.34, T.19N., R.29E.- (188-A-1-A)
Parcel 19 - 0.45 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.27, T.19N., R.29E. - (700-B-1)
Parcel 20 - 0.84 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.29, T.19N., R.29E. - (704-A)
Parcel 21 - 4.60 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.31, T.19N., R.29E. - (714-A).

The proposed places of use are described as being located within 15.2 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 2.2 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 11.8 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 6.5 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ all in Section 8, T.18N., R.28E., M.D.B. & M.

II.

Application 47840 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.¹³⁷ The State Engineer finds that the PLPT narrowed its protest claims as follows:¹³⁸

Parcel 1 - Lack of perfection, forfeiture, abandonment
Parcel 2 - Forfeiture, abandonment
Parcel 3 - Forfeiture, abandonment
Parcel 4 - Lack of perfection, forfeiture, abandonment
Parcel 5 - Lack of perfection, forfeiture, abandonment
Parcel 6 - Lack of perfection, forfeiture, abandonment
Parcel 7 - Forfeiture, abandonment
Parcel 8 - Forfeiture, abandonment
Parcel 9 - Forfeiture, abandonment
Parcel 10 - Lack of perfection, forfeiture, abandonment
Parcel 11 - Lack of perfection, forfeiture, abandonment
Parcel 12 - Lack of perfection, forfeiture, abandonment
Parcel 13 - Lack of perfection, forfeiture, abandonment
Parcel 14 - Lack of perfection, forfeiture, abandonment
Parcel 15 - Lack of perfection, forfeiture, abandonment
Parcel 16 - Abandonment

¹³⁷ RORR, Vol. 27, Tab 190. Exhibit No. 3, public administrative hearing before the State Engineer, October 15-18, 1996.

¹³⁸ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

Parcel 17 - Abandonment
Parcel 18 - Abandonment
Parcel 19 - Lack of perfection, forfeiture, abandonment
Parcel 20 - Abandonment
Parcel 21 - Abandonment.

III.

UNDERLYING CONTRACTS AND CONTRACT DATES 47840

Exhibit CC from the June 1985 administrative hearing did not include contracts covering all 21 parcels identified as the existing places of use under the application.¹³⁹ At the 1996 hearing the United States introduced supplemental contract documentation covering some of the parcels of land described under the transfer application; however, the United States took no position and introduced no evidence to clarify which contract would be the appropriate one covering any relevant parcel of land.

The most accurate indicator of the underlying contract file are the serial numbers identified by the applicant in Application 47840 and on the supporting application map. The State Engineer specifically adopts and incorporates General Finding of Fact VIII as to which contract date will be used by the State Engineer.

Exhibit CC¹⁴⁰ contains contracts covering Parcels 16, 17, 18, 20 and 21. The State Engineer finds as to Parcels 16, 17, 18, 20 and 21 the contracts found in Exhibit CC are the relevant documents to be considered in this ruling. Since nothing was contained in Exhibit CC for the remaining parcels and no evidence was provided by the applicant regarding contract dates as to those parcels of land for which Exhibit CC does not contain a contract, the State Engineer finds that the supplemental contract documents provided by the Bureau of Reclamation will be considered the relevant contract

¹³⁹ In spite of that oversight it is still possible to identify the contract file(s) from the serial numbers provided in the water right application and on the application map.

¹⁴⁰ RORR Vol. 30, Tab 207. Exhibit No. 27, public administrative hearing before the State Engineer, October 15-18, 1996.

documents.

Parcel 1 - The supplemental contract documents introduced into evidence by the United States¹⁴¹ included an "Application for Permanent Water Right" dated April 30, 1954, which covers the land described as Parcel 1 and is identified as Serial No. 94, the serial number indicated in the transfer application for this parcel. A second contract in the packet, "Water-Right Application Homesteads Under the Reclamation Act", dated July 30, 1919, also indicates it covers land described as Parcel 1; however, it identifies a serial number of 768, a serial number not provided for in the transfer application. The April 30, 1954, contract provides there are no other existing water rights established in the area described; therefore, the water rights under the contract identified as serial number 768 must not have still been in existence in 1954 or do not apply to this parcel. The State Engineer finds as to Parcel 1 the contract date is April 30, 1954.

Parcel 2 - The supplemental contract documents provided by the United States include a contract dated April 9, 1908.¹⁴² Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is April 9, 1908.

Parcel 3 - The supplemental contract documents provided by the United States include a contract dated August 6, 1907.¹⁴³ Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is August 6, 1907.

Parcel 4 - The supplemental contract documents provided by the United States include a contract dated December 31, 1907.¹⁴⁴

¹⁴¹ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁴² RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁴³ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁴⁴ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is December 31, 1907.

Parcel 5 - The supplemental contract documents provided by the United States include a contract dated June 11, 1951.¹⁴⁵ Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is June 11, 1951.

Parcel 6 - The supplemental contract documents provided by the United States include¹⁴⁶ a "Certificate of Filing Water Right Application" dated December 31, 1907, covering the land described as Parcel 6. A second document, "Water-right Application for Lands in Private Ownership", dated June 17, 1915, also covers the land described as Parcel 6; however, it identifies serial number 377, a serial number not identified under the transfer application. The State Engineer finds as the 1915 contract references a serial number not relevant to this application the contract date is December 31, 1907.

Parcels 7, 8 and 9 - The supplemental contract documents provided by the United States include¹⁴⁷ a "Certificate of Filing Water Right Application" dated December 31, 1907, covering the land described as Parcels 7, 8 and 9. A second document, "Water-Right Application for Lands in Private Ownership", dated June 17, 1915, also covers the land described; however, it identifies serial number 377, a serial number not provided for in the transfer application. A third document, "Agreement", dated April 25, 1907, also covers the land described in Parcel 7. The Agreement provides for the conveyance of vested water rights to the United States in exchange for Project water. The State Engineer finds that the 1915

¹⁴⁵ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁴⁶ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁴⁷ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

contract references a serial number not relevant to this application. The State Engineer further finds the 1907 Agreement evidences that the water rights at issue pre-date the Project, and the Certificate of Filing Water Right Application dated December 31, 1907, appears to merely confirm the exchange of vested water rights for Project water rights; therefore, the contract date is April 25, 1907.

Parcel 10 - The supplemental contract documents provided by the United States include a contract dated April 9, 1908, covering the land described as Parcel 10.¹⁴⁸ Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is April 9, 1908.

Parcels 11 and 12 - No contracts covering these parcels of land were introduced into evidence. The only evidence before the State Engineer of the underlying contracts is found on the supporting application maps¹⁴⁹ which indicates that the water is being transferred from contract file serial number 729-A. The State Engineer makes no finding as to the correct contract dates.

Parcel 13 - The supplemental contract documents provided by the United States include a contract dated February 1, 1919, covering the land described as Parcel 13.¹⁵⁰ Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is February 1, 1919.

Parcels 14, 15 and 19 - The supplemental contract documents provided by the United States include a contract dated May 25, 1907, covering the land described as Parcels 14, 15, and 19.¹⁵¹

¹⁴⁸ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁴⁹ RORR Vol. 27, Tab 191. Exhibit No. 4, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁵⁰ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁵¹ RROR Vol. 30, Tab 208. Exhibit No. 29, public administrative hearing before the State Engineer, October 15-18, 1996.

Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is May 25, 1907.

Parcels 16, 17 and 18 - Exhibit CC¹⁵² contained a contract dated December 27, 1907, covering the land described as Parcels 16, 17, and 18. Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is December 27, 1907.

Parcel 20 - Exhibit CC¹⁵³ contained a contract dated November 2, 1908, covering the land described as Parcel 20. Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is November 2, 1908.

Parcel 21 - Exhibit CC¹⁵⁴ contained a contract dated December 26, 1907, covering the land described as Parcel 21. Since no other evidence was provided indicating any other contract the State Engineer finds the contract date is December 26, 1907.

IV.

PERFECTION

The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 1 - The contract date is April 30, 1954. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁵⁵ which indicates from aerial photographs that in 1948 the land under this parcel was bare land and natural vegetation. In 1962 the land use was described as mostly the West Side Drain

¹⁵² RORR Vol. 30, Tab 207. Exhibit No. 27, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁵³ RORR Vol. 30, Tab 207. Exhibit No. 27, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁵⁴ RORR Vol. 30, Tab 207. Exhibit No. 27, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁵⁵ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

and adjacent land. The protestant did not provide any evidence other than two land use descriptions from aerial photographs dated 1948 and 1962 for its evidence that water was not perfected on Parcel 1 between 1954 and 1962 and the scale of the 1962 photograph is so small the State Engineer questions if an accurate land use determination is possible. Further, the description of the drain evidences irrigation activity in the immediate vicinity. The State Engineer finds that the protestant did not prove that water was never perfected on this parcel between 1954 and 1962, and did not prove its claim of lack of perfection.

Parcels 4, 10 and 13 - Parcels 4, 10 and 13 have contract dates of 1907, 1908 and 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁵⁶ which indicates from aerial photographs that in 1948 the land use on these parcels was described as roads and adjacent land. The protestant did not provide any evidence other than land use descriptions taken from 1948 aerial photographs as its evidence that water was not perfected on Parcels 4, 10 and 13 between the early 1900's and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water was never perfected on these parcels and the protestant did not prove its claim of lack of perfection. The State Engineer further finds, based on General Conclusion of Law II, since the contracts all pre-date 1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 5 - The contract date is June 11, 1951. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁵⁷ which indicates from aerial photographs that in 1948, 1962, and 1972 through 1984 the land use on this parcel was a road

¹⁵⁶ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁵⁷ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

and adjacent land. The State Engineer finds based on the fact that the land use description never changes from 1948 through 1984, on the fact that the contract date is 1951, and on the fact that no evidence was provided by the applicant to challenge the land use description or to show water was perfected, that a water right was never perfected on this parcel from the time of the contract in 1951 through the filing of the change application in 1984, a period of 33 years. The State Engineer further finds in the absence of evidence to the contrary a lapse of 33 years does not demonstrate due diligence in placing the water to beneficial use; therefore, there is no water right that can be related back under the doctrine of relation back and there is no water right available to be transferred from this parcel.

Parcel 6 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁵⁸ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as a road and adjacent land. The protestant did not provide any evidence other than the land use description from a 1948 aerial photograph as its evidence that water was not perfected on this parcel between 1907 and 1948. The State Engineer finds this is not sufficient evidence to prove lack of perfection and the protestant did not prove its claim of lack of perfection on this parcel.

The State Engineer further finds that documents entitled "Certificate of Filing Water Right Application" appear to relate to obtaining a final certificate to evidence the exchange of pre-Project vested water rights for Project water rights, as described under Parcel 7 above in the contract date section. That being the case, and based on General Conclusion of Law II, since the contract pre-dates 1927 the State Engineer finds the water right under this contract was perfected at some point in time prior to the contract

¹⁵⁸ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

date.

Parcels 11 and 12 - The State Engineer found no determination could be made as to contract dates since no contracts were ever put into evidence. The State Engineer finds since he does not know what date a contract was obtained he is unable to make a determination as to perfection or lack thereof regarding these parcels. Since no determination can be made as to contract date or perfection, the State Engineer finds he cannot rule on the protestant's claim. Therefore, there is insufficient information in the record to deal with the protestant's claims or to allow the transfer of these water rights.

Parcels 14, 15 and 19 - The contract date is May 25, 1907. The Agreements covering Parcels 14, 15 and 19 provide that they involved the exchange of pre-Project vested water rights for Project water rights. In General Finding of Fact XI, the State Engineer found that pre-statutory water rights exchanged for Project water rights were perfected as a matter of fact and law.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁵⁹ which identifies from aerial photographs that in 1948 the land use on these parcels was roads and adjacent land. The protestant did not provide any evidence other than the land use description from a 1948 photograph that water was not perfected on these parcels between 1907 and 1948. The State Engineer finds these water rights were perfected as a matter of law, the evidence is not sufficient to prove lack of perfection and the protestant did not prove its claim of lack of perfection on these parcels.

V.

FORFEITURE

The State Engineer specifically adopts and incorporates General Conclusion of Law IV which held that all water rights in

¹⁵⁹ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

the Project were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

Parcel 1 - The contract date is April 30, 1954. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁶⁰ which indicates from aerial photographs that from 1962 through 1984 the land use was described as mostly the West Side Drain and adjacent land. At the 1985 administrative hearing, the applicant described the land use as Upper West Side Drain,¹⁶¹ and no evidence was provided to the contrary.

In the absence of evidence to the contrary, the State Engineer finds that from 1962 through 1984 no water was placed to beneficial use on Parcel 1. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

Parcels 2, 3, 4, 6, 7, 8, 9, 10, 14, 15, and 19 all have contract dates that pre-date March 22, 1913. The State Engineer finds as to these parcels, the contracts alone show that the water rights were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

Parcel 5 - The State Engineer found that water was never placed to beneficial use on this particular parcel under this contract, and that as due diligence was not demonstrated the doctrine of relation back did not apply and no water right was available to be transferred. The State Engineer finds the concept of forfeiture does not apply to a water right that has never been perfected as only a perfected water right can be abandoned or forfeited;

¹⁶⁰ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁶¹ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

therefore, the protestant's forfeiture claim cannot stand.

Parcels 11 and 12 - As the State Engineer was unable to make a determination as to the contract dates or perfection, he is also unable to make a determination regarding forfeiture.

Parcel 13 - The contract date is February 1, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁶² which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as a road and adjacent land. At the 1985 administrative hearing, the applicant described the land use as Austin Highway.¹⁶³ In the absence of evidence to the contrary the State Engineer finds that from 1948 through 1984 no water was placed to beneficial use on Parcel 13. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.¹⁶⁴ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."¹⁶⁵ Non-use for a period of time may

¹⁶² RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁶³ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996,

¹⁶⁴ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

¹⁶⁵ Revert v. Ray, 95 Nev. 782, 786 (1979).

inferentially be some evidence of intent to abandon;¹⁶⁶ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearing that the owner of the water rights under Application 47840 had continually paid the assessments and taxes due on these water rights and that none were delinquent.¹⁶⁷

Parcel 1 - The State Engineer found that no water was placed to beneficial use on Parcel 1 from 1962 through 1984. The State Engineer finds that while the PLPT's evidence indicates the land was not used for irrigation, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. The State Engineer finds the protestant did not prove intent to abandon; therefore, the protestant did not prove its claim of abandonment as to Parcel 1.

Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 - The PLPT presented evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁶⁸ that from 1962 through 1984 the lands identified as the existing places of use were occupied by mostly roads and adjacent land. At the 1985 administrative hearing, the applicant described the land use on all

¹⁶⁶ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

¹⁶⁷ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

¹⁶⁸ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

these parcels as either Austin Highway or U.S. Highway 50.¹⁶⁹ In the absence of evidence to the contrary, the State Engineer finds that no water was placed to beneficial use on these parcels from 1962 through 1984. The State Engineer finds that while the PLPT's evidence indicates the land was not used for irrigation for the time periods indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. The State Engineer finds the protestant did not prove intent to abandon; therefore, the protestant did not prove its claims of abandonment as to Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Parcel 21 - The PLPT presented evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁷⁰ that in 1948 and 1962 the existing place of use was irrigated and that from 1972 through 1984 the land identified as the existing place of use was occupied by bare land and structures, including some trees in 1980. At the 1985 administrative hearing, the applicant described the land use as buildings and yard.¹⁷¹ The State Engineer finds that while the PLPT's evidence indicates that after 1972 the land was transitioning out of irrigated fields and that some of the land may not have been used for irrigation, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon.

