

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

IN THE MATTER OF APPLICATIONS )  
49395, 49396, 49569, 49689, 49880, )  
49999, 51039, 51041, 51054, 51057, )  
51231, 51235, 51368, 51369, 51371, )  
51374, 51377, 51599, 51605, 51735, )  
51737, 52335, 52545, 52549, 52550, )  
52552, 52554, 52843, 53662, 53910 )

RULING ON REMAND

# 5005

GENERAL INTRODUCTION

I.

**FILING OF APPLICATIONS AND PROTESTS**

Applications 49395, 49396, 49569, 49689, 49880, 49999, 51039, 51041, 51054, 51057, 51231, 51235, 51368, 51369, 51371, 51374, 51377, 51599, 51605, 51735, 51737, 52335, 52545, 52549, 52550, 52552, 52554, 52843, 53662, 53910<sup>1</sup> 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.<sup>2</sup> The applications represent requests to change the place of use of portions of the water rights decreed and contracted for use within the Newlands Reclamation Project ("Project").

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<sup>1</sup> 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. Group 4 consisting of 24 applications, Group 5 consisting of 52 applications, Group 6 consisting of 62 applications, and Group 7 consisting of 52 applications became known commonly by the courts and the parties as the "subsequent 190" transfer applications.

<sup>2</sup> 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").

The applications (also identified herein as the portions of the Groups 3, 4, 5, 6, and 7 transfer applications) were timely protested by the Pyramid Lake Paiute Tribe of Indians ("PLPT") on various grounds, including the following:

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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 ("BOR"), petitioned the State Engineer to intervene as an unaligned party in interest.<sup>3</sup> Intervention was granted on the grounds that there were federal interests in the proceedings that justified standing as a party.<sup>4</sup>

## III.

### PREVIOUS HEARINGS ON GROUP 3, 4, 5, 6, AND 7

#### TRANSFER APPLICATIONS

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

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<sup>3</sup> 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.

<sup>4</sup> 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 its standing to that protection).

June 24, 1985, in Fallon, Nevada. Public administrative hearings in the matters of Groups 4, 5, 6, and 7 were respectively held on January 16, 1986, February 21, 1986, January 28, 1988, February 16 and 22, 1989, and April 1, 1991. The applicants and protestants made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties.<sup>5</sup> As the hearings progressed, the parties stipulated to incorporating the record of the previous administrative hearings on other transfer applications into the evidentiary record of the administrative hearings on Groups 3 through 5, inclusive.<sup>6</sup> While the transcripts from the February 16 and 22, 1989, administrative hearing on Group 6, and the April 9, 1991, administrative hearing on Group 7 do not have specific references to incorporating the previous administrative hearing records, by the fact that the protestant examined applicant's witness Doris Morin, without objection, on testimony presented in those earlier hearings, the State Engineer believes everyone was operating under the assumption that the stipulation to incorporation of the previous administrative hearing records into those hearings was in effect.

On September 30, 1985, the State Engineer issued his ruling with regard to 27 transfer applications overruling the PLPT's protests to the Group 3 transfer applications and approving all the subject applications.<sup>7</sup> On February 12, 1987, the State

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<sup>5</sup> Transcript, public administrative hearing before the State Engineer, June 24, 1985. Previous Record on Review filed with the Federal District Court in November 1985. Transcripts, public administrative hearings before the State Engineer, January 16, 1986, February 21, 1986, January 28, 1988, February 16 and 22, 1989, and April 1, 1991.

<sup>6</sup> 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. Transcript, p. 12, public administrative hearing before the State Engineer, January 16, 1986. Transcript, pp. 4-5, public administrative hearing before the State Engineer, January 28, 1988.

<sup>7</sup> State Engineer's Ruling No. 3241, dated September 30, 1985.

Engineer issued his ruling with regard to the Group 4 transfer applications overruling the PLPT's protests and approving all the subject applications.<sup>8</sup> On June 2, 1988, the State Engineer issued his ruling with regard to the Group 5 transfer applications overruling the PLPT's protests and approving all the subject applications.<sup>9</sup> On April 14, 1989, the State Engineer issued his ruling with regard to the Group 6 transfer applications overruling the PLPT's protests and approving all the subject applications.<sup>10</sup>

On July 25, 1990, the United States District Court remanded to the State Engineer those transfer applications which were decided by rulings of the State Engineer dated February 12, 1987 (Group 4), June 2, 1988 (Group 5), and April 14, 1989 (Group 6) (total of 138 applications). An administrative hearing was set to begin on November 7, 1990; however, the applicants requested a pre-hearing conference. The State Engineer granted that request with the administrative hearing to begin immediately thereafter on November 7, 1990. At the pre-hearing conference, administrative notice was taken of all testimony and exhibits from the past administrative hearings as they pertained to the issues of perfection, forfeiture and abandonment.<sup>11</sup> No new evidence was presented at the November 7, 1990, pre-hearing conference/administrative hearing and the State Engineer proceeded to rule on remand from the evidence already contained in the

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<sup>8</sup> State Engineer's Ruling No. 3412, dated February 12, 1987, official records in the office of the State Engineer.

<sup>9</sup> State Engineer's Ruling No. 3528, dated June 2, 1988, official records in the office of the State Engineer.

<sup>10</sup> State Engineer's Ruling No. 3598, dated April 14, 1989, official records in the office of the State Engineer.

<sup>11</sup> Transcript, p. 6, public administrative hearing before the State Engineer, November 7, 1990, official records in the office of the State Engineer.

record of the proceedings.<sup>12</sup>

On January 30, 1992, the State Engineer issued his ruling with regard to the 52 transfer applications in Group 7 overruling the PLPT's protests and approving all the subject applications.<sup>13</sup>

The State Engineer's rulings approving those 190 transfer applications in Groups 4, 5, 6, and 7 (commonly known as the "subsequent 190" transfer applications) were appealed to the Federal District Court, however, on April 20, 1992, the District Court issued a Minute Order granting a joint motion filed by the United States, the PLPT, the State Engineer and the Truckee-Carson Irrigation District to defer appellate proceedings on those rulings. The Record on Review was never filed in the Groups 4 through 7 cases nor have those applications ever received an initial review by the Federal District Court.

#### IV.

##### ALPINE II

An appeal of the State Engineer's Ruling No. 3241 on the Group 3 transfer applications 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.<sup>14</sup> 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

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<sup>12</sup> State Engineer's Supplemental Ruling on Remand No. 3778, dated February 8, 1991, official records in the office of the State Engineer.

<sup>13</sup> State Engineer's Ruling No. 3868, dated January 30, 1992, official records in the office of the State Engineer.

<sup>14</sup> U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217 (9th Cir. 1989) ("Alpine II").

Newlands Project properties are entitled to receive Project water, that 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; and

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.

Further, the Ninth Circuit Court of Appeals 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.<sup>15</sup>

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<sup>15</sup> U.S. v. Alpine Land and Reservoir Co., 983 F.2d 1487 (9th Cir. 1992)

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 water 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 provision of NRS § 533.060.<sup>16</sup>

VII.

**ORDER OF REMAND TO STATE ENGINEER**

On October 4, 1995, the U.S. District Court issued an order

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("Alpine III").

<sup>16</sup> Alpine III, 983 F.2d at 1496.

remanding the transfer application cases<sup>17</sup> 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.**

**1996 STATUS CONFERENCE AND HEARING NOTICES**

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.<sup>18</sup> 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 to be held between the applicants and the protestant.<sup>19</sup> At the status conference, applicants from Groups 4 through 7 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.

**IX.**

**EXCHANGE OF INFORMATION AND LEGAL BRIEFS**

By notices dated February 12, 1996,<sup>20</sup> and March 6, 1996,<sup>21</sup> the

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<sup>17</sup> *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.

<sup>18</sup> January 10, 1996, Notice of Status Conference.

<sup>19</sup> Transcript, Status Conference, public administrative hearing before the State Engineer, February 5, 1996.

<sup>20</sup> February 12, 1996, Notice of Group 3 discovery schedule.

<sup>21</sup> March 6, 1996, Notices of Groups 4-7 discovery schedule.

State Engineer established timetables for Groups 3 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 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 rebuttal<sup>22</sup> 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.<sup>23</sup>

**X.**

**STATE ENGINEER'S INTERIM RULING NO. 4411**

On August 30, 1996, the State Engineer issued Interim Ruling No. 4411<sup>24</sup> 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:

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<sup>22</sup> The State Engineer notes that the use of the word rebuttal evidence in the February 12, 1996, and the March 6, 1996, notices presented confusion in 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.

<sup>23</sup> Several water right owners in the Newlands Reclamation Project had applications in more than one group. They requested the State Engineer to hold hearings on their multiple applications at one time.

<sup>24</sup> State Engineer's Interim Ruling No. 4411, dated August 30, 1996.

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?
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. Pursuant to Interim Ruling No. 4411, the State Engineer found, among other things, that he would not pre-judge 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 NRS § 533.325, through the addition of NRS § 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 procedural rule, a rule of policy, and will be disregarded when compelling circumstances call for a redetermination of the previously decided 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 Engineer<sup>25</sup>, that the PLPT has the burden of proving its case of abandonment by clear and convincing evidence of acts of abandonment and intent to abandon.

**XI.**

**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. The PLPT moved the State Engineer to reverse that part of Interim Ruling No. 4411 which concluded that NRS § 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.

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<sup>25</sup> Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948 (1992).

XII.

1996-1998 HEARINGS

After all parties of interest were duly noticed by certified mail, the public administrative hearings regarding certain transfer applications from Groups 3 through 7 were re-opened and hearings were continued on October 15-18, 1996,<sup>26</sup> November 12-15, 1996,<sup>27</sup> January 23-24, 1997,<sup>28</sup> and March 4, 1997,<sup>29</sup> April 14-16, 1997,<sup>30</sup> August 25-26, 1997,<sup>31</sup> September 22-24, 1997,<sup>32</sup> October 7-8, 1997,<sup>33</sup> October 20-23, 1997,<sup>34</sup> November 17, 1997,<sup>35</sup> and February 2-3, 1998,<sup>36</sup> at Carson City, Nevada, before representatives of the office of the State Engineer. At the pre-hearing status

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<sup>26</sup> Transcript, public administrative hearing before the State Engineer, October 15-18, 1996.

<sup>27</sup> Transcript, public administrative hearing before the State Engineer, November 12-15, 1996.

<sup>28</sup> Transcript, public administrative hearing before the State Engineer, January 23-24, 1997.

<sup>29</sup> Transcript, public administrative hearing before the State Engineer, March 4, 1997.

<sup>30</sup> Transcript, public administrative hearing before the State Engineer, April 14-16, 1997.

<sup>31</sup> Transcript, public administrative hearing before the State Engineer, August 25-26, 1997.

<sup>32</sup> Transcript, public administrative hearing before the State Engineer, September 22-24, 1997.

<sup>33</sup> Transcript, public administrative hearing before the State Engineer, October 7-8, 1997.

<sup>34</sup> Transcript, public administrative hearing before the State Engineer, October 20-23, 1997.

<sup>35</sup> Transcript, public administrative hearing before the State Engineer, November 7, 1997.

<sup>36</sup> Transcript, public administrative hearing before the State Engineer, February 2-3, 1998.

conference, the parties agreed that a "clean record" would be easier to follow. A clean record 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 re-marked 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 relevant to these cases.<sup>37</sup>

**XIII.**

**STATE ENGINEER'S RULING ON REMAND NO. 4591 AND  
FEDERAL DISTRICT COURT REMAND**

On December 22, 1997, the State Engineer issued State Engineer's Ruling on Remand No. 4591 regarding change applications filed to move water rights within the Truckee-Carson Irrigation District ("TCID"), specifically, transfer Applications 47840, 48423, 48467, 48468, 48647, 48666, 48667, 48668, 48672, among others. These applications are part of what are known as the "Original 25" TCID transfer applications. An appeal of State Engineer's Ruling on Remand No. 4591 was filed in the United States District Court by the protestant Pyramid Lake Paiute Tribe, and another appeal was filed by the intervenor the United States of America.

On September 3, 1998, the Honorable Howard McKibben of the United States District Court issued an Order in the matter of those appeals. Judge McKibben held that under the constraints of

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<sup>37</sup> Transcript p. 7, public administrative hearing before the State Engineer, October 15-18, 1996.

Alpine III the State Engineer's conclusion that all of the individual landowners' water rights were initiated in accordance with the law in effect in 1902 was erroneous, and as to the protest claims of forfeiture that in the absence of any evidence of individual steps taken to appropriate the water before March 22, 1913, the State Engineer must use the contract date as the date the water right was initiated. The Court held that it and the State Engineer are bound by the holdings in Alpine III, but noted that it agrees with the State Engineer that there is only one set of water rights for the Project, not two, that every water right on the Project derives from the actions of the United States beginning in 1902, and that all water rights in the Project should have the 1902 priority date controlling on the issue of forfeiture. The Court respectfully urged the Ninth Circuit Court of Appeals to re-visit this issue.