¹⁶⁹ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996. The State Engineer notes that Exhibit No. 22 has no land use description for Parcel 11.

¹⁷⁰ RORR Vol. 27, Tab 198. Exhibit No. 18, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁷¹ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

The State Engineer finds the protestant did not prove intent to abandon; therefore, the protestant did not prove its claim of abandonment as to Parcel 21.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁷²

II.

PERFECTION

Parcel 1 - The State Engineer concludes the protestant did not prove its claim of lack of perfection.

Parcels 4, 10 and 13 - The State Engineer concludes that water rights were perfected prior to receiving a contract and that the protestant did not prove its claim of lack of perfection.

Parcel 5 - The State Engineer concludes that water was never perfected on this parcel, the transferor is not within the due diligence period to enable the water right to relate back to the original contract date and the water right is not available for transfer.

Parcel 6 - The State Engineer concludes that water rights were perfected prior to receiving a contract and that the protestant did not prove its claim of lack of perfection.

Parcels 11 and 12 - No evidence was produced as to a contract date; therefore, the State Engineer cannot make a conclusion as to whether water rights were ever perfected on these parcels and without this information there is insufficient information in the record to resolve the protests or allow the transfer of these water rights.

Parcels 14, 15, and 19 - The State Engineer concludes that the agreements covering these parcels provide they involve pre-Project vested water rights and the water rights were perfected as a matter of fact and law. The State Engineer further concludes the

¹⁷² NRS Chapter 533 and Order of Remand from Federal District Court.

protestant did not prove its claim of lack of perfection.

III.

FORFEITURE

The State Engineer concludes that all water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to any of the parcels. The State Engineer further concludes that Parcels 2, 3, 4, 6, 7, 8, 9, 10, 14, 15 & 19 all have contract dates that pre-date March 22, 1913, making them not subject to the forfeiture provisions of Nevada Revised Statute § 533.060. The State Engineer concludes since water was never perfected on Parcel 5 the doctrine of forfeiture does not apply.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right. While acts of abandonment may appear as to use on particular parcels or sections of parcels of land, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessment for the water and did not know he owned the water rights until 1983.

RULING

The State Engineer affirms his ruling as to transfer Application 47840, except as to Parcels 5, 11 and 12. No water was ever perfected on Parcel 5 and due diligence was not exercised in placing the water to beneficial use. Therefore, there is no water right available for transfer from Parcel 5. Insufficient information exists as to Parcels 11 and 12; thus, the State Engineer finds he cannot adequately rule on the protestant's claims nor allow the transfer of these water rights. Permit 47840 will be amended to reflect these revisions.

APPLICATIONS 48468 AND 48668

FINDINGS OF FACT

I.

Application 48468 was filed on October 5, 1984, by Larry Fritz to change the place of use of 42.2 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 617-27-B-3, 131 and 131-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.¹⁷³ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 0.20 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.19N., R.28E. - (617-27-B-3)¹⁷⁴
- Parcel 2 - 1.90 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E. - (131)¹⁷⁵
- Parcel 3 - 4.50 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E. - (131)
- Parcel 4 - 0.80 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E. - (131)
- Parcel 5 - 2.10 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E. - (131)
- Parcel 6 - 2.50 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, T.18N., R.29E. - (131).

The proposed places of use are described as being located within 3.5 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, 4.7 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 2.7 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ and 1.1 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 7, T.18N., R.29E., M.D.B. & M.

II.

Application 48668 was filed on December 31, 1984, by Gaylord Blue Equity Trust to change the place of use of 11.7 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 574, Claim

¹⁷³ RORR, Vol. 30, Tab 209. Exhibit No. 30, public administrative hearing before the State Engineer, October 15-18, 1996. File No. 48468, official records in the office of the State Engineer.

¹⁷⁴ 617-27-B-3 and the other numbers in this column refer to the contract serial numbers relative to each parcel identified on the application and accompanying map entered as Exhibit No. 32, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁷⁵ This parcel and the remaining parcels are all identified on the application map as being transferred under Serial Numbers 131 and 131-1; however, the map does not specifically identify which parcels are Serial Number 131 and which are Serial Number 131-1.

No. 3 Orr Ditch Decree, and Alpine Decree.¹⁷⁶ The proposed point of diversion is described as being located at the Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.60 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 30, T.19N., R.28E. - (574).¹⁷⁷

The proposed place of use is described as being located within 2.6 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 30, T.19N., R.28E., M.D.B. & M.

III.

Applications 48468 and 48668 were protested by the PLPT on the grounds described in the General Introduction I of this ruling.¹⁷⁸ The State Engineer finds that the PLPT narrowed its protest claims as follows:¹⁷⁹

Application 48468

- Parcel 1 - Forfeiture, abandonment
- Parcel 2 - Forfeiture, abandonment
- Parcel 3 - Forfeiture, abandonment
- Parcel 4 - Forfeiture, abandonment
- Parcel 5 - Forfeiture, abandonment
- Parcel 6 - Forfeiture, abandonment.

Application 48668

- Parcel 1 - Lack of perfection, forfeiture, abandonment.

IV.

UNDERLYING CONTRACTS AND CONTRACT DATES 48468 AND 48668

Exhibit CC included contracts covering all six parcels

¹⁷⁶ RORR, Vol. 30, Tab 212. Exhibit No. 33, public administrative hearing before the State Engineer, October 15-18, 1996. File No. 48668, official records in the office of the State Engineer.

¹⁷⁷ 574 refers to the contract serial number relative to the parcel identified on the application map entered as Exhibit No. 35, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁷⁸ RORR Vol. 30, Tabs 210 and 213. Exhibit Nos. 31 and 34, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁷⁹ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

identified as the existing places of use under Application 48468.¹⁸⁰

The State Engineer finds the contract dates as to the parcels in **Application 48468** to be as follows:

Parcel 1 - The contract dated May 4, 1945, states that in Section 36 three acres already had an existing water right and the applicant was requesting 20 acres of new water right which covered the total 23 acres of irrigable land in that 40 acre $\frac{1}{4}$ $\frac{1}{4}$ section. Nothing in the record clarifies which land was covered by the three acres of existing water right and which land got the 20 acres of new water right. The applicant provided no evidence to assist in the clarification; therefore, based on General Finding of Fact VIII, the State Engineer finds the contract date to be May 4, 1945.

Parcel 2 - A February 5, 1953, agreement provides that in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T.18N., R.29E. there are 36 acres of irrigable land with 34 acres under cultivation. The agreement indicates that the contractor would apply for a water right on an additional two acres in the same section. While the February 5, 1953, agreement indicates by the fact there is no requirement to pay construction charges for those lands which were under cultivation they had a pre-Project vested water right, the State Engineer is unable to determine if the right sought to be transferred is out of the pre-Project vested water right or out of the two acres of water rights applied for under the February 13, 1953, application for permanent water right. Nothing in the record clarifies which land had existing pre-Project water rights. The applicant provided no evidence to assist in the clarification; therefore, based on General Finding of Fact VIII, the State Engineer finds the contract date to be February 13, 1953. The State Engineer recognizes this finding may penalize the applicant when in fact the contract date should have perhaps been a pre-1913

¹⁸⁰ RROR Vol. 31, Tab 223. Exhibit No. 44, public administrative hearing before the State Engineer, October 15-18, 1996.

date. However, the applicant's counsel took the position that he would not present any evidence or provide any assistance in clarifying the issues before the State Engineer. On the basis of the failure of the applicant to present any evidence, this is the only evidence the State Engineer has before him; therefore, he accepts it and applies General Finding of Fact VIII.

Parcel 3 - A February 5, 1953, agreement provides that within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T.18N., R.29E. there are 33 acres of irrigable land with 27 acres under cultivation. The agreement indicates that the contractor would also apply for a water right on an additional six acres in the same section. While the agreement indicates by the fact there is no requirement to pay construction charges for those lands which were under cultivation they had a pre-Project vested water right, the State Engineer is unable to determine if the water right sought to be transferred is out of the pre-Project vested water right or out of the six acres of water rights applied for under the February 13, 1953, application for permanent water right. Nothing in the record clarifies which land had existing pre-Project water rights. The applicant provided no evidence to assist in the clarification; therefore, based on General Finding of Fact VIII, the State Engineer finds the contract date to be February 13, 1953. The State Engineer recognizes this finding may penalize the applicant when in fact the contract date should have perhaps been a pre-1913 date. However, the applicant's counsel took the position that he would not present any evidence or provide any assistance in clarifying the issues before the State Engineer. On the basis of the failure of the applicant to present any evidence, this is the only evidence the State Engineer has before him; therefore, he accepts it and applies General Finding of Fact VIII.

Parcel 4 - The contract dated February 5, 1953, indicates that within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T.18N., R.29E. there are 34 acres of irrigable land that were under cultivation and that water would be delivered without charge for the construction of the Project,

indicating that the water rights were pre-Project vested water rights. The applicant did not provide any evidence as to a contract date; therefore, based on General Finding of Fact VIII, the State Engineer finds the contract date is February 5, 1953, but evidences this is a pre-Project vested water right.

Parcel 5 - The contract dated February 5, 1953, indicates that within the SE¼ SW¼ of Section 7, T.18N., R.29E. there are 36 acres of irrigable land that were under cultivation and that water would be delivered without charge for the construction of the Project, indicating that the water rights were pre-Project vested water rights. The applicant did not provide any evidence as to a contract date; therefore, based on General Finding of Fact VIII, the State Engineer finds the contract date is February 5, 1953, but evidences this is a pre-Project vested water right.

Parcel 6 - The contract dated February 5, 1953, indicates that there are 37 irrigable acres in the parcel and that the contractor would be applying for a new water right for the 37 acres. A contract dated February 13, 1953, covers the area the contractor agreed to apply for a new water right. The State Engineer finds the contract date is February 13, 1953.

Application 48668

Parcel 1 - The contract supplied by the TCID in the 1985 hearings indicates a contract date of November 11, 1916, and no evidence to the contrary was provided.¹⁸¹ The State Engineer finds the contract date is November 11, 1916.

V.

PERFECTION

Application 48668

The contract date is November 11, 1916. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract that

¹⁸¹ RROR Vol. 31, Tab 224. Exhibit No. 45, public administrative hearing before the State Engineer, October 15-18, 1996.

dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place of Use"¹⁸² which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as V-1 Canal, Upper West Side Drain and adjacent lands. At the 1985 administrative hearings the applicants indicated that water was being transferred from land covered by the "LA" Lateral and Upper West Side Ext. Drain.¹⁸³ The protestant did not provide any evidence other than a 1948 photograph as its evidence that water was not perfected on this parcel between 1916 and 1948. A major portion of the drainage system was not in existence until the early 1920's and many of the ditches, laterals and roads were changed or added after the Project was begun and the contracts consummated.¹⁸⁴

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water was never perfected on this parcel between 1916 and 1948, and the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer finds, based on General Conclusion of Law II, that the water right under this contract was perfected at some point in time prior to the contract date.

VI.

FORFEITURE

Application 48468

Parcel 1 - The contract date is May 4, 1945. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

¹⁸² RORR Vol. 30, Tab 221. Exhibit No. 42, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁸³ RROR Vol. 27, Tab 202. Exhibit No. 22 (former Exhibit No. EE in 1985 hearing), public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁸⁴ RORR Vols. 28-29, Tab 204. Transcript pp. 67-90, public administrative hearing before the State Engineer, February 4, 1985.

Place(s) of Use"¹⁸⁵ which indicates from aerial photographs in 1973 the land was irrigated and in 1974 and 1975 the land use on this parcel was described as bare land. In 1977, 1980 and 1984 the land use was described as land within a residential area. At the 1985 administrative hearing, the applicants identified the current land use as housing.¹⁸⁶ At the 1996 administrative hearing no evidence was provided to the contrary.

In light of the fact that in 1974 and 1975 the land use was described as bare land after being irrigated in 1973 the land could as easily have been irrigated as not; therefore, the State Engineer finds the protestant did not provide clear and convincing evidence to prove water was not used on the parcel in 1974 or 1975. The State Engineer finds that from 1977 through 1984, a period of seven years, there is clear and convincing evidence that no water was placed to beneficial use on Parcel 1. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

Parcel 2 - The contract date is February 13, 1953. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁸⁷ which indicates from aerial photographs that in 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 the land use on this parcel was described as a road, farm house and bare land. At the 1985 administrative hearing, the applicants identified the current land use as the Schurz Highway.¹⁸⁸ The applicant in 1996

¹⁸⁵ RORR Vol. 30, Tab 217. Exhibit No. 38, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁸⁶ RROR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁸⁷ RORR Vol. 30, Tab 217. Exhibit No. 38, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁸⁸ RROR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

provided no evidence to the contrary.

The State Engineer finds that the applicant's description of the Schurz Highway from the 1985 administrative hearing is more likely the correct land use description as it was the applicant that filed the transfer application and made that land use description. Based on the Schurz Highway description, and using the analysis found under Parcel 4 which shows Schurz Highway was in existence in 1962, the State Engineer finds that from 1962 through 1984, a period of 22 years, no water was placed to beneficial use on Parcel 2. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913. Furthermore, based on the fact that 34 acres of the 36 irrigable acres in this division of land are pre-Project vested water rights, it is probable that the contract date should actually be a pre-Project/pre-1913 date not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

Parcel 3 - The contract date is February 13, 1953. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁸⁹ which indicates from aerial photographs that in 1962 the land use was identified as roads, bare land and natural vegetation. In 1972 the land use was described as road, bare land and some irrigation. The State Engineer finds that the protestant provided no evidence as to the specific location of those lands described as roads, bare land or portion irrigated. Therefore, the protestant did not provide clear and convincing evidence as to non-use on any particular portion of the parcel particularly as the land use description changes from bare land, canals, drains and natural vegetation to roads and irrigated land, much of which evidences irrigation activity in the immediate vicinity.

¹⁸⁹ RORR Vol. 30, Tab 217. Exhibit No. 38, public administrative hearing before the State Engineer, October 15-18, 1996.

From 1973 through 1984 the protestant identified the land use as roads and non-irrigated ag. land. The non-irrigated ag. land may have been comprised of corrals and a hay stack yard.¹⁹⁰ At the 1985 administrative hearing, the applicants identified the current land use as Weaver Road, private ditch or road.¹⁹¹ The applicant in 1996 provided no evidence to the contrary.

Comparing the 1985 to the 1996 land use description there is agreement that at least some of the existing place of use was covered by roads. In 1985 the applicant appeared not to be sure if he was transferring water from a ditch or a road. Since the applicant provided no assistance in clarifying this point, taking the applicant's 1985 evidence, supplemented by the protestant's 1996 land use description of non-irrigated ag. land, the State Engineer finds that from 1973 through 1984, a period of 11 years, no water was placed to beneficial use on Parcel 3.

Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913. Furthermore, based on the fact that 27 acres of the 33 irrigable acres in this division of land are pre-Project vested water rights, it is probable that the contract date should actually be a pre-Project/pre-1913 date not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

Parcel 4 - The contract date is February 5, 1953, but indicates it is based on the exchange of pre-Project vested water rights for Project rights. The PLPT provided evidence in Table 2 -

¹⁹⁰ RORR Vol. 30, Tab 218. Exhibit No. 39, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹¹ RROR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

"Land Use Descriptions for Existing Place(s) of Use"¹⁹² which indicates from aerial photographs that in 1962, 1972, 1973, 1974, 1975, and 1977 the land use was described as a road and adjacent land. In 1980 and 1984 the land use was identified as a road. At the 1985 administrative hearing, the applicants identified the current land use as the Schurz Highway.¹⁹³ The applicant in 1996 provided no evidence to the contrary. Based on the Schurz Highway description, the State Engineer finds that from 1962 through 1984, a period of 22 years, no water was placed to beneficial use on Parcel 4. Nonetheless, the State Engineer further finds that the contract itself indicates that the water right on Parcel 4 was a pre-Project vested right not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

Parcel 5 - The contract date is February 5, 1953, but indicates it is based on the exchange of pre-Project vested water rights for Project rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁹⁴ which indicates from aerial photographs that from 1948 through 1984 the land use was described as the L and L-12 drains. At the 1985 administrative hearing, the applicants identified the current land use as a drain and Weaver Road.¹⁹⁵ The applicant in 1996 provided no evidence to the contrary. The State Engineer finds based on both descriptions that from 1948 to 1984, a period of 36 years, no water was placed to beneficial use on Parcel 5. However, the State Engineer finds that the contract itself indicates that the water right on Parcel 5 was a pre-Project vested right not subject to the

¹⁹² RORR Vol. 30, Tab 217. Exhibit No. 38, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹³ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹⁴ RORR Vol. 30, Tab 217. Exhibit No. 38, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹⁵ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

forfeiture provisions of Nevada Revised Statute § 533.060.

Parcel 6 - The contract date is February 13, 1953. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁹⁶ which indicates from aerial photographs that from 1973 through 1984 the land use was identified as roads. At the 1985 administrative hearing, the applicants identified the current land use as a road and ditch.¹⁹⁷ The applicant in 1996 provided no evidence to the contrary. Based on both descriptions, the State Engineer finds that from 1973 through 1984, a period of 11 years, no water was placed to beneficial use on Parcel 6. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

Application 48668

Parcel 1 - The contract date is November 11, 1916. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁹⁸ which indicates from aerial photographs that from 1948 through 1984 the land use was described as the V-1 canal, Upper West Side Drain and adjacent lands. At the 1985 administrative hearing, the applicants identified the current land use as "LA" Lateral and Upper West Side Ext. Drain.¹⁹⁹ The applicant in 1996 provided no evidence to the contrary. The State Engineer finds based on both land use descriptions that from 1948 through 1984, a period of 36 years, no water was placed to beneficial use on Parcel 1. Nonetheless, based on General

¹⁹⁶ RORR Vol. 30, Tab 217. Exhibit No. 38, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹⁷ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹⁸ RORR Vol. 30, Tab 221. Exhibit No. 42, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁹⁹ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

VII.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²⁰⁰ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²⁰¹ Non-use for a period of time may inferentially be some evidence of intent to abandon;²⁰² however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Testimony was provided at the 1985 hearing that owners of the water rights under Applications 48468 and 48668 had continually paid the assessments and taxes due on these water rights and that none were delinquent.²⁰³

Application 48468

Parcel 1 - The State Engineer found that from 1977 through 1984 there was clear and convincing evidence that no water was placed to beneficial use on Parcel 1.

Parcels 2 and 4 - The State Engineer found that from 1962

²⁰⁰ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁰¹ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁰² Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁰³ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

through 1984 no water was placed to beneficial use on Parcels 2 and 4.

Parcel 3 - The State Engineer found that from 1973 through 1984 no water was placed to beneficial use on Parcel 3.

Parcel 5 - The State Engineer found that from 1948 through 1984 no water was placed to beneficial use on Parcel 5.

Parcel 6 - The State Engineer found that from 1973 through 1984 no water was placed to beneficial use on Parcel 6.

In General Finding of Fact IX the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. The State Engineer finds that while the PLPT's evidence indicates that some or all of the lands identified as Parcels 1, 2, 3, 4, 5, and 6 were not used for irrigation during the time periods indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its case as to intent to abandon.

Application 48668

Parcel 1 - The State Engineer found that from 1948 through 1984 no water was placed to beneficial use on Parcel 1. The State Engineer finds that while the PLPT's evidence indicates the land was not used for irrigation during that time period indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know it owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its case as to intent to abandon.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁰⁴

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its case as to lack of perfection on Parcel 1 of Application 48668. The State Engineer concludes that using a 1948 photograph and nothing else does not prove lack of perfection of a 1916 contracted water right, and since the water right contract pre-dates 1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The State Engineer concludes that all water rights under Applications 48468 and 48668 were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply. The State Engineer further concludes that as to Parcels 4 and 5 under Application 48468 the contracts themselves indicate they are pre-Project vested water rights not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its case as to abandonment by clear and convincing acts of abandonment and intent to abandon the water rights. While acts of abandonment appear as to use on a particular parcel of land, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holders continued to pay the assessments for the water and did not know they owned the water

²⁰⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

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until 1983.

RULING

The State Engineer affirms his ruling as to transfer Applications 48468 and 48668.

APPLICATION 48828

FINDINGS OF FACT

I.

Application 48828 was filed on February 8, 1985, by Alfred Inglis to change the place of use of 17.5 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 188-7²⁰⁵ Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at the Lahontan Dam. The existing place of use is described as:

Parcel 1 - 5.0 acres SW¼ SW¼, Sec. 34, T.19N., R.29E.

The proposed place of use is described as being located on 5.0 acres in the SE¼ SW¼, Section 35, T.19N., R.26 E., M.D.B.& M. By letter received in the office of the State Engineer on April 18, 1988, the applicant withdrew 1.5 acres from the transfer request.²⁰⁶

II.

Application 48828 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²⁰⁷ The State Engineer finds that the PLPT narrowed its protest claims as follows:²⁰⁸

Parcel 1 - Forfeiture, abandonment.

²⁰⁵ RORR Vol. 31, Tabs 233 and 235 and Vol. 32, Tab 247. Exhibit Nos. 55, 57 and 69, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48828, official records in the office of the State Engineer.

²⁰⁶ RORR Vol. 31, Tab 236. Exhibit No. 58, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁰⁷ RORR, Vol. 31, Tab 234. Exhibit No. 56 public administrative hearing before the State Engineer, November 12-15, 1996.

²⁰⁸ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

III.

UNDERLYING CONTRACT AND CONTRACT DATE 48828

Exhibit CC from the 1985 administrative hearings included a contract dated May 20, 1920, covering the existing place of use under the application.²⁰⁹ The Exhibit CC contract covers the entire 20 acres in the S½ SW¼ SW¼ of Section 34 and provides that the applicant will pay Project construction charges which indicates that the water applied for was not an exchange of pre-Project vested water rights. While Exhibit CC was introduced in 1985 as evidence of the water right contract for this application, the applicant introduced evidence in the 1996 administrative hearings which attempts to go further back historically than the 1920 contract to show that water was perfected on this parcel prior to 1920.

The applicant introduced evidence that the 40 acres comprising the SW¼ SW¼ of Section 34, T.19N., R.29E. was patented on May 12, 1904.²¹⁰ The applicant also introduced evidence of an agreement dated December 27, 1907, wherein pre-Project vested water rights were conveyed to the United States in exchange for Project water rights.²¹¹ The agreement may or may not have included the existing place of use identified as Parcel 1 as the total irrigable acreage described in the agreement does not cover the total acreage of land described in the agreement.

While the 1907 agreement perhaps may have covered the existing place of use under this application, the State Engineer is not sufficiently convinced that the 1907 contract is the relevant contract document. Therefore, based on General Finding of Fact

²⁰⁹ RORR Vol. 31, Tab 237. Exhibit No. 59, public administrative hearing before the State Engineer, November 12-15, 1996.

²¹⁰ RORR Vol. 31, Tab 228. Exhibit No. 50, public administrative hearing before the State Engineer, October 15-18, 1996.

²¹¹ RORR Vol. 32, Tab 245. Exhibit No. 67, public administrative hearing before the State Engineer, November 12-15, 1996.

VIII, the State Engineer finds the contract date is May 20, 1920. Even though water may have been perfected on this parcel prior to December 27, 1907, the evidence was not sufficiently convincing to clearly establish that the 1907 agreement pertained to this particular parcel of land.

IV.

FORFEITURE

Parcel 1 - The contract date is May 20, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²¹² which indicates from aerial photographs that in 1972 the land use was described as irrigated land, in 1973 as non-irrigated ag. land, in 1974 as inconclusive, and in 1975 as a portion possibly irrigated. In 1977 the land use was described as non-irrigated ag. land, and in 1980 and 1984 as bare land and natural vegetation. The applicants provided testimony that in the late 1970's or early 1980's the land was irrigated as pasture.²¹³

In light of the fact that in 1972 the protestant described the land as irrigated and in 1975 as a portion as possibly irrigated, along with other evidence indicating that in the early 1980's the land was irrigated as pasture, the State Engineer finds that the protestant did not provide clear and convincing evidence that no water was placed to beneficial use on Parcel 1 from 1973 through the early 1980's. The evidence indicates that from an irrigated state in 1972 the culture was converted to possibly irrigated pasture in the late 1970's or early 1980's, which could explain the protestant's description of natural vegetation. Since the existing place of use continued to consist of bare land and natural vegetation in 1980 and 1984, which could have been a continuation of the irrigation of the native pasture or perhaps evidence of

²¹² RORR Vol. 31, Tab 241. Exhibit No. 63, public administrative hearing before the State Engineer, November 12-15, 1996.

²¹³ RORR Vol. 21, Tab 182. Transcript pp. 1004-1017, public administrative hearing before the State Engineer, November 12-15, 1996.

irrigated crop land, the State Engineer finds that the protestant did not prove five consecutive years of non-use by clear and convincing evidence.

The State Engineer specifically adopts and incorporates General Conclusion of Law IV which held that all water rights in the Project were initiated in accordance with the law in effect prior to March 22, 1913, and are not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

V.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²¹⁴ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²¹⁵ Non-use for a period of time may inferentially be some evidence of intent to abandon;²¹⁶ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearing that the owner of the water right under Application 48828 had continually paid the assessment and taxes due on these water

²¹⁴ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²¹⁵ Revert v. Ray, 95 Nev. 782, 786 (1979).

²¹⁶ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

rights and that none were delinquent.²¹⁷

Parcel 1 - The State Engineer has already found that the protestant did not prove five consecutive years of non-use. The State Engineer finds in light of the testimony that the owners continued to pay the assessment charges for the water rights, and based on the fact that the owners did not know they owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. The State Engineer finds that the protestant did not prove either acts of abandonment or intent to abandon by clear and convincing evidence; therefore, the protestant did not prove its claim of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²¹⁸

II.

FORFEITURE

The State Engineer concludes that the water right at issue here was initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply nor did the protestant prove five consecutive years of non-use by clear and convincing evidence.

III.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claim of abandonment by clear and convincing acts of abandonment and intent to abandon the water right.

²¹⁷ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

²¹⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

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RULING

The State Engineer affirms his ruling as to transfer
Application 48828.

APPLICATION 48647

FINDINGS OF FACT

I.

Application 48647 was filed on December 20, 1984, by Wayne Whitehead to change the place of use of 1.44 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 538 and 715-1-A-AA, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²¹⁹ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

Parcel 1 - 0.20 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 31, T.19N., R.29E.

Parcel 2 - 0.21 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E.

The proposed place of use is described as being located on 0.41 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 2, T.19N., R.29E., M.D.B.& M.

II.

Application 48647 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²²⁰ The State Engineer finds that the PLPT narrowed its protest claims as follows:²²¹

Parcel 1 - Forfeiture, abandonment

Parcel 2 - Forfeiture, abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATES 48647

Exhibit CC from the 1985 administrative hearings included a contract dated April 1, 1946, covering Parcel 1.²²² No contract for Parcel 2 was included in Exhibit CC. At the 1996

²¹⁹ RORR, Vol. 32, Tab 248. Exhibit No. 70, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48647, official records in the office of the State Engineer.

²²⁰ RORR, Vol. 32, Tab 249. Exhibit No. 71, public administrative hearing before the State Engineer, November 12-15, 1996.

²²¹ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

²²² RORR Vol. 32, Tab 251. Exhibit No. 73, public administrative hearing before the State Engineer, November 12-15, 1996.

administrative hearings, the U.S. introduced into evidence two other contracts which may cover the places of use of these parcels.²²³ One contract dated December 30, 1907, covers four acres in the same section as Parcel 1. The other contract dated December 6, 1907, is in the same section as Parcel 2. However, the U.S. made no determination if the contracts were the correct historical documents for these parcels of land.

The applicant introduced into evidence the same Section 31 (Parcel 1) contract as provided by the U.S.²²⁴ The applicant also provided evidence of two maps prepared during the period of 1912-1914 to attempt to show that the existing places of use at issue were identified as water righted ground with grain and alfalfa crops at that time.²²⁵

Parcel 1 - The 1946 contract covers five acres of land out of the ten acres described as the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31. The agreement dated December 30, 1907, provided by the Bureau of Reclamation covers four acres of land out of the 40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31; however, the State Engineer is unable to determine if the contract covers the existing place of use. The 1912-1914 maps introduced by the applicant are not of sufficient clarity, particularly as the reproductions are in black and white as opposed to the original colored maps, to be able to discern if the existing place of use was water righted land or not. In fact it appears to indicate that perhaps the land is excluded from the water righted area rather than included as the area encompassing the existing place of use is enclosed by a line with an acreage number that on other maps for other parcels appears to be a number

²²³ RORR Vol. 32, Tab 258. Exhibit No. 80, public administrative hearing before the State Engineer, November 12-15, 1996.

²²⁴ RORR Vol. 31, Tab 229. Exhibit No. 51, public administrative hearing before the State Engineer, November 12-15, 1996.

²²⁵ RORR Vol. 32, Tab 264. Exhibit No. 86, public administrative hearing before the State Engineer, November 12-15, 1996.

of acres excluded from the irrigable area. The State Engineer finds, based on General Finding of Fact VIII, that the contract date is April 1, 1946.

Parcel 2 - Exhibit CC from the 1985 administrative hearing did not include a contract under the tab for Application 48647 for the land in Section 36. The supplemental contract documents provided by the U.S. includes an agreement dated December 6, 1907, covering land in this section.²²⁶ The State Engineer finds, based on General Finding of Fact VIII, and on the basis that only one contract has been put into evidence that could cover this parcel, that the contract date is December 6, 1907.

IV.

FORFEITURE

Parcels 1 and 2 - The State Engineer finds the evidence is undisputed that from 1962 through 1984 the existing places of use were within a residential area;²²⁷ therefore, there is clear and convincing evidence that no water was placed to beneficial use on Parcels 1 and 2 from 1962 through 1984. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to the water rights as they were initiated in accordance with the law in effect prior to March 22, 1913. The State Engineer also finds that the contract for Parcel 2 indicates that the water rights are pre-Project vested rights not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

V.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden

²²⁶ RORR Vol. 32, Tab 258. Exhibit No. 80, public administrative hearing before the State Engineer, November 12-15, 1996.