The Court stated that if there is any evidence that the individual landowner took any step to appropriate the water in accordance with the law in effect prior to March 22, 1913, it would apply the doctrine of relation back and the water right would not be subject to forfeiture. In the absence of any evidence of an individual step taken to appropriate the water prior to March 22, 1913, the Court instructed the State Engineer that he must use the date of the water right contract as the date the water right was initiated and make a determination as to when the individual landowner took the first step to appropriate the water appurtenant to his land.

As to abandonment, the Court affirmed the State Engineer's determination that a rebuttable presumption of abandonment does not apply under Nevada law, and held that non-use of water is only some evidence of an intent to abandon the water right. The Court further found that the payment of assessments and taxes is a circumstance the State Engineer should take into consideration in determining whether there is an intent to abandon the water right.

The Court also held, based on equitable principles, that intrafarm transfers within the Newlands Reclamation Project should be upheld as a matter of equity and should not be subject to the doctrines of abandonment or forfeiture. The Court further held that where there is evidence of both a substantial period of non-use, combined with evidence of an improvement which is inconsistent with irrigation, such as highways, roads, residential housing, canals and drains, that the payment of taxes or assessments alone, will not defeat a claim of abandonment. If, however, there is only evidence of non-use, combined with a finding of a payment of taxes or assessments, the Court concluded the PLPT failed to provide clear and convincing evidence of abandonment.

**XIV.**

**RE-OPENED EVIDENTIARY HEARINGS 1998-1999**

On November 5, 1998, the State Engineer re-opened the administrative hearing as to those applications remanded to the State Engineer pursuant to Judge McKibben's Order of September 3, 1998. On July 21, 1999, the State Engineer issued Supplemental Ruling on Remand No. 4750 which addressed Applications 47840, 48468, 48647, 48666, 48667, 48668, 48672. Additionally, Applications 48423 and 48467 were remanded, but withdrawals of all or portions of the applications made remand moot as no protest issues remained.

Beginning on January 11, 1999, the State Engineer re-opened the administrative hearing as to Applications 47809, 48465, 48466, 48669 (Group 3), 48670, 49108, 49109, 49110, 49111, 49112, 49114, 49115, 49117, 49118, 49119, 49120, 49121, 49122, 49282, 49283, 49285, 49286, 49287, 49288 (Group 4), 49116, 49563, 49564, 49567, 49568, 49998, 50001, 50008, 50010, 50012, 50333, 51038, 51040, 51043 (Group 5), 51048, 51082, 51137, 51138, 51139, 51237 (Group 6), 51738, 52669, 53661 (Group 7) in order to provide the applicants the same final chance to provide evidence as set forth in Judge McKibben's Order of September 3, 1998, for those

applicants which were before him at that time. Those applications were ruled upon on September 24, 1999, pursuant to State Engineer's Ruling No. 4798. That ruling is now on appeal before the Federal District Court.

**XV.**

**2000 EVIDENTIARY HEARINGS AND  
PETITIONS FOR CERTIFICATION AS INTRAFARM TRANSFERS**

On January 25, 26, and 27, March 7 and 9, April 11, 12 and 13, and October 17, 2000, the hearings in the remand of the TCID transfer applications continued. The applications under consideration in this ruling are those heard during those January, March, April, and October 2000 administrative hearings, and several that were presented for consideration through the filing of petitions for certification as intrafarm transfers.

The State Engineer has before him in this ruling five (5) petitions alleging that the relevant transfer applications are intrafarm transfers. Those applicants request the State Engineer to so determine and certify any ruling as to an intrafarm transfer to the Federal District Court. These petitions are a result of the Federal District Court's Order of September 3, 1998, wherein it held that intrafarm transfers within the Newlands Reclamation Project should be upheld as a matter of equity and should not be subject to the doctrines of abandonment or forfeiture.

The intrafarm petition applicants allege that their transfer applications can be dealt with summarily without the necessity of a public administrative hearing for several reasons. First, as to the protestant's evidence, the applicants allege that up to this point in other transfer application hearings the protestant's evidence as to non-use of the water rights was almost exclusively two tables read into the record by the PLPT's witnesses. Second, the applicants believe the facts proving an intrafarm transfer can be proven by the documentary evidence attached to their petitions. The applicants agreed they would accept the protestant's evidence

as presented (without admitting its validity) and waive any cross-examination of the protestant's witnesses with respect to that evidence. The applicants believe it makes little sense to hold administrative hearings on these transfer applications consisting of intrafarm transfers because the protestant's evidence is documentary and can be ruled on without the additional expense of holding an administrative hearing.

Pursuant to a telephone conference held on June 28, 1999, the State Engineer's hearing officer agreed that administrative hearings did not appear to be necessary as far as the intrafarm petitions were concerned, particularly since the applicant was waiving any right to cross-examine the protestant's witnesses or present rebuttal evidence to the protestant's evidence. These intrafarm transfer applications are ruled upon based on the documentary evidence attached to the petitions and the evidence filed by the protestant.

**GENERAL FINDINGS OF FACT APPLICABLE TO ALL APPLICATIONS**

**UNDER CONSIDERATION IN THIS RULING**

**I.**

**BURDEN OF PROOF**

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."<sup>38</sup> 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. The State Engineer finds that the burden of producing evidence and proving the protest claims of abandonment and forfeiture lies squarely on the protestant

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<sup>38</sup> Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948, 952 (1992).

PLPT.

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 applicant's 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.

**MORE DEFINITIVE STATEMENT**

Since it is impossible for the protestant to sustain all 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, the applicants agreed to supply the protestant with any evidence they had to refute the protestant's claims.

The protestant argues it can allege alternative theories as to means by which an applicant can lose their water rights and repeatedly tried to amend its protest claims from those stated in the more definitive statement during the administrative hearings. The State Engineer did not allow the addition of protest claims from those set forth in the more definitive statement on the belief that it was unfair to the applicants to allow claims to be added during the hearing process. These protest claims were first part of the proceedings held in 1985, 1986, 1988, 1989 and 1991. The protestant provided little evidence to support its claims of lack of perfection, forfeiture and abandonment at the early

administrative hearings and has had sufficient time since the remand order in 1995 to garner any additional evidence to support its contentions. The protestant was given another opportunity more than 10 years after it first presented its cases to produce the evidence or any additional evidence to support its claims. The State Engineer finds it was reasonable to require the protestant to refine its generalized/alternating theory claims and to not allow amendment of those claims at the last minute.

### III.

#### 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 agreements, contracts and certificates.<sup>39</sup> Certain applicants argue that the water right is appurtenant to the entire parcel of land described in a contract.<sup>40</sup>

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 rights for lands then presently under cultivation and irrigation.<sup>41</sup> Other "Agreements" described obtaining a water right for the **total irrigable** area of

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<sup>39</sup> Alpine II, 878 F.2d at 1221. Agreements, contracts and certificates relevant to particular applications will be identified in the section of this ruling that deals with that application.

<sup>40</sup> 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 the owner's name 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.

<sup>41</sup> Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

the entire ownership susceptible of being served water.<sup>42</sup>

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.<sup>43</sup> In an "Application For Permanent Water Right - For all lands except entries under the reclamation law" the applicant applied for a permanent water right 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 certain portions were then classed as **irrigable**.<sup>44</sup> 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 certain portions were then classed as **irrigable**.<sup>45</sup>

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

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<sup>42</sup> Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997.

<sup>43</sup> Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

<sup>44</sup> Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997.

<sup>45</sup> Exhibit Nos. 45 and 59, public administrative hearing before the State Engineer, October 1996 through March 1997.

department would further locate those lands, i.e., the TCID water right maps would generally reveal areas designated as not having water rights.<sup>46</sup> Further evidence and testimony provides that there were hand drawn colored maps prepared over the decades by the Reclamation Service (now known as the U.S. Bureau of Reclamation) and/or the TCID showing the location of the **irrigable** acreage within the Project.<sup>47</sup> These maps were produced about 1913, 1925<sup>48</sup>, 1960<sup>49</sup> and 1981 with colors on the maps indicating the various kinds of water rights and water righted lands, e.g., 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.<sup>50</sup> The State Engineer finds that

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<sup>46</sup> 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.

<sup>47</sup> Transcript, pp. 1797-1817, 1845-1847, public administrative hearing before the State Engineer, March 4, 1997.

<sup>48</sup> Transcript, pp. 1804-1806, public administrative hearing before the State Engineer, March 4, 1997.

<sup>49</sup> "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 ¼ ¼ 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." 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 ¼ ¼ section refers to a 40 acre subdivision of a complete section of land containing approximately 640 acres. A full section is divided into quarters (NW¼) and further divided into quarter quarters (SW¼ NW¼).

<sup>50</sup> 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

the water rights contracted for in the Project are not appurtenant to the entire contract area of land described in any particular contract.

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.<sup>51</sup> 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.<sup>52</sup> Yet, farmers (with apparent acquiescence by the United States) continued to utilize and move water within a farm unit or contract area 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.,<sup>53</sup> the Court for the first time affirmed ownership of the water rights in the name of the Project water right holders. Subsequently, the users were instructed by the United States to file these transfer

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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.

<sup>51</sup> Transcript, p. 1795, public administrative hearing before the State Engineer, March 4, 1997. See also, Exhibit No. 49 (Exhibit 1 attached to Exhibit No. 49), public administrative hearing before the State Engineer, October 15-18, 1996.

<sup>52</sup> Transcript, pp. 1789-1795, public administrative hearing before the State Engineer, March 4, 1997.

<sup>53</sup> Nevada v. U.S., 463 U.S.110, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983).

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 II<sup>54</sup> 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) it may be that a determination must be made whether each individual transfer application can be upheld in equity.

Judge McKibben in his Order of September 3, 1998, relevant to transfer applications from Group 3, recognized that in some situations equity should act and held that intrafarm transfers of water rights within the Newlands Project should be upheld as a matter of equity, and the principles of forfeiture and abandonment would not apply.<sup>55</sup> However, a transfer of a water right for value, from one property owner to another, who does not have any contractual right to Project water, does not warrant the same equitable considerations and the principles of forfeiture and abandonment will apply to those interfarm transfers.

V.

**LOCATION OF LANDS COVERED BY WATER RIGHTS**

A 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 specific location of the areas with water rights within an

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<sup>54</sup> Alpine II, 878 F.2d at 1229.

<sup>55</sup> Given the Nevada Supreme Court's holding that abandonment requires a union of acts and intent and is a question of fact to be determined from all the surrounding circumstances Revert v. Ray, 95 Nev. 782, 786 (1979), any reasonable person could not find an "intent to abandon" or loss by non-use from simply eliminating irrigation from one part of a farm in favor of irrigation on another parcel in the same farm.

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 State<sup>56</sup> and the Bureau of Reclamation also have copies of those maps.<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> In September 1984, Intermountain Professional Services, Inc. entered into a

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<sup>56</sup> The State Engineer assumes the witness was referring to the State Engineer's office.

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> "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.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

During the course of its analysis, Intermountain reviewed 1,721 water right contracts and applications covering 2,584 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.<sup>63</sup> Intermountain concluded its review by proposing suggestions for further research, including further research for all water right contracts and applications and updating maps.<sup>64</sup>

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.<sup>65</sup> However, subsequently, in recognition of the difficulty of responding to that request, the Bureau of

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<sup>60</sup> Id. at 3.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> "Criddle Report" Review at 21.

<sup>64</sup> "Criddle Report" Review at 25-30.

<sup>65</sup> Official records in the office of the State Engineer.

Reclamation contracted with Chilton Engineering, Chartered ("Chilton") to perform a water rights investigation.<sup>66</sup>

On August 22, 1984, Chilton 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.<sup>67</sup> In Milestone 1, Chilton was to tabulate by ¼ ¼ sections the water righted acreage according to the TCID colored water right maps<sup>68</sup> 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.<sup>69</sup> In Milestone 2, Chilton 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.<sup>70</sup>

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<sup>66</sup> 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.

<sup>67</sup> 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, 1996.

<sup>68</sup> Id. at 1-2.

<sup>69</sup> Report on Milestone 2 at 3.

<sup>70</sup> Report on Milestone 2 at 5.

Chilton 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.<sup>71</sup> Milestone 4 would have produced a map showing the physical location of water rights within the ¼ ¼ sections<sup>72</sup> 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.**<sup>73</sup>

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.<sup>74</sup>

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.

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<sup>71</sup> Report on Milestone 2 at 6.

<sup>72</sup> Historically, the location of water rights within the Newlands Project had been defined by the irrigable areas inside ownership parcels or farm units. Report on Milestone 2 at 28.

<sup>73</sup> Report on Milestone 2 at 28-29.

<sup>74</sup> 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.

The State Engineer finds that the TCID maps are the best 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.

VI.