²²⁷ RORR Vol. 32, Tab 255. Exhibit No. 77, public administrative hearing before the State Engineer, November 12-15, 1996.

of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²²⁸ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²²⁹ Non-use for a period of time may inferentially be some evidence of intent to abandon;²³⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 and the 1996 hearings that the owner of the water right under Application 48647 had continually paid the assessments and taxes due on these water rights and that none were delinquent.²³¹

Parcels 1 and 2 - The State Engineer finds that while the PLPT's evidence indicates that the land was not used for farming during the period of time indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove intent to abandon nor its claim of abandonment.

²²⁸ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²²⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

²³⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²³¹ RORR Vols. 28-29, Tab 204. Exhibit No 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985. RORR Vol. 31, Tab 227. Exhibit No. 49, public administrative hearing before the State Engineer, November 12-15, 1996.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²³²

II.

FORFEITURE

The State Engineer concludes that all water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply. The State Engineer further concludes as to Parcel 2 that the water right involves a pre-Project vested water right not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

III.

ABANDONMENT

The State Engineer concludes that the protestant did not prove intent to abandon the water right by clear and convincing evidence nor its claim of abandonment.

RULING

The State Engineer affirms his ruling as to transfer Application 48647.

²³² NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48672

FINDINGS OF FACT

I.

Application 48672 was filed on December 31, 1984, by Herbert Lohse to change the place of use of 38.7 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 481, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²³³ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

Parcel 1 - 5.2 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T.19N., R.28E.

Parcel 2 - 3.4 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.28E.

The proposed place of use is described as being located on 8.6 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.28E., M.D.B. & M.

II.

Application 48672 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²³⁴ The State Engineer finds that the PLPT narrowed its protest claims as follows:²³⁵

Parcel 1 - Partial lack of perfection, abandonment

Parcel 2 - Partial lack of perfection, abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATES 48672

Exhibit CC from the 1985 administrative hearings included a "Certificate of Filing Water Right Application" dated December 31, 1907, covering the existing places of use described under the

²³³ RORR, Vol. 32, Tab 265. Exhibit No. 87, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48672, official records in the office of the State Engineer.

²³⁴ RORR, Vol. 32, Tab 266. Exhibit No. 88 public administrative hearing before the State Engineer, November 12-15, 1996.

²³⁵ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

application.²³⁶ No evidence was provided otherwise. The State Engineer finds that the contract date is December 31, 1907.

IV.

PARTIAL LACK OF PERFECTION

Parcels 1 and 2 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place of Use"²³⁷ which indicates from aerial photographs that in 1948 the land use on Parcel 1 was described as farm yard, bare land, portion irrigated. From 1962 through 1984 the land use on Parcel 1 remained the same, except for the addition of a road and instead of portion irrigated, it was now described as portion possibly irrigated.

In 1948 the land use on Parcel 2 was described as a road, canal, and portion irrigated. From 1962 through 1984 the land use on Parcel 2 remained the same, except that instead of portion irrigated, it was now described as portion possibly irrigated, but irrigation was noted on a portion in 1980. The protestant did not provide any evidence other than a 1948 photograph as its evidence that water was not perfected on these parcels between 1907 and 1948.

The State Engineer finds a 1948 photograph is not sufficient evidence to prove that water was never placed to beneficial use on these parcels between 1907 and 1948 and the protestant did not prove its claim of partial lack of perfection on these parcels. The State Engineer further finds that while the protestant indicated that it believes portions were irrigated and portions were not irrigated, there is nothing in the record to specifically locate those lands; therefore, the protestant did not prove non-use on any specific portion of the parcels.

²³⁶ RORR Vol. 32, Tab 268. Exhibit No. 90, public administrative hearing before the State Engineer, November 12-15, 1996.

²³⁷ RORR Vol. 32, Tab 271. Exhibit No. 93, public administrative hearing before the State Engineer, October 15-18, 1996.

The State Engineer finds, based on General Conclusion of Law II, that at some point in time prior to the date of the contract the water right was perfected. The State Engineer also finds, based on the analysis of the documents relative to Parcels 7, 8 and 9 under Application 47840, that a "Certificate of Filing Water Right Application" may have been the document given to pre-Project vested water right holders who by agreement exchanged those rights for Project water rights. A "certificate" under Nevada statutory law is the document given a water right holder after that water right has been proven to be perfected. On the basis that this water right is evidenced by a "Certificate of Filing Water Right Application", the State Engineer finds this water right is an exchanged pre-Project vested right, and based on General Finding of Fact XI, the water right was perfected as a matter of fact and law.

V.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²³⁸ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²³⁹ Non-use for a period of time may inferentially be some evidence of intent to abandon;²⁴⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right

²³⁸ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²³⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁴⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 and 1996 administrative hearings that the owner of the water rights under Application 48672 had continually paid the taxes and assessments due on these water rights and that none were delinquent.²⁴¹

Parcel 1 - In 1948 the protestant described the land use as a portion of the parcel being occupied by a farm yard, some bare land and a portion irrigated. From 1962 through 1984 the land use on Parcel 1 was described as remaining the same, except for the addition of a road and instead of portion irrigated, it was now described as portion possibly irrigated. At the 1985 administrative hearings, the applicant indicated that water on Parcel 1 was being transferred from land covered by trees and field edges.²⁴²

It is difficult to resolve the different land use descriptions given by the protestant in 1996 and the applicant in 1985. Since the protestant did not introduce the aerial photographs it was using into evidence, the State Engineer is unable to make his own determination as to what the evidence shows. The field edges described by the applicant could refer to the road described by the protestant on the eastern edge of the parcel or the portion irrigated or the bare land. The trees described by the applicant in 1985 could be the farm yard described by the protestant in 1996. The protestant later supplemented the record with an affidavit from its witnesses which indicates that in 1948, 1962, 1973, 1974, 1975, 1977, 1980 and 1984 portions of both Parcel 1 and 2 were irrigated

²⁴¹ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985. RORR Vol. 31, Tab 227. Exhibit No. 49, public administrative hearing before the State Engineer, October 15-18, 1996.

²⁴² RROR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

in each of those years.²⁴³

Taking either land use description, the State Engineer finds that from 1962 through 1984 there is not clear and convincing evidence that no water was placed to beneficial use on any specifically identifiable portion of Parcel 1. Therefore, the protestant did not prove non-use by clear and convincing evidence.

Parcel 2 - The contract date is December 31, 1907. In 1948 the protestant described the land use as a road, canal and portion irrigated. From 1962 through 1984 the land use on Parcel 2 was described as remaining the same, except that instead of portion irrigated, it was now described as portion possibly irrigated with irrigation noted on a portion of the parcel in 1980. At the 1985 administrative hearings, the applicant indicated that the land use on Parcel 2 was the Upper Soda Lake Drain, a road and a drain.²⁴⁴ The protestant's descriptions of road, canal, and portion possibly irrigated does not differ that significantly from the applicant's description in 1985 of the Upper Soda Lake Drain, a road and a drain, except that the protestant indicates that a portion was possibly irrigated. Taking the applicant's land use descriptions, the State Engineer finds that from 1948 through 1984 no water was placed to beneficial use on Parcel 2.

The State Engineer finds that the PLPT's evidence indicates that some of the land was not used for irrigation during the time period indicated. However, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove intent to abandon by clear and convincing evidence nor its claim of

²⁴³ RORR Vol. 33, Tab 284. Exhibit No. 106, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁴⁴ RROR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁴⁵

II.

PERFECTION

The State Engineer concludes that using a 1948 photograph and nothing else does not prove lack of perfection of a 1907 contracted water right and the protestant did not prove its claim of partial lack of perfection. The protestant also failed to specifically locate the exact area where it does not believe water was perfected; therefore, it did not prove its claim of non-use on any specifically identifiable portion of the parcel. The State Engineer concludes that the "Certificate of Filing Water Right Application" may be evidence that this was an agreed upon exchange of pre-Project vested water rights for Project water rights and those pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer further concludes that since the water right contract is dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its case of abandonment by clear and convincing acts of abandonment as to Parcel 1 nor intent to abandon the water right as to either parcel. While acts of abandonment may appear as to use on particular sections within Parcel 2, the protestant did not prove the exact location of those lands and did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessment for the water and did not know he owned the water until 1983.

²⁴⁵ NRS Chapter 533 and Order of Remand from Federal District Court.

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RULING

The State Engineer affirms his ruling as to transfer
Application 48672.

APPLICATION 48673

FINDINGS OF FACT

I.

Application 48673 was filed on December 31, 1984, by Richard Payne to change the place of use of 21.35 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 320, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²⁴⁶ The proposed point of diversion is described as being located at the Lahontan Dam. The existing place of use is described as:

Parcel 1 - 6.1 acres NW¼ SW¼, Sec. 35, T.18N., R.29E.

The proposed place of use was described as being located on 6.1 acres in the NE¼ SW¼, Sec. 35, T.18N., R.29E., M.D.B. & M. By letter dated November 4, 1989, the applicant withdrew 1.9 acres from the transfer request.²⁴⁷

II.

Application 48673 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²⁴⁸ The State Engineer finds that the PLPT narrowed its protest claims as follows:²⁴⁹

Parcel 1 - Partial lack of perfection, forfeiture, abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATE 48673

Exhibit CC from the 1985 administrative hearings included a contract dated June 28, 1918, covering the existing place of use

²⁴⁶ RORR, Vol. 33, Tab 276. Exhibit No. 98, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48673, official records in the office of the State Engineer.

²⁴⁷ RORR, Vol. 33, Tab 285. Exhibit No. 107, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁴⁸ RORR, Vol. 33, Tab 277. Exhibit No. 99, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁴⁹ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

described under the application.²⁵⁰ The State Engineer finds no other evidence was presented to the contrary; therefore, the contract date is June 28, 1918.

IV.

PARTIAL LACK OF PERFECTION

The protestant narrowed its protest claim from lack of perfection to partial lack of perfection.

Parcel 1 - The protestant provided evidence in Table 2 - "Land Use Descriptions for Existing Place of Use"²⁵¹ which indicates from aerial photographs that in 1948 the land use on Parcel 1 was described as a road and farm yard with a portion irrigated. The description given from aerial photographs dated 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 is road, farm yard and structures with a portion irrigated. At the 1985 administrative hearings, the applicant indicated that water on Parcel 1 was being transferred from land covered by a canal, buildings and farm yard.²⁵² Based on the transfer map²⁵³ and the soil reclassification map²⁵⁴, the State Engineer finds that the existing place of use included a road covering a 1.0 acre parcel on the North edge of the NW¼ SW¼ of Section 35, T.18N, R.29E.²⁵⁵ which existed in 1948.

The applicant withdrew 1.9 acres from the original 6.1 acres requested for transfer. Since the road occupies 1.0 acre this

²⁵⁰ RORR Vol. 33, Tab 279. Exhibit No. 101, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵¹ RORR Vol. 33, Tab 282. Exhibit No. 104, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵² RROR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵³ RORR Vol. 33, Tab 278. Exhibit No. 100, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵⁴ RORR Vol. 33, Tab 290. Exhibit No. 112, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵⁵ RORR, Vol. 33, Tab 290. Exhibit No. 112, public administrative hearing before the State Engineer, November 12-15, 1996.

leaves 3.2 acres in the existing place of use located in the S½ NW¼ SW¼ of Section 35. Testimony provided that all of the 3.2 acres in the S½ NW¼ SW¼ of Section 35 was irrigated in 1948, but only the E½ S½ NW¼ SW¼ of Section 35 was irrigated from 1962 through 1984.²⁵⁶

The protestant did not provide any evidence other than a 1948 photograph as its evidence that water was not placed to beneficial use on the area now occupied by the road in the North portion of the parcel. The evidence indicates that water was perfected on the rest of the existing place of use. The State Engineer finds a 1948 photograph is not sufficient evidence to prove that water was never perfected on the land that is now a road between 1918 and 1948 and the protestant did not prove its claim of partial lack of perfection. The State Engineer finds, based on General Conclusion of Law II, that at some point in time prior to the date of the contract the water right was perfected.

V.

FORFEITURE

Parcel 1 - The protestant's evidence indicates that from 1962 through 1984 0.9 of an acre was irrigated in the 3.2 acre area in the S½ NW¼ SW¼.²⁵⁷ If 0.9 of an acre was irrigated then 2.3 acres were not irrigated. However, other testimony provided that all of the 3.2 acres in the S½ of the NW¼ SW¼ of Section 35 was irrigated in 1948, but only the E½ of the S½ of the NW¼ SW¼ of Section 35 was irrigated from 1962 through 1984.²⁵⁸ If the 3.2 acres is divided in ½ that equals 1.6 acres irrigated.

The protestant's evidence was not refuted that from at least 1948 through 1984 the 1.0 acre comprising the road was not

²⁵⁶ RORR Vol. 22, Tab 183. Transcript p. 1262, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵⁷ RORR Vol. 22, Tab 183. Transcript pp. 1246-1247, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁵⁸ RORR Vol. 22, Tab 183. Transcript p. 1262, public administrative hearing before the State Engineer, November 12-15, 1996.

irrigated. The State Engineer notes that a discussion was had during the hearing as to whether the existing place of use included the road or just the shoulder.²⁵⁹ However, based on the transfer map²⁶⁰ and the soil reclassification map²⁶¹, the State Engineer finds that the intended existing place of use included the road.

The State Engineer finds from 1962 through 1984 no water was placed to beneficial use on the 1.0 acre comprising the road on the north edge of the existing place of use. However, the State Engineer finds there is not clear and convincing evidence as to the exact location or the quantity of acres in the 3.2 acre portion of the parcel the protestant alleges were not irrigated from 1962 through 1984. Based on this lack of evidence of specific location of lands where non-use was alleged and the fact that the amount of land changed over time, the protestant did not provide clear and convincing evidence as to non-use on a specific portion of the 3.2 acres in the S½ NW¼ SW¼. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and

²⁵⁹ RORR Vol. 22, Tab 183. Transcript p. 1256, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁶⁰ RORR Vol. 33, Tab 278. Exhibit No. 100, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁶¹ RORR Vol. 33, Tab 290. Exhibit No. 112, public administrative hearing before the State Engineer, November 12-15, 1996.

desert the water right.²⁶² "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²⁶³ Non-use for a period of time may inferentially be some evidence of intent to abandon;²⁶⁴ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983.

Parcel 1 - The State Engineer found that from 1962 through 1984 there was clear and convincing evidence that no water was placed to beneficial use on the road on the North edge of the existing place of use, but there was not clear and convincing evidence as to non-use on any specifically identifiable lands remaining. Testimony was provided at the 1985 and the 1996 hearings that the owner of the water rights under Application 48673 had continually paid the assessments and taxes due on these water rights and that none were delinquent.²⁶⁵ The State Engineer finds that while the PLPT's evidence indicates that the land was not used for irrigation during the time period indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know he owned the water right until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove intent to abandon

²⁶² RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁶³ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁶⁴ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁶⁵ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985. RORR, Vol. 31, Tab 227. Exhibit No. 49, public administrative hearing before the State Engineer, November 12-15, 1996.

nor its claim of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁶⁶

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection. The State Engineer concludes that since the water right contract pre-dates 1927 at some point in time prior to the contract date the water right was perfected.

III.

FORFEITURE

The State Engineer concludes that the water right at issue here was initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply nor was there clear and convincing evidence provided of non-use on any specifically identifiable lands.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claim of abandonment by clear and convincing acts of abandonment and intent to abandon the water right. While acts of abandonment may appear as to use on the road, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessments for the water and did not know he owned the water until 1983.

RULING

The State Engineer affirms his ruling as to transfer Application 48673.

²⁶⁶ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48424

FINDINGS OF FACT

I.

Application 48424 was filed on September 20, 1984, by D & S Dalton to change the place of use of 5.265 acre-feet annually, a portion of the waters of the Truckee River previously appropriated under Serial Number 1045, Claim No. 3 Orr Ditch Decree.²⁶⁷ The proposed point of diversion is described as being located at Derby Dam. The existing place of use is described as:

Parcel 1 - 1.17²⁶⁸ acres NE¼ SE¼, Sec. 24, T.20N., R.24E.

The proposed place of use is described as being located on 1.17 acres in the SW¼ SW¼, Sec. 14, T.20N., R.24E., M.D.B. & M.

II.

Application 48424 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²⁶⁹ The State Engineer finds that the PLPT narrowed its protest claims as follows:²⁷⁰

Parcel 1 - Forfeiture, abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATE 48424

Exhibit CC from the 1985 administrative hearing included a contract dated August 6, 1917, covering the existing place of use

²⁶⁷ RORR, Vol. 33, Tab 291, Exhibit No. 113, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48424, official records in the office of the State Engineer.

²⁶⁸ The State Engineer notes that the book record states the existing place of use is 1.7 acres; however, this is a typographical error as the original application states it is 1.17 acres. File No. 48424, official records in the office of the State Engineer.

²⁶⁹ RORR, Vol. 33, Tab 292. Exhibit No. 114, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁷⁰ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

described under the application.²⁷¹ No evidence was otherwise presented indicating any other contract date; therefore, the State Engineer finds the contract date to be August 6, 1917.

IV.

FORFEITURE

Parcel 1 - The contract date is August 6, 1917. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁷² which indicates from aerial photographs that in 1948, 1962, 1973, 1974 and 1975 the land was irrigated. There is no other photograph until July or August 1980²⁷³ from which the land use was described as bare land. In 1984 the land use was described as bare land (residential construction). The State Engineer finds that while land nearby was under construction, the existing place of use did not have any residential construction taking place on it in 1984.²⁷⁴

The State Engineer finds that since this land had been in irrigation for what appears to be more than 58 years prior to 1975, a 1980 photograph of bare land in July or August does not provide clear and convincing evidence of non-use of water on that land. The State Engineer finds that the protestant did not prove by clear and convincing evidence that the land was not irrigated in 1980 nor did it prove by clear and convincing evidence five consecutive years of non-use. The State Engineer further finds, based on General Conclusion of Law IV, that the water rights were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute §

²⁷¹ RORR Vol. 33, Tab 294. Exhibit No. 116, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁷² RORR Vol. 33, Tab 297. Exhibit No. 119, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁷³ RORR Vol. 23, Tab 184. Transcript p. 1365, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁷⁴ RORR Vol. 23, Tab 184. Transcript pp. 1348-1349, public administrative hearing before the State Engineer, November 12-15, 1996.

533.060 do not apply.

v.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²⁷⁵ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²⁷⁶ Non-use for a period of time may inferentially be some evidence of intent to abandon;²⁷⁷ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 and the 1996 hearings that the owners of the water right under Application 48424 had continually paid the assessments and taxes due on these water rights and that none were delinquent.²⁷⁸

Parcel 1 - The State Engineer has already found that the protestant did not prove five consecutive years of non-use, only that in 1980 and 1984 the land was described as bare land. The State Engineer finds there is not clear and convincing evidence of acts of abandonment and in light of the testimony that the owners

²⁷⁵ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁷⁶ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁷⁷ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁷⁸ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985. RORR Vol. 31, Tab 227. Exhibit No. 49, public administrative hearing before the State Engineer, October 15-18, 1996.

continued to pay the assessment charges for the water rights, and did not know they owned the water rights until 1983, there is no evidence of intent to abandon. Therefore, the protestant did not prove acts of abandonment nor intent to abandon and did not prove its claim of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁷⁹

II.

FORFEITURE

The State Engineer concludes that all water rights at issue here were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply nor did the protestant prove five consecutive years of non-use by clear and convincing evidence.

III.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claim of abandonment by clear and convincing acts of abandonment and intent to abandon the water right.

RULING

The State Engineer affirms his ruling as to transfer Application 48424.

²⁷⁹ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48666

FINDINGS OF FACT

I.

Application 48666 was filed on December 31, 1984, by Darrell Craig to change the place of use of 5.76 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 541-28-E-3-B-1 and 538, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²⁸⁰ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

Parcel 1 - 0.15 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 25, T.19N., R.28E.

Parcel 2 - 0.30 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.19N., R.28E.

Parcel 3 - 0.52 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E.

Parcel 4 - 0.31 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E.

The proposed place of use is described as being located on 1.28 acres, Lot 1, Sec. 19, T.19N., R.29E., M.D.B. & M.

II.

Application 48666 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²⁸¹ The State Engineer finds that the PLPT narrowed its protest claims as follows:²⁸²

Parcel 1 - Abandonment

Parcel 2 - Abandonment

Parcel 3 - Abandonment

Parcel 4 - Abandonment.

²⁸⁰ RORR, Vol. 34, Tab 302. Exhibit No. 124, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48666, official records in the office of the State Engineer.

²⁸¹ RORR, Vol. 34, Tab 303. Exhibit No. 125, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁸² RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²⁸³ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²⁸⁴ Non-use for a period of time may inferentially be some evidence of intent to abandon;²⁸⁵ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearings that the owner of the water right under Application 48666 had continually paid the assessments and taxes due on these water rights and that none were delinquent.²⁸⁶

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁸⁷ which indicates from aerial photographs that from 1972 through 1984 the land use on this parcel was a residential area. The State Engineer finds there is clear and convincing evidence that from 1972 through 1984 no water

²⁸³ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁸⁴ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁸⁵ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁸⁶ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

²⁸⁷ RORR Vol. 34, Tab 309. Exhibit No. 131, public administrative hearing before the State Engineer, November 12-15, 1996.

was placed to beneficial use on Parcel 1.

Parcel 2 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁸⁸, that indicates that the land use on this parcel in 1962 was irrigated lands. The protestant's tabular evidence further refined by testimony²⁸⁹ indicates that from 1977 through 1984 the land use on this parcel was bare land with structures on the land in 1980 and turning into a residential area by 1984. The State Engineer finds there is not clear and convincing evidence that from 1977 through 1980 no water was placed to beneficial use on Parcel 2, but that there is clear and convincing evidence that from 1980 to 1984 no water was placed to beneficial use on Parcel 2.

Parcel 3 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁹⁰ which indicates that from 1962 through 1984 the land use on this parcel was a residential area. The State Engineer finds there is clear and convincing evidence that from 1962 through 1984 no water was placed to beneficial use on Parcel 3.

Parcel 4 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁹¹ which indicates that from 1973 through 1984 the land use on this parcel was a residential area. The State Engineer finds there is clear and convincing evidence that from 1973 through 1984 no water was placed to beneficial use on Parcel 4.

The State Engineer finds that while the PLPT's evidence indicates that the land may no longer be used for irrigation, in

²⁸⁸ RORR Vol. 34, Tab 309. Exhibit No. 131, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁸⁹ RORR Vol. 23, Tab 184. Transcript p. 1399, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁹⁰ RORR Vol. 34, Tab 309. Exhibit No. 131, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁹¹ RORR Vol. 34, Tab 309. Exhibit No. 131, public administrative hearing before the State Engineer, November 12-15, 1996.

light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its case as to intent to abandon as to Parcels 1, 2, 3 or 4 nor its claim of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁹²

II.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claim of abandonment by clear and convincing acts of abandonment and intent to abandon the water right. While acts of abandonment may appear, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessment for the water and did not know he owned the water until 1983. Therefore, the protestant did not prove its claim of abandonment.

RULING

The State Engineer affirms his ruling as to transfer Application 48666.

²⁹² NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48667

FINDINGS OF FACT

I.

Application 48667 was filed on December 31, 1984, by Mark Edson to change the place of use of 46.22 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 553-3, 562-4, 617-9, 617-9-A, 526-1-H-3, 82-A-1 and 538, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²⁹³ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 0.40 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 5, T.18N., R.28E.
- Parcel 2 - 0.67 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 27, T.19N., R.28E.
- Parcel 3 - 3.00 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 36, T.19N., R.28E.
- Parcel 4 - 1.02 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 28, T.19N., R.28E.
- Parcel 5 - 2.00 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 27, T.19N., R.28E.
- Parcel 6 - 3.00 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 27, T.19N., R.28E.
- Parcel 7 - 0.18 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E.

The proposed places of use are described as being located on 0.37 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 32, T.19N., R.28E., 4.8 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 33, T.19N., R.28E., and 5.1 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 33, T.19N., R.28E. M.D.B. & M. By letter received June 15, 1988, the applicant withdrew 0.55 of an acre from the Parcel 5 request for transfer.²⁹⁴

II.

Application 48667 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.²⁹⁵ The State Engineer finds that the PLPT narrowed its protest claims as

²⁹³ RORR, Vol. 34, Tab 312. Exhibit No. 134, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48667, official records in the office of the State Engineer.

²⁹⁴ RORR, Vol. 34, Tab 313. Exhibit No. 135, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁹⁵ RORR, Vol. 34, Tab 314. Exhibit No. 136, public administrative hearing before the State Engineer, November 12-15, 1996.

follows:²⁹⁶

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Lack of perfection, forfeiture, abandonment
- Parcel 3 - None
- Parcel 4 - None
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 6 - None
- Parcel 7 - Abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATES 48667

Exhibit CC from the 1985 administrative hearings included contracts covering the existing places of use described under the application.²⁹⁷ Neither the applicant, an agent or legal counsel appeared at the administrative hearing and no evidence was otherwise presented indicating any other contract dates. Therefore, the State Engineer finds the contract dates to be as follows:

- Parcel 1 - October 23, 1916
- Parcel 2 - October 15, 1951
- Parcel 5 - March 5, 1953
- Parcel 7 - December 6, 1907.

IV.

PERFECTION

Parcel 1 - The contract date is October 23, 1916. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁹⁸ which indicates from aerial photographs that in 1948 the land under this parcel was bare land. The protestant did not provide any evidence other than a land use description from

²⁹⁶ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

²⁹⁷ RORR Vol. 34, Tab 316. Exhibit No. 138, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁹⁸ RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

an aerial photograph dated 1948 for its evidence that water was not perfected on Parcel 1 between 1916 and 1948. The State Engineer finds that a 1948 aerial photograph is not sufficient evidence to prove that water was never perfected on this parcel between 1916 and 1948 and the protestant did not prove its claim of lack of perfection. The State Engineer finds, based on General Conclusion of Law II, that at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is October 15, 1951. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁹⁹ which indicates from aerial photographs that in 1948 the land under this parcel was bare land and natural vegetation. In 1962 the land use was described as bare land, and in 1972, 1973, 1974, 1975, 1977, 1980 and 1984 the land use was described as bare land, structures. Based on the fact that in 1948 the land use was described as bare land and natural vegetation changing to bare land in 1962 there is an appearance that the land use status changed, i.e. at least the land was cleared after the date of the October 15, 1951, contract perhaps evidencing cultivation. Therefore, the State Engineer finds that the protestant did not prove its case as to lack of perfection between 1951 and 1962.

Parcel 5 - The contract date is March 5, 1953. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁰⁰ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was land adjacent to the highway. At the 1985 administrative hearing, the applicant

²⁹⁹ RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

³⁰⁰ RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

described the land use as field.³⁰¹ The State Engineer finds that the protestant's land use description will not be given as much weight as that description provided by the applicant in 1985. The State Engineer is not sufficiently convinced that the protestant's land use description is accurate or that the protestant accurately located the existing place of use on the aerial photographs it reviewed. The State Engineer finds this to be an example of the discrepancies that are inherent in using aerial photographs of the small scales used here that also have built-in error factors. The State Engineer finds the protestant did not prove lack of perfection.

V.

FORFEITURE

Parcel 1 - The contract date is October 23, 1916. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁰² which indicates from aerial photographs that in 1948 the land use on this parcel was bare land. In 1962 and 1972 the land use was described as bare land, trees. In 1973, 1974, 1975 and 1977 the land use was described as bare land, and in 1980 and 1984 the land use was described as farm yard, structures. At the 1985 administrative hearing, the applicant described the land use as housing.³⁰³ The State Engineer finds that the protestant's land use description will not be given as much weight as that description provided by the applicant in 1985. The State Engineer is not sufficiently convinced that the protestant's land use description is accurate or that the protestant accurately located the existing place of use on the aerial photographs it

³⁰¹ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996,

³⁰² RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

³⁰³ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996,

reviewed.

The State Engineer finds the protestant did not prove five consecutive years of non-use of the water. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

Parcel 2 - The contract date is October 15, 1951. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁰⁴ which indicates from aerial photographs that in 1948 the land under this parcel was bare land and natural vegetation. In 1962 the land use was described as bare land. In 1972, 1973, 1974, 1975, 1977, 1980 and 1984 the land use was described as bare land and structures. At the 1985 administrative hearing, evidence was introduced that the existing place of use was housing.³⁰⁵ The State Engineer finds that the protestant's land use description will not be given as much weight as that description provided by the applicant in 1985. The State Engineer is not sufficiently convinced that the protestant's land use description is accurate or that the protestant accurately located the existing place of use on the aerial photographs it reviewed.

The State Engineer finds the protestant did not prove five consecutive years of non-use of the water. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

Parcel 5 - The contract date is March 5, 1953. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

³⁰⁴ RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

³⁰⁵ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996

of Use"³⁰⁶ which indicates from aerial photographs that from 1948 through 1984 the land under this parcel was land adjacent to the highway. At the 1985 administrative hearing evidence was introduced that the existing place of use was a field.³⁰⁷ The State Engineer finds that the protestant's land use description will not be given as much weight as that description provided by the applicant in 1985. The State Engineer is not sufficiently convinced that the protestant's land use description is accurate or that the protestant accurately located the existing place of use on the aerial photographs it reviewed.

The State Engineer finds the protestant did not prove five consecutive years of non-use of the water. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³⁰⁸ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³⁰⁹ Non-use for a period of time may

³⁰⁶ RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

³⁰⁷ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996

³⁰⁸ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁰⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

inferentially be some evidence of intent to abandon;³¹⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearings that the owner of the water rights under Application 48667 had continually paid the assessments and taxes due on these water rights and that none were delinquent.³¹¹

Parcel 1 - The State Engineer found that the protestant did not prove five consecutive years of non-use on Parcel 1. The State Engineer finds that the protestant did not prove acts of abandonment.

Parcel 2 - The State Engineer found that the protestant did not prove five consecutive years of non-use on Parcel 2. The State Engineer finds that the protestant did not prove acts of abandonment.

Parcel 5 - The State Engineer found that the protestant did not prove five consecutive years of non-use on Parcel 5. The State Engineer finds that the protestant did not prove acts of abandonment.