**LAND USE DESCRIPTIONS**

Another issue as to the location of and descriptions of land use on 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 date of filing of the applications. The protestant's witnesses reviewed aerial photographs of the Project for the years 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 (no photographs from 1948 through 1985 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 <sup>75</sup>

Except for the 1948 and 1977 photographs, which utilized a much better scale, use of only these aerial photographs by witnesses to make land use determinations, particularly with respect to some of

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<sup>75</sup> Exhibit No. 15, public administrative hearing before the State Engineer, October 15-18, 1996.

the very small parcels of land (e.g. 0.1 of an 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.

For example, the protestant's witnesses who used the photographs to make land use determinations could not always definitively pinpoint where the section line fell. They could 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 ft<sup>2</sup> found in an acre equals 6,534 ft<sup>2</sup> 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 original administrative hearings.

#### VII.

#### CONTRACT DATES

At the first administrative hearings regarding these transfer applications, the TCID introduced what it believed to be documents which contained all the original contracts and agreements for all the existing places of use under these transfer applications.<sup>76</sup> A review of the exhibit containing the contracts from the first round of administrative hearings during the 1996-2000 hearings revealed that the contract document exhibits did not in fact

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<sup>76</sup> 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. See also, transcripts, public administrative hearings before the State Engineer, January 16, 1986, February 21, 1986, January 28, 1988, February 16 and 23, 1989 and April 9, 1991.

contain contracts covering every single parcel of land under the transfer applications.

During the 1996-2000 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 contracts found in the exhibits filed at the original administrative hearings.

The State Engineer finds that if the original contract document filed at the original administrative hearing contains a contract for the relevant parcel of land he will use that contract as the best evidence as to the date of an underlying contract unless evidence convinces him to use another 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.

#### VIII.

##### FILLING IN AND LEVELING WITHIN SAME FARM UNIT

During the administrative 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 1996-2000 hearings, the PLPT used a series of aerial photographs and satellite images to illustrate the nature of the land use at 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 images<sup>77</sup> that in some cases the

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<sup>77</sup> All parties viewed the aerial photographs and satellite images while the

proposed places of use were being irrigated at the time the aerial photographs were taken.

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.

#### IX.

#### 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."<sup>78</sup> "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."<sup>79</sup>

"Prior to the approval of the Newlands Project, approximately 30,000 acres of land had been irrigated for many years from the Carson River."<sup>80</sup> "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

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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 most of the photographs into evidence.

<sup>78</sup> 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).

<sup>79</sup> Ibid.

<sup>80</sup> 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.

1902."<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> Testimony was provided that at the time the Project was turned over to the TCID in 1926<sup>84</sup> 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.<sup>85</sup> 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.

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<sup>81</sup> Alpine, 503 F.Supp. at 881.

<sup>82</sup> Ibid.

<sup>83</sup> Alpine Decree at 151-152.

<sup>84</sup> 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.

<sup>85</sup> 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.

X.

**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 be served water from the existing Project facilities.<sup>86</sup> 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.<sup>87</sup> 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

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<sup>86</sup> 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.

<sup>87</sup> Exhibit No. 203, public administrative hearing before the State Engineer, March 4, 1997.

contract. The State Engineer further finds that if an on-farm supply ditch is within the irrigable area of an existing place of use then water was beneficially used on the parcel of land covered by the on-farm supply ditch. These supply ditches, which used to be and some still are dirt-lined, 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.

**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.<sup>88</sup> 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.<sup>89</sup>

The Special Master noted that the United States was not 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,<sup>90</sup> 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.<sup>91</sup>

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 and the Federal District Court strongly disagree. 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

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<sup>88</sup> Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, p. 44 (1925).

<sup>89</sup> U.S. v. Jesse, 744 P.2d 491 (Col. 1987).

<sup>90</sup> Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, pp. 33, 45 (1925).

<sup>91</sup> Alpine II, 878 F.2d at 1224.

tracts of land.<sup>92</sup> 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.<sup>93</sup> However, even though the 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.,<sup>94</sup> 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.<sup>95</sup> 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 was not accomplished until the water was 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

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<sup>92</sup> Alpine III, 983 F.2d at 1495.

<sup>93</sup> California v. U.S., 438 U.S. 645, 665 (1978).

<sup>94</sup> Prosole v. Steamboat Canal Co., 37 Nev. 154 (1914).

<sup>95</sup> Id. at 159-60.

and not the United States, 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 1,500 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.<sup>96</sup> The Orr Ditch 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 1,500 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.<sup>97</sup> However, if a right being determined pursuant to an adjudication was a right still in the diligence phase of development, as reflected in NRS § 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.

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<sup>96</sup> Water Resources Data for Nevada, published by the U.S. Geological Survey for gaging station #10351300.

<sup>97</sup> 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.).

From the historical records it appears that the 1,500 cfs 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.<sup>98</sup> 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,"<sup>99</sup> i.e., that the right vests only upon beneficial use of the water on the land. Therefore, the State Engineer concludes 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.<sup>100</sup> Based on the Bureau of Reclamation regulations,

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<sup>98</sup> Alpine III, at 1495-96.

<sup>99</sup> Id. at 1496.

<sup>100</sup> Transcript Vol. III, pp. 458-459, public administrative hearing before the State Engineer, November 28, 1984. Transcript, pp. 133-135, public administrative hearing before the State Engineer, April 9, 1991. Transcript, p. 1857, public administrative hearing before the State Engineer, March 4, 1997.

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. Therefore, the State Engineer concludes the evidence supports the conclusion that for lands that 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.

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 II<sup>101</sup> (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 (existing) place of use, indicating that the Ninth Circuit was mistaken in its interpretation of Nevada law.<sup>102</sup> After the Court's decision in Alpine II, the Nevada Legislature added NRS § 533.324 to clarify that as used in NRS § 533.325<sup>103</sup> "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

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<sup>101</sup> Alpine II, 878 F.2d at 1226.

<sup>102</sup> 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.

<sup>103</sup> 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.

use is made. In other words, 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.

The protestant PLPT argues that the State Engineer's conclusion that NRS § 533.324 applies to transfers of Newlands Project water rights is contrary to the language of NRS § 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 NRS § 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".<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> Yet, the law was enacted.

The Nevada legislature specifically addressed, and in its addition of NRS § 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.

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<sup>104</sup> Assembly Committee on Government Affairs, March 24, 1993.

<sup>105</sup> Briefing paper submitted by R. Michael Turnipseed, P.E., State Engineer to the 1993 Nevada State Legislature, dated March 16, 1993.

<sup>106</sup> Assembly Committee on Government Affairs, March 24, 1993.

In any analysis of a change in place of use of a pre-statutory (pre-1905) surface 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.

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...<sup>107</sup>

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 world a *bona fide* intention to complete it within a reasonable time.<sup>108</sup>

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<sup>107</sup> Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

<sup>108</sup> Id. at 546.

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.<sup>109</sup> If these waters had been appropriated under the Nevada statutory scheme for appropriating water, NRS § 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 NRS § 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.<sup>110</sup>

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.

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<sup>109</sup> 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).

<sup>110</sup> NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

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, no farmer even had an inkling that he or she would be subject to a due diligence requirement.

**SPECIFIC APPLICATIONS UNDER CONSIDERATION**

**IN THESE REMAND HEARINGS**

**APPLICATION 49395**

**GENERAL**

**I.**

Application 49395 was filed on September 17, 1985, by James E. and Delores K. Martin<sup>111</sup> to change the place of use of 12.95 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 255-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>112</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - 3.70 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 13, T.18N., R.29E., M.D.B.&M.

The proposed place of use is described as 3.70 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 13, T.18N., R.29E., M.D.B. & M.

**II.**

Application 49395 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>113</sup> and more specifically on the grounds as follows:<sup>114</sup>

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 49395**

Exhibit UU from the 1987 administrative hearing contains a contract covering the existing place of use under Application

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<sup>111</sup> A request for conveyance of Application 49395 has been filed by Churchill County

<sup>112</sup> Exhibit No. 1430, public administrative hearing before the State Engineer, April 13, 2000.

<sup>113</sup> Exhibit No. 1431, public administrative hearing before the State Engineer, April 13, 2000.

<sup>114</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

49395.<sup>115</sup>

**Parcel 1** - Exhibit UU contains a "Water-right Application" under the name of John Huttman dated March 20, 1918, covering the existing place of use. The State Engineer finds the contract date is March 20, 1918.

## II.

### PERFECTION

**Parcel 1** - The contract date is March 20, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>116</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal, road, drain ditch, bare land and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1918 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

## III.

### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that

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<sup>115</sup> Exhibit No. 1432, public administrative hearing before the State Engineer, April 13, 2000.

<sup>116</sup> Exhibit No. 1435, public administrative hearing before the State Engineer, April 13, 2000.

finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is March 20, 1918, and is therefore subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>117</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal, road, drain ditch, bare land and portion irrigated. In 1962, 1972, 1973, 1974 and 1975 the land use was described as a canal, road, drain ditch and portion irrigated. In 1977, 1980, 1984 and 1985 the land use was described as a canal, road, drain ditch and farm structure. By 1985 the proposed places of use were lands within the middle of an irrigated field.<sup>118</sup> The State Engineer finds that no water was placed to beneficial use on all of Parcel 1 from 1977 through 1985, and on portions of Parcel 1 from 1948 through 1985.

The applicant provided evidence to support a claim that the existing and proposed places are within the same farm unit and these lands have been a farm unit since at least 1918.<sup>119</sup> The State Engineer finds evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

#### IV.

#### 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

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<sup>117</sup> Exhibit No. 1435, public administrative hearing before the State Engineer, April 13, 2000.

<sup>118</sup> Exhibit Nos. 1433 and 1436, public administrative hearing before the State Engineer, April 13, 2000.

<sup>119</sup> Exhibit No. 1440, attachments A through T, public administrative hearing before the State Engineer, April 13, 2000.

desert the water right.<sup>120</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>121</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>122</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on all of Parcel 1 from 1977 through 1985, and on portions of Parcel 1 from 1948 through 1985. The State Engineer finds the existing place of use is covered by improvements inconsistent with irrigation.

The applicant provided evidence to support a claim that the existing and proposed places are within the same farm unit and these lands have been a farm unit since at least 1918.<sup>123</sup> The

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<sup>120</sup> 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).

<sup>121</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>122</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>123</sup> Exhibit No. 1440, attachments A through T, public administrative hearing before the State Engineer, April 13, 2000.

State Engineer finds evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>124</sup>

**II.**

**PERFECTION**

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

**III.**

**FORFEITURE AND ABANDONMENT**

The State Engineer concludes as to Parcel 1 that the transfer is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**RULING**

The protest to Application 49395 is hereby overruled and the State Engineer's decision granting Application 49395 is hereby affirmed.

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<sup>124</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 49396**

**GENERAL**

**I.**

Application 49396 was filed on September 17, 1985, by Kenneth A. and Martha D. Brimmer<sup>125</sup> to change the place of use of 18.54 acre-feet annually (however, upon analysis the State Engineer determined 18.34 acre-feet was the correct amount that should have been applied for under this application), a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 561-1-E, 563-1-F and 586, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>126</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 1.25 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 28, T.19N., R.28E., M.D.B.&M.

**Parcel 2** - 1.98 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 28, T.19N., R.28E., M.D.B.&M.

**Parcel 3** - 0.69 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 32, T.19N., R.28E., M.D.B.&M.

**Parcel 4** - 0.20 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 31, T.19N., R.29E., M.D.B.&M.

The proposed place of use is described as being 4.12 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 32, T.19N., R.28E., M.D.B. & M.

**II.**

Application 49396 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>127</sup> and more specifically on the grounds as follows:<sup>128</sup>

**Parcel 1** - Abandonment

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<sup>125</sup> Application 49396 was assigned in the records of the State Engineer to Kenneth A. Brimmer. File No. 49396, official records in the office of the State Engineer.

<sup>126</sup> Exhibit No. 945, public administrative hearing before the State Engineer, January 25, 2000.

<sup>127</sup> Exhibit No. 946, public administrative hearing before the State Engineer, January 25, 2000.

<sup>128</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

- Parcel 2** - Partial lack of perfection, abandonment  
**Parcel 3** - Forfeiture, abandonment  
**Parcel 4** - Lack of perfection, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 49369**

**Parcel 2** - Exhibit UU from the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated May 10, 1910, covering the existing place of use,<sup>129</sup> and which notes that the applicant is the assignee of George W. Dickinson (01513). The State Engineer finds the contract date is May 10, 1910, but is likely based on an earlier contract date.

**Parcel 3** - Exhibit UU from the 1988 administrative hearing contains an "Amended Water-right Application" dated May 26, 1917, under the name of John G. Hassard, covering the existing place of use. In the upper right hand corner of this document is indicated that it is to be substituted for #682, which is also the serial number on the 1917 contract. At the January 2000 hearing, the applicant provided a "Certificate of Filing Water Right Application" dated January 15, 1918, under the name of John G. Hassard,<sup>130</sup> covering the existing place of use which provides that "[t]his application is to be substituted for application #682 which was filed May 26, 1917 under H.E. No. 010103 dated May 28, 1917." While something caused the execution of a new document, since both documents are under the name of the same person, the 1917 document evidences the first time a water right was applied for on this existing place of use. The State Engineer finds the contract date is May 26, 1917.