Parcel 7 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³¹² which indicates from aerial photographs that from 1977 through 1984 the land use on this parcel was a residential area. At the 1985 administrative hearing,

³¹⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³¹¹ RORR Vols. 28-29 , Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

³¹² RORR Vol. 34, Tab 320. Exhibit No. 142, public administrative hearing before the State Engineer, November 12-15, 1996.

evidence was introduced that the existing place of use was housing.³¹³ The State Engineer finds there is clear and convincing evidence that from 1977 through 1984 no water was placed to beneficial use on Parcel 7.

The State Engineer finds that while the PLPT's evidence indicates that the land may not have been used for irrigation for the time period indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of non-use on Parcels 1 2, and 5 and did not prove intent to abandon as to Parcels 1, 2, 5 and 7.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³¹⁴

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claim of lack of perfection and the burden was upon the protestant to prove its claim. As to Parcel 1, the State Engineer further concludes that since the water right contract pre-dates 1927 at some point in time prior to the contract date the water right was perfected.

III.

FORFEITURE

The State Engineer concludes that all water rights at issue were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised

³¹³ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996

³¹⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

Statute § 533.060 do not apply and as to Parcels 1, 2 and 5 the protestant did not prove five years of non-use by clear and convincing evidence.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its case as to abandonment by clear and convincing acts of abandonment and intent to abandon the water right. While acts of abandonment may appear as to Parcel 7, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessment for the water and did not know he owned the water until 1983.

RULING

The State Engineer affirms his ruling as to transfer Application 48667.

APPLICATION 48825

FINDINGS OF FACT

I.

Application 48825 was filed on February 8, 1985, by Lowell D. and Delma E. Emery to change the place of use of 8.325 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 508-3-A³¹⁵, Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at the Lahontan Dam. The existing place of use is described as:

Parcel 1 - 1.85 acres NW¼ SW¼, Sec. 19, T.19N., R.28E.

The proposed place of use is described as being located on 1.85 acres in the SW¼ SE¼ Sec. 22, T.19N., R.28E., M.D.B. & M.

II.

Application 48825 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.³¹⁶ The State Engineer finds that the PLPT narrowed its protest claims as follows:³¹⁷

Parcel 1 - Partial lack of perfection, forfeiture, abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATE 48825

Exhibit CC from the 1985 administrative hearing included a contract covering the existing place of use described under the application.³¹⁸ Neither the applicant, an agent or legal counsel appeared at the administrative hearing and no evidence was

³¹⁵ RORR Vol. 34, Tabs 323 and 325. Exhibit Nos. 145 and 147, public administrative hearing before the State Engineer, November 12-15, 1996. File No. 48825, official records in the office of the State Engineer.

³¹⁶ RORR, Vol. 34, Tab 324. Exhibit No. 146, public administrative hearing before the State Engineer, November 12-15, 1996.

³¹⁷ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

³¹⁸ RORR Vol. 34, Tab 326. Exhibit No. 148, public administrative hearing before the State Engineer, November 12-15, 1996.

otherwise presented indicating any other contract date. Therefore, the State Engineer finds the contract date is November 20, 1917.

IV.

PARTIAL LACK OF PERFECTION

Parcel 1 - The contract date is November 20, 1917. The protestant alleges partial lack of perfection as to this parcel yet nothing was introduced into evidence specifically locating which portion of the parcel the protestant alleges was not perfected. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³¹⁹ which indicates from aerial photographs that in 1948 the land under this parcel was bare land and natural vegetation. The protestant did not provide any evidence other than a land use description from an aerial photograph dated 1948 for its evidence that water was not perfected on Parcel 1 between 1917 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water was never perfected on this parcel between 1917 and 1948 and the protestant did not prove its claim of lack of perfection. The State Engineer finds, based on General Conclusion of Law II, that at some point in time prior to the date of the contract the water right was perfected.

V.

FORFEITURE

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³²⁰ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980 and 1984 the land under this parcel was bare land and natural vegetation. The protestant also introduced evidence that brushy

³¹⁹ RORR Vol. 34, Tab 329. Exhibit No. 151, public administrative hearing before the State Engineer, November 12-15, 1996.

³²⁰ RORR Vol. 34, Tab 329. Exhibit No. 151, public administrative hearing before the State Engineer, November 12-15, 1996.

native vegetation and grasses now cover the existing place of use.³²¹ The brushy native vegetation indicates that water has not been placed to beneficial use on this parcel for a number of years, but that vegetation could have grown between the filing of the change application in 1985 and the photographic evidence taken in 1996. The State Engineer finds since during the entire time frame of 1948 to 1984 a portion of the land was described as bare land, there is not clear and convincing evidence that no water was placed to beneficial use on that portion of Parcel 1 described as bare land. Therefore, the protestant did not prove non-use on that portion of the parcel described as native vegetation by clear and convincing evidence nor is there anything in the record to specifically locate those lands covered by native vegetation, so the protestant did not prove non-use on any specific lands. The State Engineer finds, based on General Conclusion of Law IV, that the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³²² "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³²³ Non-use for a period of time may

³²¹ RORR Vol. 35, Tab 331. Exhibit No. 153, public administrative hearing before the State Engineer, November 15-18, 1996.

³²² RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³²³ Revert v. Ray, 95 Nev. 782, 786 (1979).

inferentially be some evidence of intent to abandon;³²⁴ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearings that the owner of the water rights under Application 48825 had continually paid the assessments and taxes due on these water rights and that none were delinquent.³²⁵

Parcel 1 - The State Engineer found there was not clear and convincing evidence that no water was placed to beneficial use on that portion of Parcel 1 described as bare land. The State Engineer finds that while the PLPT's evidence indicates that the portion of the land covered by native vegetation was not used for irrigation, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and did not know he owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of abandonment as to Parcel 1.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³²⁶

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claim of lack of perfection and the burden was upon the

³²⁴ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³²⁵ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

³²⁶ NRS Chapter 533 and Order of Remand from Federal District Court.

protestant to prove its claim. The State Engineer concludes that since the water right contract pre-dates 1927 at some point in time prior to the contract date the water right was perfected.

III.

FORFEITURE

The State Engineer concludes that all water rights at issue were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply nor was there clear and convincing evidence that water was not placed to beneficial use on that portion described as bare land.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claim of abandonment by clear and convincing acts of abandonment and intent to abandon the water right. While acts of abandonment may appear as to use on a particular section of the parcel of land, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessment for the water and did not know he owned the water rights until 1983.

RULING

The State Engineer affirms his ruling as to transfer Application 48825.

APPLICATION 48467

FINDINGS OF FACT

I.

Application 48467 was filed on October 5, 1984, by Anne Gerdamann³²⁷ to change the place of use of 17.10 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 538 and 591³²⁸, Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

Parcel 1 - 3.09 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 33, T.19N., R.28E.

Parcel 2 - 0.71 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E.

The proposed place of use is described as being located on 3.8 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 33, T.19N., R.28E., M.D.B. & M.

II.

Application 48467 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.³²⁹ The State Engineer finds that the PLPT narrowed its protest claims as follows:³³⁰

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Abandonment.

III.

UNDERLYING CONTRACT AND CONTRACT DATES 48467

Exhibit CC from the 1985 administrative hearings included contracts covering the existing places of use described under the

³²⁷ The present owners of record are John and Anna Rebol. File No. 48467, official records in the office of the State Engineer.

³²⁸ RORR Vol. 35, Tab 334. Exhibit No. 156, public administrative hearing before the State Engineer, January 23-24, 1997.

³²⁹ RORR, Vol. 35, Tab 335. Exhibit No. 157, public administrative hearing before the State Engineer, January 23-24, 1997.

³³⁰ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

application.³³¹

Parcel 1 - Exhibit CC contained a contract dated January 11, 1915, covering the place of use identified as Parcel 1. While Exhibit CC is evidence of a valid water right contract, the applicants introduced evidence in the 1996 administrative hearing which goes further back historically and which indicates that a "Certificate of Filing Water Right Application" was first filed on this parcel on September 22, 1914, for 35 acres of irrigable ground on the 40 acre parcel identified as "Farm Unit G".³³² However, at the time the water rights were applied for irrigation works were already in place on the property.³³³ The Certificate of Filing Water Right Application (as seen under Parcel 7, contract date section, Application 47840 already considered) indicates that the water rights on this parcel are pre-Project vested water rights.

The September 22, 1914, contract appears to have been filed by a predecessor in interest who sold the property to Frank Rebol who traces title to the present owner. The January 11, 1915, contract, which is also a Certificate of Filing Water Right Application, was perhaps the method by which Frank Rebol got the water right for the property into his own name. Based on General Finding of Fact VIII, the State Engineer finds that the September 22, 1914, date will be accepted as the historical date that a water right contract was first executed for this property with the recognition that the water right on this parcel is a pre-Project vested water right.

³³¹ RORR Vol. 35, Tab 337. Exhibit No. 159, public administrative hearing before the State Engineer, January 23-24, 1997.

³³² RORR Vols.36-37, Tab 365, Attachment 1. Exhibit No. 188, Attachment 1, public administrative hearing before the State Engineer, January 23-24, 1997.

³³³ RORR Vols.36-37, Tab 365, p. 4. Exhibit No. 188, public administrative hearing before the State Engineer, January 23-24, 1997.

IV.

PERFECTION

Parcel 1 - The contract date is September 22, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³³⁴ which indicates from aerial photographs that from 1948 through 1984 the parcel was described as being occupied by a road, the Sheckler "I" Drain, the "V-5" Canal and adjacent lands. At the 1985 administrative hearing the applicant indicated that the place of use was occupied by the Sheckler Road and a drain.³³⁵ A major portion of the drainage system was not in existence until the early 1920's and many of the ditches, laterals, and roads were changed or added after the Project was begun and the contracts consummated.³³⁶

The protestant did not provide any evidence other than a 1948 photograph as its evidence that water was not perfected on this parcel between 1914 and 1948. The applicant provided evidence that by 1923 at least ½ of the irrigable land in the Homestead entry had been reclaimed and all of the water right assessments paid, and that by 1933 the water right holder had used slightly more water than the total quantity allotted for the parcel, indicating perfection of the entire amount.³³⁷ The State Engineer finds a 1948 photograph is not sufficient evidence to prove that water was never put to beneficial use on this parcel between 1914 and 1948 and the protestant did not prove its claim of lack of perfection. The State Engineer finds, based on General Conclusion of Law II,

³³⁴ RORR Vol. 35, Tab 340. Exhibit No. 162, public administrative hearing before the State Engineer, January 23-24, 1997.

³³⁵ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

³³⁶ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript pp. 67-90, public administrative hearing before the State Engineer, February 4, 1985.

³³⁷ RORR Vols. 36-37, Tab 365, pp. 4-5. Exhibit No. 188, public administrative hearing before the State Engineer, January 23-24, 1997.

that the water right under this contract water was perfected at some point in time prior to the contract date, and further finds that the Certificate of Filing Water Right Application evidences that this is a pre-Project vested water right perfected as a matter of fact and law as set forth in General Finding of Fact XI.

V.

FORFEITURE

Parcel 1 - The State Engineer finds there is clear and convincing evidence that no water was placed to beneficial use on Parcel 1 from 1948 through 1984. Nonetheless, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913. The State Engineer further finds since the water right is evidenced by a Certificate of Filing Water Right Application dated September 22, 1914, and that Certificate states that irrigation works were already on the property, this water right is a pre-Project vested water right not subject to the forfeiture provisions of Nevada Revised Statute § 533.060.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³³⁸ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³³⁹ Non-use for a period of time may

³³⁸ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³³⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

inferentially be some evidence of intent to abandon;³⁴⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearings that the owner of the water rights under Application 48467 had continually paid the assessments and taxes due on these water rights and that none were delinquent.³⁴¹

Parcel 1 - The State Engineer found that from 1948 through 1984 there was clear and convincing evidence that no water was placed to beneficial use on Parcel 1. The State Engineer finds that while the PLPT's evidence indicates that the land was not used for irrigation during the time period indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know she owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its case as to intent to abandon.

Parcel 2 - At the 1985 administrative hearing, the applicant indicated that the place of use was occupied by housing.³⁴² Testimony was provided that during the 1963-1966 time frame the area was in transition from farming to residential with the entire area being residential by 1976.³⁴³ There is no dispute that the existing place of use is within a residential subdivision within

³⁴⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁴¹ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

³⁴² RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996.

³⁴³ RORR Vol. 25, Tab 186. Transcript pp. 1707-1709, 1715, public administrative hearing before the State Engineer, January 23-24, 1997.

the city limits of Fallon, Nevada. The State Engineer finds that from 1976 through 1984 there is clear and convincing evidence that water was not placed to beneficial use on Parcel 2. The State Engineer further finds that while the PLPT's evidence indicates that the land was not used for irrigation during the time period indicated, in light of the testimony that the owner continued to pay the assessment charges for the water rights, and the fact that the owner did not know she owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its case as to intent to abandon nor its case of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁴⁴

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its case as to lack of perfection and the burden was upon the protestant to prove its claim. The State Engineer concludes that since the water right contract pre-dates 1927 at some point in time prior to the contract date the water right was perfected.

III.

FORFEITURE

The State Engineer concludes that all water rights at issue were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply. The State Engineer further concludes the water rights on Parcel 1 pre-date March 22, 1913, and thereby are specifically exempt from the forfeiture provisions of Nevada Revised Statute § 533.060.

³⁴⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its case as to abandonment by clear and convincing evidence of intent to abandon the water right. While acts of abandonment may appear as to use, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holder continued to pay the assessment for the water and did not know she owned the water until 1983.

RULING

The State Engineer affirms his ruling as to transfer Application 48467.

APPLICATION 48423

FINDINGS OF FACT

I.

Application 48423 was filed on September 20, 1984, by E. & B. Hoeksema³⁴⁵ to change the place of use of 5.445 acre-feet annually, a portion of the waters of the Truckee River previously appropriated under Serial Numbers 1031-1-B-2H, 1045 and 1015-A³⁴⁶, Claim No. 3 Orr Ditch Decree. The proposed point of diversion is described as being located at the Derby Dam. The existing places of use are described as:

Parcel 1 - 0.17 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 14, T.20N., R.24E. - (1031-B-2H)³⁴⁷

Parcel 2 - 0.368 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 24, T.20N., R.24E. - (1045)

Parcel 3 - 0.672 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T.20N., R.24E. - (1015-A).

The proposed place of use is described as being located on 1.21 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 14, T.20N., R.24E., M.D.B. & M.

II.

Application 48423 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.³⁴⁸ The State Engineer finds that the PLPT narrowed its protest claims as follows:³⁴⁹

Parcel 1 - Abandonment

Parcel 2 - Forfeiture, abandonment

Parcel 3 - Lack of perfection, forfeiture, abandonment.

³⁴⁵ The current owners of record are Jack and Nancy Cook. File No. 48423, official records in the office of the State Engineer.

³⁴⁶ RORR Vol. 35, Tab 344. Exhibit No. 166, public administrative hearing before the State Engineer, January 23-24, 1997.

³⁴⁷ 1031-B-2H and the other numbers in this column refer to the contract serial numbers relative to each parcel identified on the application and accompanying map entered as Exhibit No. 168, public administrative hearing before the State Engineer, January 23-24, 1997.

³⁴⁸ RORR, Vol. 35, Tab 345. Exhibit No. 167, public administrative hearing before the State Engineer, January 23-24, 1997.

³⁴⁹ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

III.

UNDERLYING CONTRACT AND CONTRACT DATES 48423

Exhibit CC from the 1985 administrative hearing included contracts covering the existing places of use described under the application.³⁵⁰ The State Engineer finds the contract dates to be as follows:

Parcel 2 - August 6, 1917.

Parcel 3 - Exhibit CC contained a contract dated January 14, 1915, covering the existing place of use of this parcel. The applicant introduced a patent dated August 9, 1912, which grants a right to the use of water from the Truckee-Carson Reclamation Project as an appurtenance to the irrigable land in the tract.³⁵¹ The January 14, 1915, contract states that the applicant agrees to pay construction charges which evidences that the water right was not based on a pre-Project vested water right. While the 1912 patent grants a right of use of water from the Project for the irrigable land, nothing in this record demonstrates that this parcel had a water right contract until 1915. The State Engineer finds the contract date is January 14, 1915.

IV.

PERFECTION

Parcel 3 - The contract date is January 14, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁵² which indicates from aerial photographs that in 1962 the land use was described as bare land. The protestant did not provide any evidence other than the land use description from the aerial photograph as its evidence that water was not

³⁵⁰ RORR Vol. 35, Tab 347. Exhibit No. 169, public administrative hearing before the State Engineer, January 23-24, 1997.

³⁵¹ RORR Vol. 35, Tab 361. Exhibit No. 183, public administrative hearing before the State Engineer, January 23, 1997.

³⁵² RORR Vol. 35, Tab 351. Exhibit No. 173, public administrative hearing before the State Engineer, January 23-24, 1997.

perfected on Parcel 3 between 1915 and 1962. The State Engineer finds that a 1962 photograph is not sufficient evidence that water was never perfected on this parcel between 1915 and 1962 and the protestant did not prove its claim of lack of perfection. The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract pre-dates 1927 at some point in time prior to the date of the contract the water right was perfected.

V.

FORFEITURE

Parcel 2 - The contract date is August 6, 1917. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁵³ which indicates from aerial photographs that in 1962, 1973, 1974, 1975 and 1977 the land use was described as irrigated land. In 1980 the land use was described as bare land and in 1984 as bare land (residential construction). At the 1985 administrative hearing, the applicant described the land use as a sand hill.³⁵⁴ The State Engineer finds there is a significant discrepancy in the land use description and there is not clear and convincing evidence that no water was placed to beneficial use on Parcel 2 from 1980 through 1984 nor clear and convincing evidence of five years of non-use of the water.

The State Engineer finds the protestant did not prove five consecutive years of non-use of the water. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

³⁵³ RORR Vol. 35, Tab 351. Exhibit No. 173, public administrative hearing before the State Engineer, January 23-24, 1997.

³⁵⁴ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1996

Parcel 3 - The contract date is January 14, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁵⁵ which indicates from aerial photographs that in 1962, 1973, 1974, 1975, 1977, 1980 and 1984 the land use was described as bare land. The State Engineer finds on that description alone there is not clear and convincing evidence that no water was placed to beneficial use during the years the land was identified as bare land. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³⁵⁶ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³⁵⁷ Non-use for a period of time may inferentially be some evidence of intent to abandon;³⁵⁸ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did

³⁵⁵ RORR Vol. 35, Tab 351. Exhibit No. 173, public administrative hearing before the State Engineer, January 23-24, 1997.

³⁵⁶ RORR Vol. 7, Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁵⁷ Revert v. Ray, 95 Nev. 782, 786 (1979).

³⁵⁸ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

not know they owned until 1983. Testimony was provided at the 1985 hearings that the owners of the water rights under Application 48423 had continually paid the assessments and taxes due on these water rights and that none were delinquent.³⁵⁹

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁶⁰ which indicates from aerial photographs that in 1973 and 1974 the land use was described as bare land. In 1977, 1980 and 1984 the land was described as land within a residential area. The State Engineer finds there is clear and convincing evidence that from 1977 through 1984 no water was placed to beneficial use on Parcel 1.

Parcel 2 - The State Engineer found there was not clear and convincing evidence of five successive years of non-use or clear and convincing evidence that no water was placed to beneficial use on Parcel 2 from 1980 through 1984.

Parcel 3 - The State Engineer found there was not clear and convincing evidence that no water was placed to beneficial use on Parcel 3 from 1962 through 1984.

The State Engineer finds that while the PLPT's evidence indicates that there is evidence of acts of abandonment on Parcel 1, in light of the testimony that the owners continued to pay the assessment charges for the water rights, and the fact that the owners did not know they owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon as to Parcel 1.

As to Parcels 2 and 3, the State Engineer finds the protestant did not prove by clear and convincing evidence that no water was placed to beneficial use. Further, in light of the testimony that the owners continued to pay the assessment charges for the water

³⁵⁹ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

³⁶⁰ RORR Vol. 35, Tab 351. Exhibit No. 173, public administrative hearing before the State Engineer, January 23-24, 1997.

rights, and the fact that the owners did not know they owned the water rights until 1983, there is no union of acts of abandonment with an intent to abandon as to Parcels 2 and 3. The State Engineer finds that the protestant did not prove its case of acts of abandonment as to Parcels 2 and 3 nor intent to abandon as to all three parcels; therefore, it did not prove its claims of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁶¹

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its case as to lack of perfection and the burden was upon the protestant to prove its claim. The State Engineer concludes that since the water right contract pre-dated 1927 at some point in time prior to the contract date the water right was perfected.

III.

FORFEITURE

The State Engineer concludes that all water rights at issue were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply. The State Engineer further concludes as to Parcel 2 the protestant did not prove five consecutive years of non-use and as to Parcel 3 the protestant did not prove non-use by clear and convincing evidence.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claims of abandonment by clear and convincing acts of abandonment as to Parcels 2 and 3 nor intent to abandon the water

³⁶¹ NRS Chapter 533 and Order of Remand from Federal District Court.

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right as to Parcels 1, 2, or 3. While acts of abandonment may appear as to use on Parcel 1, the protestant did not prove intent to abandon, particularly in light of the evidence that the water right holders continued to pay the assessments for the water and did not know they owned the water rights until 1983.

RULING

The State Engineer affirms his ruling as to transfer Application 48423.

APPLICATION 48865

FINDINGS OF FACT

I.

Application 48865 was filed on February 20, 1985, by Rambling River Ranches, Inc. to change the place of use of 70.5 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 399-1 and 554-2³⁶², Claim No. 3 Orr Ditch Decree, and Alpine Decree. Application 48865 was filed to correct errors in earlier transfer Application 47892.³⁶³ The proposed point of diversion is described as being located at the Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 3.00 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, T.19N., R.27E. - (399-1)³⁶⁴
- Parcel 2 - 15.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, T.19N., R.27E. - (399-1)
- Parcel 3 - 2.00 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.19N., R.27E. - (399-1)
- Parcel 4 - 2.10 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T.19N., R.27E. - (399-1)
- Parcel 5 - 16.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T.19N., R.27E. - (399-1)
- Parcel 6 - 3.50 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 14, T.19N., R.27E. - (399-1)
- Parcel 7 - 3.70 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 28, T.19N., R.28E. - (554-2).

By letter dated September 28, 1993, the applicant withdrew 1.85 acres from the transfer application, and by letters dated November 2, 1993, and March 3, 1994, the applicant voided the September 28, 1993, withdrawal and filed a new withdrawal request and withdrawal maps under the transfer application.³⁶⁵ Pursuant

³⁶² RORR Vol. 38, Tab 367. Exhibit No. 190, public administrative hearing before the State Engineer, March 4, 1997. File No. 48865, official records in the office of the State Engineer.

³⁶³ RORR Vols. 39-40, Tab 379. Exhibit No. 202, public administrative hearing before the State Engineer, March 4, 1997.

³⁶⁴ 399-1 and the other numbers in this column refer to the contract serial numbers relative to each parcel identified on the application and accompanying map entered as Exhibit No. 193, public administrative hearing before the State Engineer, March 4, 1997.

³⁶⁵ RORR Vol. 38, Tab 368. Exhibit No. 191, public administrative hearing before the State Engineer, March 4, 1997. File No. 48865, official records in the office of the State Engineer.

to the March 3, 1994, withdrawal, the applicant withdrew 1.35 acres from the 2.00 acres proposed for transfer in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.19N., R.27E., and withdrew 0.45 acres proposed for transfer from the 3.70 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 28, T.19N., R.28E.

The proposed places of use are described as being located as follows:

- Parcel 1 - 7.30 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 14, T.19N., R.27E.
- Parcel 2 - 0.60 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.19N., R.27E.
- Parcel 3 - 0.90 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 22, T.19N., R.27E.
- Parcel 4 - 1.00 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, T.19N., R.27E.
- Parcel 5 - 0.80 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 22, T.19N., R.27E.
- Parcel 6 - 4.80 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 23, T.19N., R.27E.
- Parcel 7 - 1.70 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T.19N., R.27E.
- Parcel 8 - 3.70 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 27, T.19N., R.28E.
- Parcel 9 - 8.10 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 27, T.19N., R.28E.
- Parcel 10 - 4.40 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 27, T.19N., R.28E.
- Parcel 11 - 4.60 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 28, T.19N., R.28E.
- Parcel 12 - 3.90 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 28, T.19N., R.28E.
- Parcel 13 - 3.50 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 28, T.19N., R.28E., M.D.B. & M.

II.

Application 48865 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.³⁶⁶ The State Engineer finds that the PLPT narrowed its protest claims as follows:³⁶⁷

- Parcel 1 - Abandonment, forfeiture
- Parcel 2 - Partial lack of perfection, forfeiture
- Parcel 3 - Lack of perfection, forfeiture, abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Partial lack of perfection, forfeiture, partial abandonment
- Parcel 6 - Lack of perfection, abandonment
- Parcel 7 - Partial lack of perfection, abandonment.

³⁶⁶ RORR, Vol. 38, Tab 369. Exhibit No. 192, public administrative hearing before the State Engineer, March 4, 1997.

³⁶⁷ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

III.

UNDERLYING CONTRACT AND CONTRACT DATES 48865

Exhibit CC from the 1985 administrative hearing included contracts covering the existing places of use described under the application.³⁶⁸ The State Engineer specifically incorporates General Finding of Fact VIII. The applicant upon further research determined that perhaps the TCID contract information in Exhibit CC was not completely accurate as to this transfer application.³⁶⁹ Based upon the applicant's research, and the protestant's apparent agreement with the applicant evidenced by its revision of contract dates on its Table of Contentions³⁷⁰, the State Engineer finds the contract dates to be as follows:

Parcel 1 - February 19, 1925

Parcel 2 - February 19, 1925

Parcel 3 - February 10, 1936

Parcel 4 - October 14, 1913 - 1913 contract was substituted in place of a January 13, 1909, contract. However, the applicant believes the 1913 date is the correct date to use.

Parcel 5 - February 19, 1925

Parcel 6 - December 31, 1907

Parcel 7 - August 19, 1911.

IV.

PERFECTION

Parcel 2 - The protestant alleges partial lack of perfection. The contract date is February 19, 1925. The PLPT provided evidence in

³⁶⁸ RORR Vol. 38, Tab 371. Exhibit No. 194, public administrative hearing before the State Engineer, March 4, 1997.

³⁶⁹ RORR Vols. 39 and 40, Tab 379. Exhibit No. 202, public administrative hearing before the State Engineer, March 4, 1997. RORR Vol. 26, Tab 187, Transcript, public administrative hearing before the State Engineer, March 4, 1997.

³⁷⁰ RORR Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁷¹ which indicates from an aerial photograph that in 1948 the land use is described as bare land, natural vegetation and non-irrigated ag. Testimony provided that the 1948 aerial photograph showed evidence of irrigation structures, i.e. borders and ditches around the parcel, that portions of the parcel had been worked and that the parcel was part of a farm unit being developed over time³⁷². Further evidence was provided of personal knowledge of the field encompassing Parcel 2 being irrigated in the late 1930's.³⁷³ The protestant recognized that at least 5.1 acres of the 15.0 acres encompassing Parcel 2 were irrigated in 1962.³⁷⁴

Based on the 1948 photograph, which showed evidence of irrigation structures, and on the testimony of personal knowledge of irrigation (evidence which far outweighs that of a March 1948 photograph), the State Engineer finds the water right was perfected on this parcel. The State Engineer finds that a 1948 aerial photograph is not sufficient to prove that water was never perfected on this parcel between 1925 and 1948, and the protestant did not prove its claim of lack of perfection. The State Engineer further finds based on the testimony of perfection, and on General Conclusion of Law II, at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is February 10, 1936. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

³⁷¹ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁷² RORR Vol. 26, Tab 187. Transcript pp. 1741-1746, 1814-1815, public administrative hearing before the State Engineer, March 4, 1997.

³⁷³ RORR Vol. 26, Tab 187. Transcript pp. 1813-1815, public administrative hearing before the State Engineer, March 4, 1997. RORR Vols. 39-40, Tab 379, Attachment 27. Exhibit No. 202, Attachment 27, public administrative hearing before the State Engineer, March 4, 1997.

³⁷⁴ RORR Vol. 26, Tab 187. Transcript pp. 1729-130, public administrative hearing before the State Engineer, March 4, 1997.

Place(s) of Use"³⁷⁵ which indicates from aerial photographs that in 1948 the land use is described as bare land and trees with the land remaining in the same state in 1962, 1973, 1974, 1975, 1977, 1980 and 1984. At the 1985 administrative hearing, the applicant described the land use on this parcel as part of a field and a river channel.³⁷⁶ The protestant did not provide any evidence other than the 1948 land use description from an aerial photograph for its evidence that water was not perfected on Parcel 3 between 1936 and 1948.

As to the portion of the parcel described in 1997 by the protestant's witness as bare land and described in 1985 by the applicant as part of a field, the State Engineer finds the area described as bare land is most likely the same area the applicant described as a field. As to the portion of the parcel described in 1997 by the protestant's witness as trees and described in 1985 as river channel, the State Engineer finds that perhaps a more accurate description is trees along the bank of the river, but that he will accept the applicant's description of river channel.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water was never perfected on the portion of the parcel described as part of a field/bare land between 1936 and 1948. On the portion described as river channel/trees the State Engineer finds that it is likely that a water right was never perfected on that portion of the parcel between 1936 and 1948; however, there is nothing in the record to sufficiently locate those specific lands within the 2.0 acre parcel. The State Engineer finds that while the protestant proved that a water right was not perfected on the river channel portion of this parcel, it did not prove its claim of lack of perfection on

³⁷⁵ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁷⁶ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1997, March 4, 1997.

any specific portion of the parcel as there is nothing in the record to specifically locate that portion of Parcel 3 which is the river channel.

Parcel 4 - The contract date is October 14, 1913. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁷⁷ which indicates from an aerial photograph that in 1948 the land use is described as bare land and trees. At the 1985 administrative hearing the applicant described the land use on this parcel as land adjacent to an irrigated field, a river channel and trees.³⁷⁸ The protestant did not provide any evidence other than the 1948 land use description from an aerial photograph for its evidence that water was not perfected on Parcel 4 between 1913 and 1948.