**Parcel 4** - Exhibit UU from the 1988 administrative hearing

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<sup>129</sup> Exhibit No. 947, public administrative hearing before the State Engineer, January 25, 2000.

<sup>130</sup> Exhibit No. 959, public administrative hearing before the State Engineer, January 25, 2000.

contains an "Agreement" dated July 30, 1910, covering the existing place of use. The contract does not provide for the payment of Project construction charges, which indicates that the water right applied for was based on an exchange of a pre-Project vested water right. The State Engineer finds the contract date is July 30, 1910, but evidences that the water right on this parcel is based on a pre-Project vested water right.

## II.

### PERFECTION

**Parcel 2** - The contract date is May 10, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>131</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation and a portion irrigated. The protestant's witnesses admitted that at least 0.59 of an acre out of the 1.98 acres comprising the existing place of use had been irrigated from 1948 through 1974.<sup>132</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the entire parcel between 1910 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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 4** - The contract date is July 30, 1910, but evidences that the water right on this parcel is based on a pre-Project vested water right. The PLPT provided evidence in Table 2 - "Land Use

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<sup>131</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>132</sup> Exhibit No. 955, public administrative hearing before the State Engineer, January 25, 2000.

Descriptions for Existing Place(s) of Use"<sup>133</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as residential. The applicant testified that when he bought the water rights off this 0.20 acre parcel in August 1985 the land was bare ground within a residential area, that the four-plex that now exists on the parcel was not completed until May 19, 1988, that there are parcels within that subdivided residential area that are still receiving water through laterals, and that he knows from personal knowledge that this 0.2 acre parcel was irrigated within the five year period prior to his acquisition of the property.<sup>134</sup>

The State Engineer finds the evidence as to this parcel thoroughly demonstrates the problems with using aerial photographs to pick out parcels as small as this one to make land use determinations as critical as those being made in these cases. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1910 and 1948, therefore, the protestant did not prove its claim of lack of 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.

#### IV.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3 held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the

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<sup>133</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>134</sup> Transcript, pp. 4990-4994, 5015-5020; Exhibit Nos. 970, 971, public administrative hearing before the State Engineer, January 25, 2000.

Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 3** - The contract date is May 26, 1917, thereby making this water right subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>135</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a delivery ditch, natural vegetation and a portion irrigated. In 1973, 1974 and 1975 the land use was described as a portion irrigated and natural vegetation. In 1977, 1980, 1984 and 1985 the land use was described as farmyard and farm structures. At the 2000 administrative hearing, the applicant provided testimony and evidence that he bought the property in Section 32 (the "homeplace") in 1962, added to the "homeplace" some time between 1970 and 1974, that when he purchased the property one of the proposed places of use was a sand hill that he allowed the county to take the sand from for road purposes and he then put in a pasture. He testified that he has always irrigated the proposed places of use, irrigating the western proposed place of use after the sand hill was removed, and he built his house some time between 1970 and 1974.<sup>136</sup> The State Engineer notes that the protestant's evidence indicates the house was built some time between 1975 and 1977.

The State Engineer finds that no water was placed to beneficial use on Parcel 3 for the 8 year period from 1977 through 1984, however, the State Engineer finds that the proposed places of use within Section 32, T.19., R.28E. were irrigated in the mid-1970's before the filing of the change application. The State

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<sup>135</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>136</sup> Transcript, pp. 4988-4989, 5008-5014; Exhibit Nos. 960, 961, 962, 963, 964, 965, 966, 967, 968, public administrative hearing before the State Engineer, January 25, 2000.

Engineer further finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

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.<sup>137</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>138</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>139</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

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<sup>137</sup> 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).

<sup>138</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>139</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>140</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977 and 1980 the land use on this parcel was described as irrigated. In 1984 and 1985 the land use was described as residential. At the January 2000 administrative hearing, the applicant provided testimony that Parcel 1 was bare ground prior to the time he purchased it in 1983,<sup>141</sup> that he built the storage facility on the parcel beginning in the winter of 1984 completing it in 1985, very close to the time he filed the application to transfer the water, and that at the time he bought the parcel it could have been irrigated.<sup>142</sup> The water right application to transfer the water off this parcel was filed on September 17, 1985, which is not long after the completion of the storage units on the parcel. The protestant's witness admitted that parcel was irrigated in 1980 and he has no evidence as to what took place on the parcel between 1980 and 1984. The State Engineer finds there is only evidence that the parcel was not irrigated for one year before the filing of the application to transfer which does not amount to a sufficient period of time of non-use and that the land use was not inconsistent with irrigation for any length of time prior to the filing of the change application. The State Engineer finds the fact that the applicant transferred the water off the parcel as soon as the storage facility was completed to use the water on his "homeplace" belies an intent to abandon the water right, and is a sufficient showing of a lack of intent to abandon the water right.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use

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<sup>140</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>141</sup> Transcript, p. 4997, public administrative hearing before the State Engineer, January 25, 2000.

<sup>142</sup> Transcript, pp. 4993-4998, public administrative hearing before the State Engineer, January 25, 2000.

Descriptions for Existing Place(s) of Use"<sup>143</sup> which indicates from aerial photographs that in 1948 the land use was described as bare land, natural vegetation and a portion irrigated. In 1962, 1972, 1973 and 1974 the land use on this parcel was described as bare land, natural vegetation, portion irrigated and farm structures. In 1975, 1977, 1980, 1984 and 1985 the land use was described as residential. At the January 2000 administrative hearing, the applicant provided testimony that Parcel 2 was nearly all bare ground prior to the time he purchased it except for a small 800 square foot house on the parcel, that he bought the parcel in October 1984, that irrigation works were located on the property at the time he purchased the land, and that there is now an auto store and a mechanics shop on the parcel with a small dwelling in between the two.<sup>144</sup>

The State Engineer finds there is not clear and convincing evidence of the non-use of the water right on this land. The State Engineer finds based on the applicant's testimony there is only evidence that the parcel was not irrigated for one year before the filing of the application to transfer, which does not amount to a sufficient period of time of non-use, and finds that the land use was not inconsistent with irrigation for any length of time prior to the filing of the change application. The State Engineer finds the fact that the applicant transferred the water off soon after his purchase of the water right belies an intent to abandon the water right and is a sufficient showing of a lack of intent to abandon the water right.

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use

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<sup>143</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>144</sup> Transcript, pp. 4997-4999, public administrative hearing before the State Engineer, January 25, 2000.

Descriptions for Existing Place(s) of Use"<sup>145</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a delivery ditch, natural vegetation and a portion irrigated. In 1973, 1974 and 1975 the land use was described as a portion irrigated and natural vegetation. In 1977, 1980, 1984 and 1985 the land use was described as farm yard and farm structures. At the 2000 administrative hearing, the applicant provided testimony and evidence that he bought the property in 1962, added to the "homeplace" some time between 1970 and 1974, that when he purchased the property one of the proposed places of use was a sand hill that he allowed the county to take the sand from for road purposes and he then put in a pasture. He testified that he has always irrigated the proposed places of use, irrigating the western proposed place of use after the sand hill was removed, and that he built his house some time between 1970 and 1974.<sup>146</sup> The State Engineer notes that the protestant's evidence indicates the house was built some time between 1975 and 1977.

The State Engineer finds that no water was placed to beneficial use on Parcel 3 for the 8 year period from 1977 through 1984, however, the State Engineer finds that the proposed places of use within Section 32, T.19., R.28E. were irrigated in the mid-1970's before the filing of the change application. The State Engineer further finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 4** - The PLPT provided evidence in Table 2 - "Land Use

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<sup>145</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>146</sup> Transcript, pp. 4988-4989, 5008-5013; Exhibit Nos. 960, 961, 962, 963, 964, 965, 966, 967, 968, public administrative hearing before the State Engineer, January 25, 2000.

Descriptions for Existing Place(s) of Use"<sup>147</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984 and 1985 the land use on this parcel was described as residential. The applicant testified that when he bought the water rights off this 0.20 acre parcel in August 1985<sup>148</sup> the land was bare ground within a residential area, that the four-plex that now exists on the parcel was not completed until May 19, 1988,<sup>149</sup> that there are parcels within that subdivided residential area that are still receiving water through laterals, and that he knows this 0.2 acre parcel was irrigated within the five year period prior to his acquisition of the property.<sup>150</sup>

The State Engineer finds the evidence as to this parcel thoroughly demonstrates the problems with using aerial photographs to pick out parcels as small as this one to make land use determinations as critical as those being made in these cases. The State Engineer finds there is not clear and convincing evidence of the non-use of the water right on this land. The State Engineer finds based on the applicant's testimony there is no evidence of a significant period of non-use of the water right and that the land use was not inconsistent with irrigation for any length of time prior to the filing of the change application. The State Engineer finds the fact that the applicant transferred the water off soon after his purchase of the water right belies an intent to abandon the water right, and is a sufficient showing of a lack of intent to abandon the water right.

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<sup>147</sup> Exhibit No. 953, public administrative hearing before the State Engineer, January 25, 2000.

<sup>148</sup> Exhibit No. 970, public administrative hearing before the State Engineer, January 25, 2000.

<sup>149</sup> Exhibit No. 971, public administrative hearing before the State Engineer, January 25, 2000.

<sup>150</sup> Transcript, pp. 4990-4994, 5015-5020; Exhibit Nos. 970, 971, public administrative hearing before the State Engineer, January 25, 2000.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>151</sup>

**II.**

**PERFECTION**

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 2 and 4.

**III.**

**FORFEITURE**

The State Engineer concludes that the transfer from Parcel 3 is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

**IV.**

**ABANDONMENT**

The State Engineer concludes that the transfer from Parcel 3 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further concludes as to Parcels 1, 2 and 4 that the protestant did not prove its claim of non-use for a sufficient period of time by clear and convincing evidence, did not prove a land use inconsistent with irrigation nor an intent to abandon the water right.

**RULING**

The protest to Application 49396 is hereby overruled and the State Engineer's decision granting the transfer of water rights under Application 49396 is hereby affirmed. There are issues regarding bench land bottom land designations which could require adjustments to this permit. Such adjustments will be dealt with at the time of filing proof of beneficial use and certificating the water right.

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<sup>151</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 49569**

**GENERAL**

**I.**

Application 49569 was filed on December 10, 1985, by Wayne L. and Joann N. Stark to change the place of use of 2.62 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 188-6-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>152</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 0.17 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 25, T.19N., R.28E., M.D.B.&M.

**Parcel 2** - 0.29 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.&M.

**Parcel 3** - 0.15 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.&M.

**Parcel 4** - 0.14 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 0.75 of an acre in the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.19N., R.29E., M.D.B. & M.

**II.**

Application 49569 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>153</sup> and more specifically on the grounds as follows:<sup>154</sup>

**Parcel 1** - Abandonment

**Parcel 2** - Forfeiture, abandonment

**Parcel 3** - Lack of perfection, abandonment

**Parcel 4** - Abandonment.

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<sup>152</sup> Exhibit No. 1143, public administrative hearing before the State Engineer, March 9, 2000.

<sup>153</sup> Exhibit No. 1144, public administrative hearing before the State Engineer, March 9, 2000.

<sup>154</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 49569**

Exhibit UU from the 1988 administrative hearing contains contracts covering the existing places of use under Application 49569.<sup>155</sup>

**Parcels 1, 3 and 4** - Exhibit UU contains an "Agreement" dated December 6, 1907, which covers the lands described as Parcels 1, 3 and 4, and evidences the water rights are based on pre-Project vested water rights. The State Engineer finds the contract dates are December 6, 1907.

**Parcel 2** - Exhibit UU contains an "Application for Permanent Water Right" dated November 24, 1933, which covers the land described as Parcel 2. The State Engineer finds the contract date is November 24, 1933.

**II.**

**PERFECTION**

**Parcel 3** - The contract date is December 6, 1907, and the water right is based on a pre-Project vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>156</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts

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<sup>155</sup> Exhibit Nos. 1145 and 1147, public administrative hearing before the State Engineer, March 9, 2000.

<sup>156</sup> Exhibit No. 1148, public administrative hearing before the State Engineer, March 9, 2000.

and incorporates General Finding of Fact IX that pre-Project vested water rights were perfected as a matter of fact and law.

**III.**

**FORFEITURE**

**Parcel 2** - The contract date is November 24, 1933, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>157</sup> which indicates from aerial photographs that from 1977 through 1985 the land use is described as residential. The applicants did not appear at the time and place noticed for the hearing in spite of that fact they received notice of the hearing.<sup>158</sup> The State Engineer finds the protestant proved the statutory period of non-use.

**IV.**

**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.<sup>159</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>160</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>161</sup> however,

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<sup>157</sup> Exhibit No. 1148, public administrative hearing before the State Engineer, March 9, 2000.

<sup>158</sup> File No. 49569, official records in the office of the State Engineer.

<sup>159</sup> 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).

<sup>160</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>161</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcels 1, 3 and 4** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>162</sup> which indicates from aerial photographs that from 1977 through 1985 the land uses on these parcels were described as residential. The State Engineer finds the protestant proved a substantial period of non-use and a land use inconsistent with irrigation. The State Engineer finds the applicant did not provided any evidence; therefore, there is no evidence as to a lack of intent to abandon.

**Parcel 2** - The State Engineer has already found the protestant proved a substantial period of non-use from 1977 through 1985, and finds the protestant proved a land use inconsistent with irrigation. The State Engineer finds the applicant did not provided any evidence; therefore, there is no evidence as to a lack of intent to abandon.

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<sup>162</sup> Exhibit No. 1148, public administrative hearing before the State Engineer, March 9, 2000.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>163</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcel 3.

**III.**

**FORFEITURE**

The State Engineer concludes the protestant proved the water right is subject to the forfeiture provision of NRS § 533.060 and proved the statutory period of non-use, therefore, the water right appurtenant to Parcel 2 is subject to forfeiture.

**IV.**

**ABANDONMENT**

The State Engineer concludes as to Parcels 1, 2, 3 and 4 that the protestant proved a substantial period of non-use and land uses inconsistent with irrigation, and with no evidence to support a lack of intent to abandon the water rights, the protestant proved its claims of abandonment.

**RULING**

The protest to Application 49569 is hereby upheld and the State Engineer's decision granting Application 49569 is hereby rescinded. Application 49569 is hereby denied as no water right exists to be changed.

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<sup>163</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 49689**

**GENERAL**

**I.**

Application 49689 was filed on February 5, 1986, by Alfred Inglis to change the place of use of 17.50 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>164</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - a portion of NE¼ NE¼, Sec. 10, T.18N., R.28E., M.D.B.&M.

The proposed place of use is described as 5.00 acres in the SE¼ SW¼ of Section 35, T.19N., R.26E., M.D.B. & M. By letter dated February 14, 1989, the applicant withdrew 1.40 acres from the request for transfer.<sup>165</sup>

**II.**

Application 49689 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>166</sup> and more specifically on the grounds as follows:<sup>167</sup>

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

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<sup>164</sup> Exhibit No. 1054, public administrative hearing before the State Engineer, January 27, 2000.

<sup>165</sup> Exhibit No. 1056, public administrative hearing before the State Engineer, January 27, 2000.

<sup>166</sup> Exhibit No. 1055, public administrative hearing before the State Engineer, January 27, 2000.

<sup>167</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 49689**

**Parcel 1** - Exhibit UU from the January 1988 administrative hearing contains an "Application for Permanent Water Right" dated December 30, 1954, covering the existing place of use under Application 49689.<sup>168</sup> The State Engineer finds the contract date is December 30, 1954.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is December 30, 1954. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>169</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land use on this parcel was described as a road and natural vegetation. At the 1988 administrative hearing, the applicants indicated that in 1948 the land use on this parcel was described as barren ground.<sup>170</sup>

At the January 2000 administrative hearing, both the protestant and the applicant provided photographs, which were taken just prior to the hearing, covering portions of the existing place of use.<sup>171</sup> On Exhibit No. 1058 (the map which accompanied Application 49689), the direction from which the photographs were taken is indicated. The protestant's photograph found in Exhibit No. 1062 shows a house which is located within the portion of the

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<sup>168</sup> Exhibit No. 1057, public administrative hearing before the State Engineer, January 27, 2000.

<sup>169</sup> Exhibit No. 1060, public administrative hearing before the State Engineer, January 27, 2000.

<sup>170</sup> Exhibit No. 449, public administrative hearing before the State Engineer, September 24, 1997.

<sup>171</sup> Exhibit Nos. 1062 and 1064 public administrative hearing before the State Engineer, January 27, 2000.

existing place of use that was withdrawn from the application<sup>172</sup> and only some of the land shown in the distance covers the existing place of use. The applicant's photographs found in Exhibit No. 1064 and identified as photographs E-5, E-6, E-7 and E-8 also have some problems.

Looking in the center of the protestant's photograph 11-9B in Exhibit No. 1062 one is able to pick out a very unusually shaped tree to the left of the telephone pole. This tree is the same one seen on the right hand side of applicant's photograph E-6, and indicates much of the existing place of use is not shown in the protestant's photograph 11-9B as photograph E-6 shows the existing place of use. Photograph E-5 was admittedly taken while standing on or very close to the gravel driveway that forms the eastern border of the existing place of use,<sup>173</sup> and shows lands that do not encompass the existing place of use, but rather are the east of the gravel driveway in photograph E-8 and are not relevant. Looking at photograph E-7 there is a gravel driveway in the middle of the right hand side of the photograph. The State Engineer believes that is the same gravel driveway that is depicted in photograph E-8, and is the same gravel driveway seen in photograph E-6 below the unusual shaped tree on the left hand side of the photograph, and which is the same tree seen to the left of the gravel drive in photograph E-8. The State Engineer finds that since the applicant's witness was either standing on or very close to the gravel driveway that forms the eastern edge of the existing place of use that the ditch remnant seen in photograph E-5 is on the property to the east of the existing place of use, but demonstrates that the ditch did come into the ditch remnant seen in photograph E-7 to the right of the fence which is located

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<sup>172</sup> Exhibit No. 1056, public administrative hearing before the State Engineer, January 27, 2000.

<sup>173</sup> Transcript, pp. 5276-5277, public administrative hearing before the State Engineer, January 27, 2000.

within the existing place of use.

The State Engineer does not believe the protestant's witnesses' description of natural vegetation is an accurate description of the land use. The applicant's witness testified that the area is pasture grass and not natural vegetation,<sup>174</sup> a point with which the State Engineer agrees based on an examination of the photographs.

The State Engineer finds that photograph E-6 demonstrates that this land was most likely used as pastureland, and that the ditch remnant indicates that irrigation was attempted in the area.

The State Engineer finds that no water was placed to beneficial use on the road, but no evidence was provided indicating the portion of the existing place of use taken up by the road. The State Engineer finds the photograph and evidence provided by the protestant do not prove that a water right was never perfected on the portion of this existing place of use taken up by what appears to be pasture land.

The protestant did not provide any evidence other than the series of photographs as its evidence that a water right was not perfected on this parcel between 1954 and 1986. The State Engineer finds in this instance these photographs are not sufficient evidence to prove that a water right was never perfected on the portion of this parcel not covered by the road, and evidence of a ditch leans more towards a finding that water was applied to this parcel. The protestant did not provide adequate evidence as to how much of the existing place of use was taken up by the road, therefore, the protestant did not prove its claim of lack of perfection on any specifically identifiable ground.

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<sup>174</sup> Transcript, p. 5271, public administrative hearing before the State Engineer, January 27, 2000.

**II.**

**FORFEITURE**

**Parcel 1** - The contract date is December 30, 1954, and therefore the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>175</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land use on this parcel was described as a road and natural vegetation. As just previously discussed, the photographs provided by both the protestant and the applicant appear to show this parcel to be pasture land, but for that portion the protestant's witness said was taken up by a road. The applicant's witness testified that he believed the last time the parcel was probably irrigated was in the early 1980's and the protestant did not adequately rebut this testimony.<sup>176</sup> The State Engineer finds there is not clear and convincing evidence of non-use of the water right for the 5-year statutory period prior to the filing of the transfer application required for forfeiture as to the pasture land, and there is not clear and convincing evidence as to how much of the existing place of use is covered by the road; therefore, the protestant did not prove its claim of non-use by clear and convincing evidence as to specifically locatable and quantifiable property.

**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

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<sup>175</sup> Exhibit No. 1060, public administrative hearing before the State Engineer, January 27, 2000.

<sup>176</sup> Transcript, p. 5278, public administrative hearing before the State Engineer, January 27, 2000.

desert the water right.<sup>177</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>178</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>179</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer finds there is not clear and convincing evidence of non-use of the water right for a substantial period of time, and there is not clear and convincing evidence as to how much of the existing place of use is covered by the road; therefore, the protestant did not prove its claim of non-use as to any specifically locatable and quantifiable property.

The State Engineer finds the protestant did not provide clear and convincing evidence of an intent to abandon the water right. The State Engineer further finds as to the pastureland that the

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<sup>177</sup> 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).

<sup>178</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>179</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

land use is not inconsistent with irrigation and 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.<sup>180</sup>

**II.**

**PERFECTION**

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

**III.**

**FORFEITURE**

The State Engineer concludes the protestant did not prove its claim of forfeiture as to Parcel 1 by clear and convincing evidence.

**IV.**

**ABANDONMENT**

The State Engineer concludes that the protestant did not prove its claim of abandonment as to Parcel 1 by clear and convincing evidence.

**RULING**

The protest to Application 49689 is hereby overruled and the State Engineer's affirms his decision granting Application 49689. Due to the withdrawal requested, which was after the original permit was issued under Application 49689, the permit granted under Application 49689 is amended to allow the transfer of water rights appurtenant to 3.60 acres of land totaling 12.6 acre-feet of water to be perfected at the proposed place of use. There are issues regarding bench land bottom land designations which could

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<sup>180</sup> NRS chapter 533 and Order of Remand from Federal District Court.

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require adjustments to this permit. Such adjustments will be dealt with at the time of filing proof of beneficial use and certificating the water right.

**APPLICATION 49880**

**GENERAL**

**I.**

Application 49880 was filed on May 15, 1986, by Alfred Inglis to change the place of use of 64.80 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>181</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - 16.20 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 23, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 1.40 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 1.43 acres in the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 11.06 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , and 2.31 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , all in Section 35, T.19N., R.26E., M.D.B. & M.

By letter dated February 14, 1989, the applicant withdrew 2.36 acres from the request for transfer.<sup>182</sup>

**II.**

Application 49880 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>183</sup> and more specifically on the grounds as follows:<sup>184</sup>

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

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<sup>181</sup> Exhibit No. 1065, public administrative hearing before the State Engineer, January 27, 2000.

<sup>182</sup> Exhibit No. 1067, public administrative hearing before the State Engineer, January 27, 2000.

<sup>183</sup> Exhibit No. 1066, public administrative hearing before the State Engineer, January 27, 2000.

<sup>184</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

FINDINGS OF FACT

I.

**CONTRACT DATES 49880**

**Parcel 1** - Exhibit UU from the January 1988 administrative hearing contains a "Water-right Application" dated August 18, 1919, covering the existing place of use under Application 49880.<sup>185</sup> The State Engineer finds the contract date is August 18, 1919.

II.

**PERFECTION**

**Parcel 1** - The contract date is August 18, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>186</sup> which indicates from aerial photographs that in 1962, 1973, 1974, 1975, 1977, 1980, 1984 and 1985 the land use on this parcel was described as natural vegetation. At the 1988 administrative hearing, the applicant indicated in 1948 the land use on this parcel was described as barren ground.<sup>187</sup>

At the January 2000 administrative hearing, the applicant's witness provided photographs purportedly covering portions of the existing place of use.<sup>188</sup> Pursuant to questions raised at the administrative hearing, by letter dated February 18, 2000, conveyed to the State Engineer by the applicant's legal counsel on April 7, 2000, the witness came to the conclusion that photographs E-3 and E-4 were erroneously admitted. Therefore, the State Engineer will ignore any testimony provided as to those photographs.

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<sup>185</sup> Exhibit No. 1068, public administrative hearing before the State Engineer, January 27, 2000.

<sup>186</sup> Exhibit No. 1071, public administrative hearing before the State Engineer, January 27, 2000.

<sup>187</sup> Exhibit No. 449, public administrative hearing before the State Engineer, September 24, 1997.

<sup>188</sup> Exhibit No. 1064, photographs E-3 and E-4, public administrative hearing before the State Engineer, January 27, 2000.

Testimony and evidence were provided that remnants of a significantly large ditch are located upgradient approximately 1/8th mile from the existing place of use.<sup>189</sup> The protestant's witness did not believe the ditch was there for the purpose of carrying water to the existing place of use, but believed it was to capture surface runoff from a low spot located below the ditch. The State Engineer notes this is Nevada, there is very little surface runoff to capture, and any water is usually welcomed. The applicant's witness believes the structure was used to carry water and not capture runoff as there are berms on either side of the ditch as seen in photographs E-1 and E-2 in Exhibit No. 1064, and that the ditch was an irrigation canal built many years ago to take water to that part of the Newlands Project.

The State Engineer finds the applicant's evidence of an irrigation ditch to be more credible than that of the protestant's witness that it was a structure to capture runoff, thereby evidencing irrigation activity in the area. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948, therefore, the protestant did not prove its claim of lack of perfection.