As to the portion of the parcel described in 1997 by the protestant's witness as bare land and described in 1985 by the applicant as land adjacent to an irrigated field, the State Engineer finds the area described as bare land is most likely the same area the applicant described as land adjacent to irrigated field. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water was never perfected on the portion of the parcel described as land adjacent to a field between 1913 and 1948. On the portion of the parcel described by the applicant as river channel and trees, the State Engineer does not believe a water right would have been granted for a river channel. Therefore, it is likely that either the river moved or perhaps an error was made in the original mapping of the irrigable area. Based on the Bureau of Reclamation policy of excluding areas not irrigable from the contract area and on the policy of perfection before contract, it is more likely than not the river moved and

³⁷⁷ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁷⁸ RORR Vol. 27, Tab 202. Exhibit No. 22, public administrative hearing before the State Engineer, October 15-18, 1997, March 4, 1997.

encompasses an area that used to be considered irrigable ground. The State Engineer finds the protestant did not prove its claim of lack of perfection of a 1913 water right with a 1948 aerial photograph. The State Engineer finds based on General Conclusion of Law II, at some point in time prior to the date of the contract the water right was perfected.

Parcel 5 - The protestant alleges partial lack of perfection. The contract date is February 19, 1925. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁷⁹ which indicates from aerial photographs that in 1948 the land use is described as bare land and natural vegetation. In 1973, 1974, 1975, 1977, 1980 and 1984 the protestant's evidence indicates that the parcel was partially irrigated and partially bare land. The protestant recognized that at least 7.08 acres of the 16.0 acres encompassing Parcel 5 was irrigated in 1977 and that at least a portion of the parcel was irrigated in the other years referenced between 1973 and 1984,³⁸⁰ but did not provide any evidence as to the specific location of those alleged unperfected lands.

The State Engineer finds that one 1948 photograph is not sufficient to prove that water was never perfected on this parcel between 1925 and 1948, the protestant's own evidence indicates that nearly ½ the parcel was perfected, and the protestant did not prove its claim of partial lack of perfection as to Parcel 5. The State Engineer finds, based on General Conclusion of Law II, at some point in time prior to the date of the contract the water right was perfected.

Parcel 6 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

³⁷⁹ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁸⁰ RORR Vol. 26, Tab 187. Transcript pp. 1729-1731, public administrative hearing before the State Engineer, March 4, 1997.

Place(s) of Use"³⁸¹ which indicates from an aerial photograph dated 1948 the land use is described as bare land and natural vegetation. The State Engineer finds that a 1948 photograph is not sufficient to prove that water was never perfected on this parcel between 1907 and 1948, and that the protestant did not prove its claim of lack of perfection. The State Engineer finds, based on General Conclusion of Law II, at some point in time prior to the date of the contract the water right was perfected.

Parcel 7 - The protestant alleges partial lack of perfection. The contract date is August 19, 1911. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁸² which indicates from aerial photographs that in 1948 the land use is described as bare land. In 1962 the land use was described as partially irrigated; in 1972 as bare land with small portions possibly irrigated; in 1973 as mostly bare land with a portion possibly irrigated; and in 1974, 1975, 1977, 1980 and 1984 as bare land. The protestant recognized that at least 1.66 acres of the 3.7 acres encompassing Parcel 7 was irrigated in 1962 and 1973,³⁸³ but did not provide any evidence as to the specific location of the alleged unperfected lands.

The State Engineer finds that a 1948 photograph is not sufficient to prove that water was never perfected on this parcel between 1911 and 1948, particularly in light of the fact that the protestant recognized that various portions of the 3.7 acres were irrigated over a 22 year period. The State Engineer finds that the protestant did not prove its claim of partial lack of perfection as to Parcel 7. The State Engineer finds, based on General Conclusion

³⁸¹ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁸² RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁸³ RORR Vol. 26, Tab 187. Transcript pp. 1730-1731, public administrative hearing before the State Engineer, March 4, 1997.

of Law II, at some point in time prior to the date of the contract the water right was perfected.

V.

FORFEITURE

The State Engineer specifically adopts and incorporates General Findings of Fact V and X. Testimony provided indicated that the transfer at issue here is an intrafarm transfer wherein the transfer application was filed to bring the records into compliance with where the water was actually being used within the farm unit.³⁸⁴

Parcels 1 and 2 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁸⁵ which indicates from aerial photographs that in 1948 the land use was described as bare land, natural vegetation and non-irrigated ag. In 1962, 1973, 1974, 1975, 1977, 1980 and 1984 the land use was described as bare land and natural vegetation. Parcels 1 and 2 were developed as part of the same farm unit over time³⁸⁶ and the transfers at issue here were intrafarm transfers wherein the transfer applications were filed to bring the records into compliance with where the water was actually being used within the farm unit.³⁸⁷

The State Engineer finds that the protestant did not prove five consecutive years of non-use on the portions of Parcels 1 and 2 described as bare land, but did prove that from 1962 through 1984 water was not placed to beneficial use on that portion of the parcel described as natural vegetation. However, nothing in the record indicates the size or specific location of that portion of

³⁸⁴ RORR Vol. 26, Tab 187. Transcript pp. 1748, 1797, 1818-1825, public administrative hearing before the State Engineer, March 4, 1997.

³⁸⁵ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁸⁶ RORR Vol. 26, Tab 187. Transcript pp. 1741-1746, public administrative hearing before the State Engineer, March 4, 1997.

³⁸⁷ RORR Vol. 26, Tab 187. Transcript pp. 1748, 1797, 1818-1825, public administrative hearing before the State Engineer, March 4, 1997.

the parcel covered by native vegetation. Therefore, the protestant did not prove non-use on any specific lands by clear and convincing evidence.

The State Engineer finds there is not clear and convincing evidence of five consecutive years of non-use on any specific land. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

Parcels 3 and 4 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁸⁸ which indicates from aerial photographs that from 1948 through 1984 the land use was described as bare land and trees. The transfers at issue here were intrafarm transfers wherein the transfer applications were filed to bring the records into compliance with where the water was actually being used within the farm unit.³⁸⁹

The State Engineer finds that the protestant did not prove five consecutive years of non-use on the portions of Parcels 3 and 4 described as bare land, but did prove that from 1948 through 1984 water was not used on that portion of the parcel described as river channel and/or trees. However, nothing in the record indicates the size or location of those parcels; therefore, the protestant did not prove non-use on any specific lands by clear and convincing evidence.

The State Engineer finds there is not clear and convincing evidence of five consecutive years of non-use on any specific land. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the

³⁸⁸ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁸⁹ RORR Vol. 26, Tab 187. Transcript pp. 1748, 1979, 1818-1825, public administrative hearing before the State Engineer, March 4, 1997.

law in effect prior to March 22, 1913.

Parcel 5 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁹⁰ which indicates from aerial photographs that in 1948 and 1962 the land use is described as bare land and natural vegetation. In 1973, 1974, 1975, 1977, 1980 and 1984 the protestant's evidence indicates that the parcel was partially irrigated and partially bare land. The protestant recognized that at least 7.08 acres of the 16.0 acres encompassing Parcel 5 was irrigated in 1977 and that at least a portion of the parcel was irrigated in other years.³⁹¹ However, nothing in the record indicates the specific location of lands where water was not used during any particular year. The transfer at issue here was an intrafarm transfer wherein the transfer application was filed to bring the records into compliance with where the water was actually being used within the farm unit.³⁹²

The State Engineer finds that the protestant did not prove five consecutive years of non-use on any specific portion of Parcel 5. The State Engineer finds while perhaps a portion of the water may not have been used on Parcel 5 during the 1973 through 1984 time frame there is not clear and convincing evidence that the water was not placed to beneficial use on any specific portion of Parcel 5 for a period of five successive years as the evidence indicates that for the entire time period at least a portion of the parcel was irrigated. Further, based on General Conclusion of Law IV, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply to these water rights since they were initiated in accordance with the law in effect prior to March 22, 1913.

³⁹⁰ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

³⁹¹ RORR Vol. 26, Tab 187. Transcript pp. 1729-1731, public administrative hearing before the State Engineer, March 4, 1997.

³⁹² RORR Vol. 26, Tab 187. Transcript pp. 1748, 1797, 1818-1825, public administrative hearing before the State Engineer, March 4, 1997.

VI.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³⁹³ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³⁹⁴ Non-use for a period of time may inferentially be some evidence of intent to abandon;³⁹⁵ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. Furthermore, in General Finding of Fact IX, the State Engineer found that a water right holder could not have the intent to abandon something he or she did not know they owned until 1983. Testimony was provided at the 1985 hearings that the owner of the water rights under Application 48865 had continually paid the assessments and taxes due on these water rights and that none were delinquent.³⁹⁶

Parcel 1 - The State Engineer found that from 1962 through 1984 no water was placed to beneficial use on that portion of Parcel 1 described as natural vegetation; however, the protestant did not provide clear and convincing evidence of non-use of water on any specific portion of the parcel. The owners of the applicant ranch business specifically testified that since 1946 there has never been any intent to abandon the water rights, particularly since the

³⁹³ RORR Vol. 7 , Tab 66. State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁹⁴ Revert v. Ray, 95 Nev. 782, 786 (1979).

³⁹⁵ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁹⁶ RORR Vols. 28-29, Tab 204. Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985.

water was being used on other portions of the ranch.³⁹⁷ The State Engineer finds in light of the testimony that the owners continued to pay the assessment charges for the water rights, that they testified they did not intend to abandon the water rights, that the water was being used during the time at issue, and that the owners did not know they owned the water rights until 1983, there are no acts of abandonment, no intent to abandon and no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of abandonment as to Parcel 1.

Parcels 3 and 4 - The State Engineer found that from 1948 through 1984 no water was placed to beneficial use on those portions of Parcels 3 and 4 described as river channel and/or trees; however, the protestant did not provide clear and convincing evidence of non-use of water on any specific portion of the parcel. The owners of the applicant ranch business specifically testified that since 1946 there has never been any intent to abandon the water rights, particularly since the water was being used on other parts of the ranch.³⁹⁸ The State Engineer finds in light of the testimony that the owners continued to pay the assessment charges for the water rights, that they testified they did not intend to abandon the water rights, that the water was being used during the time at issue, and that the owners did not know they owned the water rights until 1983, there are no acts of abandonment, no intent to abandon and no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of abandonment as to Parcels 3 and 4.

Parcel 5 - The protestant alleges partial abandonment. The State Engineer found there was not clear and convincing evidence that the water was not placed to beneficial use on any specific portion of

³⁹⁷ RORR Vol. 26, Tab 187. Transcript pp. 1800-1802, public administrative hearing before the State Engineer, March 4, 1997.

³⁹⁸ RORR Vol. 26, Tab 187. Transcript pp. 1800-1802, public administrative hearing before the State Engineer, March 4, 1997.

Parcel 5 for five consecutive years. The owners of the applicant ranch business specifically testified that since 1946 there has never been any intent to abandon the water rights, particularly since the water was being used on other parts of the ranch.³⁹⁹ The State Engineer finds in light of the testimony that the owners continued to pay the assessment charges for the water rights, that they testified they did not intend to abandon the water rights, that the water was being used during the time at issue, and that the owners did not know they owned the water rights until 1983, there are no acts of abandonment, no intent to abandon and no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of abandonment as to Parcel 5.

Parcel 6 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁰⁰ which indicates from aerial photographs dated 1948, 1962, 1973, 1974, 1975, 1977, 1980 and 1984 the land use is described as bare land and natural vegetation. The State Engineer finds that from 1948 through 1984 there is not clear and convincing evidence that no water was placed to beneficial use on that portion of the parcel described as bare land, but there is clear and convincing evidence that no water was placed to beneficial use on that portion of Parcel 6 described as natural vegetation; however, the protestant did not provide clear and convincing evidence of non-use of water on any specifically identifiable portion of the parcel. The owners of the applicant ranch business specifically testified that since 1946 there has never been any intent to abandon the water rights, particularly since the water was being used on other portions of the ranch.⁴⁰¹

³⁹⁹ RORR Vol. 26, Tab 187. Transcript pp. 1800-1802, public administrative hearing before the State Engineer, March 4, 1997.

⁴⁰⁰ RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

⁴⁰¹ RORR Vol. 26, Tab 187. Transcript pp. 1800-1802, public administrative hearing before the State Engineer, March 4, 1997.

The State Engineer finds in light of the testimony that the owners continued to pay the assessment charges for the water rights, that they testified they did not intend to abandon the water rights, that the water was being used during the time at issue, and that the owners did not know they owned the water rights until 1983, there are no acts of abandonment, no intent to abandon and no union of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of abandonment as to Parcel 6. **Parcel 7** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁰² which indicates from aerial photographs that in 1948 the land use is described as bare land. In 1962 the land use was described as partially irrigated; in 1972 as bare land with small portions possibly irrigated; in 1973 as mostly bare land with a portion possibly irrigated; and in 1974, 1975, 1977, 1980 and 1984 as bare land.

The State Engineer finds there is not clear and convincing evidence that no water was placed to beneficial use on any particular portion of the parcel and there is not clear and convincing evidence that no water was placed to beneficial use on that portion described as bare land. The owners of the applicant ranch business specifically testified that since 1946 there has never been any intent to abandon the water rights, particularly since the water was being used on other portions of the ranch.⁴⁰³ The State Engineer finds in light of the testimony that the owners continued to pay the assessment charges for the water rights, that they testified they did not intend to abandon the water rights, that the water was being used during the time at issue, and that the owners did not know they owned the water rights until 1983, there are no acts of abandonment, no intent to abandon and no union

⁴⁰² RORR Vol. 38, Tabs 375 and 376. Exhibit Nos. 198 and 199, public administrative hearing before the State Engineer, March 4, 1997.

⁴⁰³ RORR Vol. 26, Tab 187. Transcript pp. 1800-1802, public administrative hearing before the State Engineer, March 4, 1997.

of acts of abandonment with an intent to abandon. Therefore, the protestant did not prove its claim of abandonment as to Parcel 7.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁰⁴

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to any specifically identifiable lands and the burden was upon the protestant to prove its claim. As Parcels 2, 4, 5, 6, and 7 all have contracts that pre-date 1927, the State Engineer concludes, based on General Conclusion of Law II, that prior to the date of the contract the water rights were perfected on these parcels.

III.

FORFEITURE

The State Engineer concludes that all water rights at issue were initiated in accordance with the law in effect prior to March 22, 1913; therefore, the forfeiture provisions of Nevada Revised Statute § 533.060 do not apply. The State Engineer further concludes that the protestant did not prove non-use for five consecutive years on any specifically identifiable portion of land. Furthermore, testimony was presented that the water was being used on the farming unit during the time period in question.

IV.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claims of abandonment by clear and convincing acts of abandonment and intent to abandon the water right. The applicants testified there has never been an intent to abandon the water rights and the water was being used on the farm unit during the

⁴⁰⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

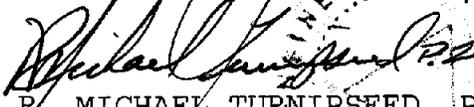
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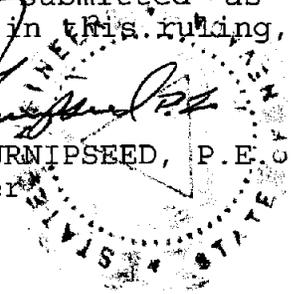
period in question precluding abandonment.

RULING

The State Engineer affirms his ruling as to transfer Application 48865.

Respectfully submitted as to all applications in this ruling,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/SJT/ab

Dated this 22nd day of
December, 1997.