## II.

### FORFEITURE

**Parcel 1** - The contract date is August 18, 1919, and thereby the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>190</sup> which indicates from aerial photographs that in 1962, 1973, 1974, 1975, 1977, 1980,

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<sup>189</sup> Transcript, pp. 5287, 5297-5298, 5309; Exhibit No. 1064, photographs E-1 and E-2, public administrative hearing before the State Engineer, January 27, 2000.

<sup>190</sup> Exhibit No. 1071, public administrative hearing before the State Engineer, January 27, 2000.

1984 and 1985 the land use on this parcel was described as natural vegetation. The land use as demonstrated by a 1985 aerial photograph<sup>191</sup> was covered by mature native vegetation such as sage brush that had obviously been there for a long period of time. The State Engineer finds no water was placed to beneficial use on Parcel 1 for the 23-year period from 1962 through 1985.

### 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.<sup>192</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>193</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>194</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer.

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<sup>191</sup> Exhibit No. 1072, public administrative hearing before the State Engineer, January 27, 2000.

<sup>192</sup> 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).

<sup>193</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>194</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on Parcel 1 for the 23-year period from 1962 through 1985. The State Engineer finds that while the land is not physically covered by a structure, the land use is inconsistent with irrigated agriculture in that it is covered with mature native brush. The State Engineer finds that no evidence was provided to rebut an intent to abandon the water right.

No testimony was provided at the 2000 administrative hearing that the owner of the water rights under Application 49880 had continually paid the assessments and taxes due on these water rights and that none were delinquent.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>195</sup>

##### **II.**

#### **PERFECTION**

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

##### **III.**

#### **FORFEITURE**

The State Engineer concludes that the protestant proved the statutory period of non-use, the water rights are subject to the forfeiture provision of NRS § 533.060, and the water right appurtenant to Parcel 1 is subject to forfeiture.

#### **ABANDONMENT**

The State Engineer concludes as to Parcel 1 that the

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<sup>195</sup> NRS chapter 533 and Order of Remand from Federal District Court.

protestant proved non-use for a substantial period of time, proved a land use inconsistent with irrigation, and that the applicant did not make a sufficient showing of lack of intent to abandon the water right, therefore, the water right appurtenant to Parcel 1 is subject to abandonment.

**RULING**

The protest to Application 49880 is upheld in part and overruled in part. The State Engineer's decision as to the granting of the transfer of water rights appurtenant to Parcel 1 is hereby rescinded and the water right appurtenant to Parcel 1 is hereby declared forfeited and abandoned. Application 49880 is hereby denied as there is no water right to support the change application.

**APPLICATION 49999**

**GENERAL**

**I.**

Application 49999 was filed on July 16, 1986, by Edward P. Workman to change the place of use of 23.00 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 562, 562-1, 561-8 and 561-8-B, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>196</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 2.41 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 28, T.19N., R.28E., M.D.B.&M.

**Parcel 2** - 0.36 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 28, T.19N., R.28E., M.D.B.&M.

**Parcel 3** - 2.34 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 28, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 5.11 acres in the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 5, T.19N., R.28E., M.D.B. & M.

Application 49999 was protested by the PLPT on the grounds described in the General Introduction I of this ruling<sup>197</sup> and more specifically on the grounds as follows:<sup>198</sup>

**Parcel 1** - None

**Parcel 2** - None

**Parcel 3** - Forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 49999**

**Parcel 3** - Exhibit UU from the 1988 administrative hearing contains two documents covering this existing place of use. The first is a "Certificate of Filing Water Right Application" dated

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<sup>196</sup> Exhibit No. 1200, public administrative hearing before the State Engineer, April 11, 2000.

<sup>197</sup> Exhibit No. 1201, public administrative hearing before the State Engineer, April 11, 2000.

<sup>198</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

December 30, 1907,<sup>199</sup> under the name of Walter Moody. The second is a "Water-right Application" dated August 10, 1918, under the name of James Burton. The 1918 document indicates that the water right was assigned by a Mrs. M.R. Wampler to Mr. Burton, and that the land was entered into by Walter Moody under his homestead application number 1394 with said homestead being assigned to James Burton by Moody's heir Cora B. Wampler, sometimes known as Mrs. M.R. Wampler. Other evidence provides that Moody was paying money for water right charges in 1909-1911, and that his widow, Cora Moody-Wampler, had a notice of proof of homestead, residence, cultivation and improvements by October 1914.<sup>200</sup> The State Engineer finds there is sufficient information in the documentation to tie the 1918 contract to the 1907 contract and finds the contract date is December 30, 1907.

**II.**

**FORFEITURE**

**Parcel 3** - The contract date is December 30, 1907, therefore, the water right is not subject to the forfeiture provision of NRS § 533.060.

**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.<sup>201</sup> "Abandonment, requiring a union of acts

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<sup>199</sup> Exhibit No. 1203, public administrative hearing before the State Engineer, April 11, 2000.

<sup>200</sup> Exhibit Nos. 1209, 1210, 1211, 1212, public administrative hearing before the State Engineer, April 11, 2000.

<sup>201</sup> 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).

and intent is a question of fact to be determined from all the surrounding circumstances."<sup>202</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>203</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>204</sup> which indicates from aerial photographs that in 1948 the land was irrigated. In 1962, 1973, 1974 and 1975 the land use was described as bare land. In 1977 the land use was described as residential and bare land, and in 1980, 1984, 1985 and 1986 the land use was described as residential. The protestant provided evidence to corroborate its analysis of the aerial photographs which shows the buildings identified as residential are a row of storage and commercial buildings.<sup>205</sup> The evidence indicates that from 1962 through 1973

<sup>202</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>203</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>204</sup> Exhibit No. 1205, public administrative hearing before the State Engineer, April 11, 2000.

<sup>205</sup> Exhibit Nos. 1206, 1207, photographs 13-75 and 13-77, public administrative hearing before the State Engineer, April 11, 2000.

tree and brush type vegetation seemed to be invading the area and that ditches, borders and evidence of irrigation structures appear to be disappearing throughout those years, that from about 1973 through 1977 the then owner irrigated the area as pasture, and that by 1977 at least two structures appeared on the property.<sup>206</sup> Other evidence provided shows that other structures were not built until 1984, 1985 and 1987,<sup>207</sup> but no evidence was provided demonstrating beneficial use of water on this property later than 1977.<sup>208</sup> The applicant did not purchase the water rights until April 2, 1986,<sup>209</sup> several months before the filing of the water right application.

The State Engineer finds there is not clear and convincing evidence as to water use or lack thereof between 1977 and 1980, that no evidence was presented that water was placed to beneficial use on Parcel 3 for the 6 year period from 1980 through 1986, and the land use is inconsistent with irrigation. However, by the fact that the former owner exercised dominion and control over the water rights within that 6-year period pursuant to their sale in 1986 there is evidence of a lack of intent to abandon the water right by the very fact that he sold the water rights.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>210</sup>

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<sup>206</sup> Transcript, pp. 5744-5752, 5767-5770, public administrative hearing before the State Engineer, April 11, 2000.

<sup>207</sup> Exhibit No. 1218, public administrative hearing before the State Engineer, April 11, 2000.

<sup>208</sup> Transcript, p. 5770, public administrative hearing before the State Engineer, April 11, 2000.

<sup>209</sup> Exhibit Nos. 1213 and 1214, public administrative hearing before the State Engineer, April 11, 2000.

<sup>210</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**II.**

**FORFEITURE**

The State Engineer concludes the water right is not subject to the forfeiture provision of NRS § 533.060.

**III.**

**ABANDONMENT**

The State Engineer concludes there is evidence demonstrating a lack of intent to abandon the water right.

**RULING**

The protest to Application 49999 is overruled and the State Engineer's decision granting Application 49999 is hereby affirmed. There are issues regarding bench land bottom land designations which could require adjustments to this permit. Such adjustments will be dealt with at the time of filing proof of beneficial use and certificating of the water right.

**APPLICATION 51039**

**GENERAL**

**I.**

Application 51039 was filed on June 18, 1987, by Raul & Frances A. Santos to change the place of use of 21.32 acre-feet annually (however, upon analysis the State Engineer determined 21.315 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 200, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>211</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - 6.09 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 5, T.18N., R.29E., M.D.B.&M.

The proposed place of use is described as 6.09 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 5, T.18N., R.29E., M.D.B.& M. By letter dated February 28, 1995, the applicant indicated that too much acreage (1.20 acres) had been removed from the existing place of use on the supporting map and submitted a correction map indicating the location of the water rights that were requested for transfer.<sup>212</sup>

**II.**

Application 51039 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>213</sup> and more specifically on the grounds as follows:<sup>214</sup>

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<sup>211</sup> This application is being processed pursuant to a petition to certify the application as an intrafarm transfer, therefore, no administrative hearing was held. However, for ease of record keeping the State Engineer marked the documents with exhibit numbers. Exhibit No. 1441, official records in the office of the State Engineer.

<sup>212</sup> Exhibit No. 1445, official records in the office of the State Engineer.

<sup>213</sup> File No. 51039, official records of the office of the State Engineer.

<sup>214</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997; protestant's evidence submission filed July 7, 2000, official records in the office of the State Engineer.

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51039**

Exhibit ZZ-2 from the 1988 administrative hearing contains a contract covering the existing place of use under Application 51039.<sup>215</sup>

**Parcel 1** - Exhibit ZZ-2 contains a "Water-right Application" under the name of Fred P. Steinbrook dated April 3, 1913, covering the existing place of use. This contract notes that the following: "homestead application number Serial 0850 assigned March 26, 1912 & Jan. 22, 1913, dated May 5, 1905, Fred L. Higby." Exhibit ZZ-2 also contains a "Certificate of Filing Water Right Application" under the name of Fred L. Higby dated June 22, 1907, covering the existing place of use. The State Engineer finds there is sufficient information to tie the two documents together and finds the contract date is June 22, 1907.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is June 22, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>216</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a portion irrigated, road, delivery ditch, on-farm supply ditch and bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel

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<sup>215</sup> Exhibit No. 1443, official records in the office of the State Engineer.

<sup>216</sup> Exhibit No. 1448, official records in the office of the State Engineer.

between 1907 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is June 22, 1907, and therefore, is not subject to the forfeiture provision of NRS § 533.060.

### IV.

#### 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.<sup>217</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>218</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>219</sup> however, abandonment will not be presumed, but rather must be clearly and

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<sup>217</sup> 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).

<sup>218</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>219</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>220</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a portion irrigated, road, delivery ditch, on-farm supply ditch and bare land. In 1962, 1972, 1973, 1974 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a portion irrigated, road, delivery ditch and on-farm supply ditch. The protestant provided evidence that out of the 6.09 acres comprising the existing place of use that 5.31 acres was irrigated from 1962 through 1987.<sup>221</sup> The protestant further provided evidence that out of the 6.09 acres comprising the existing place of use that 0.32 of an acre was covered by on-farm ditches from 1962-1987.<sup>222</sup> Therefore, the only part of the existing place of use that the protestant did not show as irrigated from 1962 through 1987 was a 0.46 of an acre taken up by the land use along the western border of the existing place of use, which it

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<sup>220</sup> Exhibit No. 1448, official records in the office of the State Engineer.

<sup>221</sup> Exhibit No. 1451, official records in the office of the State Engineer.

<sup>222</sup> Exhibit No. 1452, official records in the office of the State Engineer.

appears<sup>223</sup> the protestant's evidence indicates is a road and a delivery ditch. The State Engineer finds that no water was placed to beneficial use on a 0.46 of an acre portion on the western edge of the existing place of use from 1962 through 1987, and the land use is inconsistent with irrigation.

The applicant provided evidence to support a claim that the existing and proposed places of use are within the same farm unit and these lands have been a farm unit since at least 1907.<sup>224</sup> The State Engineer finds evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>225</sup>

##### **II.**

#### **PERFECTION**

The State Engineer concludes that the protestant did not prove its claim of partial lack of perfection as to Parcel 1.

##### **III.**

#### **FORFEITURE**

The State Engineer concludes based on the contract date that the water right is not subject to the forfeiture provision of NRS § 533.060 and that the transfer is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

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<sup>223</sup> Exhibit No. 1449, official records in the office of the State Engineer.

<sup>224</sup> Exhibit No. 1446, attachments C through J, official records in the office of the State Engineer.

<sup>225</sup> NRS chapter 533 and Order of Remand from Federal District Court.

IV.

**ABANDONMENT**

The State Engineer concludes that the transfer is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**RULING**

The protest to Application 51039 is hereby overruled and the State Engineer's decision granting Application 51039 is hereby affirmed.

**APPLICATION 51041**

**GENERAL**

**I.**

Application 51041 was filed on June 18, 1987, by Gary and Billie Jo Frazier Snow to change the place of use of 71.82 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Serial No. 25, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>226</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 2.37 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.18N., R.29E., M.D.B.&M.
- Parcel 2 - 1.30 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.18N., R.29E., M.D.B.&M.
- Parcel 3 - 5.27 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 34, T.18N., R.29E., M.D.B.&M.
- Parcel 4 - 2.75 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 34, T.18N., R.29E., M.D.B.&M.
- Parcel 5 - 0.21 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 34, T.18N., R.29E., M.D.B.&M.
- Parcel 6 - 1.59 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.18N., R.29E., M.D.B.&M.
- Parcel 7 - 1.42 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 35, T.18N., R.29E., M.D.B.&M.
- Parcel 8 - 5.61 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 35, T.18N., R.29E., M.D.B.&M.

The proposed places of use are described as 3.70 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 0.58 of an acre in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 5.39 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 1.09 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , 7.92 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 0.83 of an acre in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , and 1.01 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , all in Section 34, T.18N., R.29E., M.D.B. & M.

**II.**

Application 51041 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>227</sup> and more specifically on the grounds as follows:<sup>228</sup>

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<sup>226</sup> Exhibit Nos. 1090 and 1093, public administrative hearing before the State Engineer, March 7, 2000.

<sup>227</sup> Exhibit No. 1091, public administrative hearing before the State Engineer, March 7, 2000.

<sup>228</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

- Parcel 1** - Partial lack of perfection, partial forfeiture,  
partial abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Partial lack of perfection, partial forfeiture,  
partial abandonment
- Parcel 4** - None
- Parcel 5** - Partial forfeiture, partial abandonment
- Parcel 6** - Lack of perfection, forfeiture, abandonment
- Parcel 7** - Lack of perfection, forfeiture, abandonment
- Parcel 8** - Partial lack of perfection, partial forfeiture,  
partial abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51041**

Exhibit LLL from the 1989 administrative hearing contains contracts covering the existing places of use under Application 51041.<sup>229</sup> However, as noted below, the State Engineer believes not all the relevant contract documents were put into evidence at the 1989 or the 2000 administrative hearings, and that one of the contracts may not be relevant to lands under Application 51041.

**Parcel 1** - Exhibit LLL contains two contracts covering this existing place of use. The first is an "Agreement" dated September 8, 1920, between Robert and Rebecca Yarbrough and the United States in which it indicates that F. W. Wightman and Emma Snow Wightman, his wife, entered into a contract with the United States in 1918. This document was recorded at the request of George B. Snow on December 7, 1920. The 1920 agreement provides that a supplemental instrument should thereafter be entered into designating the irrigable acreage to be located in each smallest subdivision of property of Wightman and his wife which therein is to describe a sum total of 475 water righted acres. The agreement

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<sup>229</sup> Exhibit No: 1092, public administrative hearing before the State Engineer, March 7, 2000.

then describes many parcels, including the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., and says as to the NE $\frac{1}{4}$  NW $\frac{1}{4}$  there are 20 acres of irrigable land. The second is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers a part of the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B. & M., and indicates under that contract there were 18.25 total acres, 9 acres were already covered by a water right, that 16.6 acres were suitable for cultivation, and that there were 7.6 acres suitable for cultivation in excess of water rights. The last page of Exhibit LLL (Exhibit No. 1092) shows that in this  $\frac{1}{4}$   $\frac{1}{4}$  section there were 9 acres of vested water rights under a deed to Frank Ranch and Cattle Co.

The facts that can be ascertained from a careful study of all the contracts found in Exhibit LLL and by drawing out of the  $\frac{1}{4}$   $\frac{1}{4}$  sections of land covered by those contracts are that the lands under the 1920 agreement were part of a farm to the west of the existing places of use under this application (but somehow connected to the Snow family). The lands which encompass the existing and proposed places of use under Application 51041 (but for Parcel 8) were part of a farm upon which there were vested water rights, which in 1917 went to Sam Frank and/or Frank Ranch and Cattle Co. and which later went into the hands of the Snow family. It appears that the Snow family (extended or not) had an extremely large farm in this area, which early in the century encompassed many sections of land.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  there are 29 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 7.6 acres of applied for waters right in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B. & M. The State Engineer notes that 7.6 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for cultivation in

excess of water right. Therefore, the State Engineer does not believe that all pertinent documents were provided during the original 1989 hearing, or at the 2000 administrative hearing, as there appears to be missing a vested water right contract.

The State Engineer believes, upon review of the maps and evidence, that the 1920 contract applies to the 20 acres which is west of the existing place of use which cuts from north to south through this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and the 1943 contract is the relevant document for the existing places of use under Parcel 1 with the caveat that there appears to be missing a vested water right contract for the approximate 10 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M.

The State Engineer finds from the review of the documents presented and the maps on file in the office of the State Engineer, that the portion of the existing place of use under Parcel 1 that is in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  is an applied for water right most likely under the 1943 contract. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated.

The State Engineer finds that the only document presented into evidence as to the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  is the 1943 contract, but finds the area is covered by a vested water right, however, no evidence of that contract date was put into evidence at the administrative hearings. Therefore, the only evidence the State Engineer has is the 1943 contract. The State Engineer finds the contract date is October 1, 1943, noting that the existing place of use in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 34 is covered by a vested water right.

**Parcel 2** - Parcel 2 has a nearly identical analysis as that just provided above for Parcel 1. Exhibit LLL contains two contracts covering this existing place of use. The first is an "Agreement"

dated September 8, 1920, in which it indicates that F. W. Wightman and Emma Snow Wightman, his wife, entered into a contract with the United States in 1918. The 1920 agreement provides that a supplemental instrument should thereafter be entered into designating the irrigable acreage to be located in each smallest subdivision of property of Wightman and his wife which therein is to describe a sum total of 475 water righted acres. The agreement then describes many parcels, including the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., and says as to the SE $\frac{1}{4}$  NW $\frac{1}{4}$  there are 19.7 acres of irrigable land. The second is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers a part of the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B. & M., and indicates under that contract there were 20.3 total acres, 10 acres were already covered by a water right, that 19.8 acres were suitable for cultivation, and that there were 9.8 acres suitable for cultivation in excess of water rights. The last page of Exhibit LLL (Exhibit No. 1092) shows that in this  $\frac{1}{4}$   $\frac{1}{4}$  section there were 10 acres of vested water rights under a deed to Frank Ranch and Cattle Co.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  there are 29.7 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 9.8 acres of applied for water rights in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M. The State Engineer notes that 9.8 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for cultivation in excess of water right. Therefore, the State Engineer does not believe that all pertinent documents were provided during the original 1989 hearing, or at the 2000 administrative hearing as there appears to be missing a vested water right contract.

The State Engineer believes, upon review of the maps and evidence, that the 1920 contract applies to the 19.7 acres which is west of the existing place of use which cuts from north to south through this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and the 1943 contract is the relevant document for the existing places of use under Parcel 2 with the caveat that there appears to be missing a vested water right contract for the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M.

The State Engineer finds from the review of the documents presented and the maps on file in the office of the State Engineer, that the portion of the existing place of use under Parcel 2 that is in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  is an applied for water right most likely under the 1943 contract. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated.

The State Engineer finds that the only document presented into evidence as to the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M. is the 1943 contract, but finds the area is covered by a vested water right, however, no evidence of that contract date was put into evidence at the administrative hearings. Therefore, the only evidence the State Engineer has is the 1943 contract. The State Engineer finds the contract date is October 1, 1943, noting that the existing place of use in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 34 is covered by a vested water right.

**Parcel 3** - Parcel 3 has the similar problems as seen in Parcels 1 and 2 in that a complete analysis does not appear to have been performed by either the applicant or the United States at the 1989 administrative hearing or by any party at the 2000 administrative hearing.

Exhibit LLL contains only one contract covering this  $\frac{1}{4}$   $\frac{1}{4}$  section of land, but by reviewing the water right maps on file in

the office of the State Engineer, the State Engineer does not believe it is the correct contract for this existing place of use. However, it does evidence water rights on this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and therefore will be used as the relevant document in the face of no further documentation being provided. The document found in Exhibit LLL is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.& M., and indicates under that contract there were 40 total acres, 20 acres were already covered by a water right, that 35.3 acres were suitable for cultivation, and that there were 15.3 acres suitable for cultivation in excess of water rights. The last page of Exhibit LLL (Exhibit No. 1092) shows that in this  $\frac{1}{4}$   $\frac{1}{4}$  section there were 20 acres of vested water rights under a deed to Frank Ranch and Cattle Co.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  there are 20 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 15.3 acres of applied for water rights in the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M. The State Engineer notes that 15.3 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for cultivation in excess of water right. Therefore, the State Engineer does not believe that all pertinent documents were provided during the original 1989 hearing, or at the 2000 administrative hearing as there appears to be missing a vested water right contract.

The State Engineer believes, upon review of the maps and evidence, that the 1943 contract applies to the 15.3 acres which is in the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and the 1943 contract is not the relevant document for the existing places of use under Parcel 3 since the maps indicate that the N $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., which is where the existing place of use is located, is an area covered by a vested water

right.

The State Engineer finds from the review of the documents presented and the maps on file in the office of the State Engineer, that the existing place of use under Parcel 3 is covered by a vested water right. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated.

The State Engineer finds that the only document presented into evidence as to the N $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  is the 1943 contract, but finds the area is covered by a vested water right, however, no evidence of that contract date was put into evidence at the administrative hearings. Therefore, the only evidence the State Engineer has is the 1943 contract. The State Engineer finds the contract date is October 1, 1943, noting that the existing place of use in the N $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 34 is covered by a vested water right.

**Parcel 5** - Parcel 5 has the similar problems as seen in Parcels 1, 2 and 3 in that a complete analysis does not appear to have been performed by either the applicant or the United States at the 1989 administrative hearing or by any party at the 2000 administrative hearing.

Exhibit LLL contains only one contract covering this  $\frac{1}{4}$   $\frac{1}{4}$  section of land, but by reviewing the water right maps on file in the office of the State Engineer, the State Engineer does not believe it is the correct contract for this existing place of use. However, it does evidence water rights on this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and therefore will be used as the relevant document in the face of no further documentation being provided. The document found in Exhibit LLL is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., and indicates under that contract there were 40 total acres, 20 acres were already covered by a

water right, that 38.3 acres were suitable for cultivation, and that there were 18.3 acres suitable for cultivation in excess of water rights. The last page of Exhibit LLL (Exhibit No. 1092) shows that in this  $\frac{1}{4}$   $\frac{1}{4}$  section there were 20 acres of vested water rights under a deed to Frank Ranch and Cattle Co.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  there are 20 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 18.3 acres of applied for water rights in the S $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M. The State Engineer notes that 18.3 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for cultivation in excess of water right. Therefore, the State Engineer does not believe that all pertinent documents were provided during the original 1989 hearing, or at the 2000 administrative hearing as there appears to be missing a vested water right contract.

The State Engineer believes, upon review of the maps and evidence, that the 1943 contract applies to the 18.3 acres which is in the S $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  of this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and the 1943 contract is not the relevant document for the existing places of use under Parcel 5 since the maps indicate this area was covered by a vested water right in the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M.

The State Engineer finds from the review of the documents presented and the maps on file in the office of the State Engineer, that the portion of the existing place of use under Parcel 5 that is in the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  is covered by a vested water right. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated.

The State Engineer finds that the only document presented into evidence as to the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  is the 1943 contract, but finds the area is covered by a vested water right, however, no evidence of that contract date was put into evidence at the administrative hearings. Therefore, the only evidence the State Engineer has is the 1943 contract. The State Engineer finds the contract date is October 1, 1943, noting that the existing place of use in the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 34 is covered by a vested water right.

**Parcel 6** - Parcel 6 has issues similar to the above-referenced parcels, but the State Engineer believes the 1943 contract is the relevant document. Exhibit LLL contains only one contract covering this existing place of use and by reviewing the water right maps on file in the office of the State Engineer, the State Engineer believes it is the correct contract for this existing place of use. The document found in Exhibit LLL is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., and indicates under that contract there were 40 total acres, 20 acres were already covered by a water right, that 37.1 acres were suitable for cultivation, and that there were 17.1 acres suitable for cultivation in excess of water rights. The last page of Exhibit LLL (Exhibit No. 1092) shows that in this  $\frac{1}{4}$   $\frac{1}{4}$  section there were 20 acres of vested water rights under a deed to Frank Ranch and Cattle Co.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  there are 20 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 17.1 acres of applied for water rights in the S $\frac{1}{2}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M. The State Engineer notes that 17.1 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for cultivation in excess of water right. These 17.1 acres encompasses the existing

place of use under Parcel 6.

The State Engineer finds, from the review of the documents presented and the maps on file in the office of the State Engineer, that the existing place of use under Parcel 6 in the S $\frac{1}{4}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$  is covered by the water right applied for under the 1943 contract. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated. The State Engineer finds the contract date is October 1, 1943.

**Parcel 7** - Parcel 7 has a nearly identical analysis as provided above for Parcels 1 and 2. Exhibit LLL contains two contracts covering this existing place of use. The first is an "Agreement" dated September 8, 1920, in which it indicates that F. W. Wightman and Emma Snow Wightman, his wife, entered into a contract with the United States in 1918. The 1920 agreement provides that a supplemental instrument should thereafter be entered into designating the irrigable acreage to be located in each smallest subdivision of property of Wightman and his wife which therein is to describe a sum total of 475 water righted acres. The agreement then describes many parcels, including the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E. M.D.B.&M., and says as to the NE $\frac{1}{4}$  SW $\frac{1}{4}$  there are 17.6 acres of irrigable land. The second is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers a part of the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.& M., and indicates under that contract there were 22.5 total acres, 12 acres were already covered by a water right, that 20.7 acres were suitable for cultivation, and that there were 8.7 acres suitable for cultivation in excess of water rights. The last page of Exhibit LLL (Exhibit No. 1092) shows that in this  $\frac{1}{4}$   $\frac{1}{4}$  section there were 12 acres of vested water rights under a deed to Frank Ranch and Cattle Co.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  there are 29.6 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 8.7 acres of applied water right in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M. The State Engineer notes that 8.7 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for cultivation in excess of water right. Therefore, the State Engineer does not believe that all pertinent documents were provided during the original 1989 hearing, or at the 2000 administrative hearing as there appears to be missing a vested water right contract.

The State Engineer believes, upon review of the maps and evidence, that the 1920 contract applies to the 17.6 acres which is west of the existing place of use which cuts from north to south through this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and the 1943 contract is the relevant document for the existing places of use under Parcel 7 with the caveat that there appears to be missing a vested water right contract for the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M.

The State Engineer finds from the review of the documents presented and the maps on file in the office of the State Engineer, that the portion of the existing place of use under Parcel 7 that is in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  is an applied for water right most likely under the 1943 contract. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated.

The State Engineer finds that the only document presented into evidence as to the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  is the 1943 contract, but finds the area is covered by a vested water right, however, no

evidence of that contract date was put into evidence at the administrative hearings. Therefore, the only evidence the State Engineer has is the 1943 contract. The State Engineer finds the contract date is October 1, 1943, noting that the existing place of use in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 34 is covered by a vested water right.

**Parcel 8** - Parcel 8 has a nearly identical analysis as provided above for Parcels 1, 2 and 7. Exhibit LLL contains two contracts covering this existing place of use. The first is an "Agreement" dated September 8, 1920, in which it indicates that F. W. Wightman and Emma Snow Wightman, his wife, entered into a contract with the United States in 1918. The 1920 agreement provides that a supplemental instrument should thereafter be entered into designating the irrigable acreage to be located in each smallest subdivision of property of Wightman and his wife which therein describes the sum total of 475 water righted acres. The agreement then describes many parcels, including the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., and says as to the SE $\frac{1}{4}$  SW $\frac{1}{4}$  there are 12.4 acres of irrigable land. The second is an "Application for Permanent Water Right" dated October 1, 1943, which indicates it covers a part of the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E., M.D.B.&M., and indicates under that contract there were 25 total acres, no acres were already covered by a water right, that 22.7 acres were suitable for cultivation, and that there were 22.7 acres suitable for cultivation in excess of water rights.

When one reviews the water right maps that are used in the office of the State Engineer, as noted in General Finding of Fact V, it shows that in the SE $\frac{1}{4}$  SW $\frac{1}{4}$  there are 12.4 acres of vested water rights in this  $\frac{1}{4}$   $\frac{1}{4}$  section and there are 22.7 acres of applied water right in the E $\frac{1}{2}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.18N., R.29E. M.D.B.&M. The State Engineer notes that 22.7 acres of applied for water rights is the exact same amount of acreage that the 1943 contract indicates there was an area suitable for

cultivation in excess of water right.

The State Engineer believes, upon review of the maps and evidence, that the 1920 contract applies to the 12.4 acres which is west of the existing place of use which cuts from north to south through this  $\frac{1}{4}$   $\frac{1}{4}$  section of land and the 1943 contract is the relevant document for the existing places of use under Parcel 8.

The State Engineer finds from the review of the documents presented and the maps on file in the office of the State Engineer, that the portion of the existing place of use under Parcel 8 is an applied for water right most likely under the 1943 contract. Having seen a document like the 1943 contract before in these proceedings, the 1943 contract appears to be a sort of change application pursuant to which acreages were straightened out to land actually either under cultivation or to be cultivated. The State Engineer finds the contract date is October 1, 1943.

## II.

### PERFECTION

**Parcel 1** - The contract date is October 1, 1943, but the State Engineer notes that the existing place of use in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  is covered by a vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>230</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between either pre-Project times or 1943 and 1948 and did not provide any evidence as to the when canal might have been built. Furthermore, as set forth in General Finding of Fact X, the canal must not have been in existence at the time of the 1943 contract as canals were excluded by Reclamation Service

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<sup>230</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

Regulations from being considered irrigable areas.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between pre-Project times or 1943 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. Noting that the maps show the area in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  to be covered by a vested water right, and the water right is based on the exchange of pre-Project vested water rights for Project water rights, the State Engineer specifically adopts and incorporates General Finding of Fact IX that pre-Project vested water rights were perfected as a matter of fact and law.

**Parcel 2** - The contract date is October 1, 1943, but the State Engineer notes that the existing place of use in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  is covered by a vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>231</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between pre-Project times or 1943 and 1948 and did not provide any evidence as to when the canal might have been built. Furthermore, as set forth in General Finding of Fact X, the canal must not have been in existence at the time of the 1943 contract as canals were excluded by Reclamation Service Regulations from being considered irrigable areas.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between pre-Project times or 1943 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. Noting that the maps show the

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<sup>231</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

area in the NE¼ SE¼ NW¼ to be covered by a vested water right, and is therefore based on the exchange of pre-Project vested water rights for Project water rights, the State Engineer specifically adopts and incorporates General Finding of Fact IX that pre-Project vested water rights were perfected as a matter of fact and law.

**Parcel 3** - The State Engineer finds the contract date is October 1, 1943, but the existing place of use is covered by a vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>232</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as irrigated. Therefore, the State Engineer finds the protestant's claim of partial lack of perfection is without merit.

**Parcel 6** - The contract date is October 1, 1943. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>233</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1943 and 1948 and did not provide any evidence as to the when drain ditch might have been built. Furthermore, as set forth in General Finding of Fact X, the drain must not have been in existence at the time of the 1943 contract as drains were excluded by Reclamation Service Regulations from being considered irrigable areas.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1943 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this

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<sup>232</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>233</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

parcel.

**Parcel 7** - The contract date is October 1, 1943, but the State Engineer notes that the existing place of use in the N $\frac{1}{2}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  is covered by a vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>234</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between pre-Project and 1943 and 1948 and did not provide any evidence as to when the canal might have been built. Furthermore, as set forth in General Finding of Fact X, the canal must not have been in existence at the time of the 1943 contract as canals were excluded by Reclamation Service Regulations from being considered irrigable areas.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between pre-Project and 1943 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. Noting that the maps show the area in the N $\frac{1}{2}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  to be covered by a vested water right, and the water right is therefore based on the exchange of pre-Project vested water rights for Project water rights, the State Engineer specifically adopts and incorporates General Finding of Fact IX that pre-Project vested water rights were perfected as a matter of fact and law.

**Parcel 8** - The contract date is October 1, 1943. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>235</sup> which indicates from aerial photographs that in

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<sup>234</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>235</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

1948 the land use on this parcel was described as a canal and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1943 and 1948 and did not provide any evidence as to when the canal might have been built. Furthermore, as set forth in General Finding of Fact X, the canal must not have been in existence at the time of the 1943 contract as canals were excluded by Reclamation Service Regulations from being considered irrigable areas.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1943 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel.

### III.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3 held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcels 1, 2, 3, 5 and 7** - Portions or all of the existing places of use under all these parcels are covered by vested water rights even though the State Engineer above found the water right contract to be dated October 1, 1943, because he was not given evidence of the actual contract date of the vested water right. However, this does not negate the fact that the State Engineer has evidence that the water rights on those parcels are pre-Project vested water rights. The State Engineer finds for those portions of the listed parcels that are covered by vested water rights, since those rights pre-date March 22, 1913, they are not subject to the forfeiture provision of NRS § 533.060.

Therefore, as to Parcel 1 the portion of the existing place of use in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060; as to Parcel 2 the portion of the existing place of use in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060; as to Parcel 3 the entire existing place of use is in the N $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  and is not subject to the forfeiture provision of NRS § 533.060; as to Parcel 5 the existing place of use is in the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060; and as to Parcel 7 the portion of the existing place of use in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>236</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984 and 1985, the land use on this parcel was described as a canal and portion irrigated. In 1986 and 1987, the land use was described as a canal and bare land. The protestant provided further evidence that from 1948 through 1985 1.2 acres of the existing place of use in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  were irrigated.<sup>237</sup> It appears that the protestant's remaining contention goes to the area it describes as a canal. The State Engineer finds that no water was placed to beneficial use under the area described as a canal from 1948 through 1987.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>238</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel

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<sup>236</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>237</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

<sup>238</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

was described as a canal. The State Engineer finds that no water was placed to beneficial use under the area described as a canal from 1948 through 1987.

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>239</sup> which indicates from aerial photographs that in 1975 and 1980 the existing place it of use was fully irrigated. In 1984, 1985, 1986 and 1987, the land use on this parcel was described as bare land and portion irrigated. The protestant provided further evidence that from 1962 through 1987 2.09 acres of the existing place of use were irrigated.<sup>240</sup> By review of the 1986 aerial photograph #65 found in Exhibit No. 1096, the State Engineer does not agree that a portion of this parcel was bare ground,<sup>241</sup> but rather finds the parcel was fully irrigated thereby precluding any claim of forfeiture. The State Engineer finds there is not clear and convincing evidence of non-use for the statutory 5-year period.

**Parcel 5** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>242</sup> which indicates from aerial photographs that from 1948 through 1975 the land use on this parcel was described as irrigated. In 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a lined, on-farm supply ditch. The protestant provided evidence that the on-farm supply ditch covers 0.21 of an acre.<sup>243</sup> If the

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<sup>239</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>240</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

<sup>241</sup> Exhibit No. 1096, public administrative hearing before the State Engineer, March 7, 2000.

<sup>242</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>243</sup> Exhibit No. 1098, public administrative hearing before the State Engineer, March 7, 2000.

area was irrigated through at least 1975, and then an on-farm supply ditch was put in (in modern times now lined to increase the efficiency of water use) the State Engineer does not believe this changes the analysis that this was considered a water righted area, and since the ditch was new in 1977 it is more likely than not that it was being used to irrigate the fields clearly seen in Exhibit No. 1096 demonstrating beneficial use of the water thereby precluding any claim of non-use. The State Engineer finds there is not clear and convincing evidence of non-use.

**Parcel 6** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>244</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a drain ditch. The State Engineer finds that no water was placed to beneficial use under the area described as a ditch from 1948 through 1987.

**Parcel 7** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>245</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a canal. The State Engineer finds that no water was placed to beneficial use under the area described as a canal from 1948 through 1987.

**Parcel 8** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>246</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel

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<sup>244</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>245</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>246</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

was described as a canal and portion irrigated. The protestant provided further evidence that from 1948 through 1987 4.24 acres of the existing place of use were irrigated.<sup>247</sup> The State Engineer finds that no water was placed to beneficial use under the area described as a canal from 1948 through 1987.

**Parcels 1, 2, 3, 4, 5, 6, 7, 8,** - The State Engineer finds the contract date is October 1, 1943, but for those portions of the existing places of use in Parcels 1, 2, 3, 5 and 7 that are covered by vested water rights. The 1943 contract shows that all the lands at issue under Application 51041 were part of the same farm in 1943 and no evidence indicates it is otherwise at the time the application was filed, in fact the evidence points to it still be one family farm. The aerial photographs provided by the protestant<sup>248</sup> show that the farm extends into the area discussed under the Contract Date section of this ruling as being under the 1920 contract. The "Agreement" dated September 8, 1920, in which it indicates that F. W. Wightman and Emma Snow Wightman, his wife, entered into a contract with the United States in 1918, interestingly is in the name of someone with a middle name of Snow, which is the same unusual name which is the last name of the applicants under Application 51041.

The State Engineer finds from the review of the evidence presented that all the existing and proposed places of use under Application 51041 are within the same family farm unit which has been a farm unit since at least 1943, and perhaps earlier. The State Engineer finds all the transfers requested under Application 51041 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

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<sup>247</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

<sup>248</sup> Exhibit No. 1096, public administrative hearing before the State Engineer, March 7, 2000.

IV.

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.<sup>249</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>250</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>251</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence. The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, further held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the

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<sup>249</sup> 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).

<sup>250</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>251</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Federal District Court, and held that the water rights would not be subject to the doctrine of abandonment.

**Parcels 1, 2, 7 and 8** - The State Engineer has already found that no water was placed to beneficial use under the areas described as canals from 1948 through 1987. The State Engineer finds that the canal area is a use inconsistent with irrigation and the applicant made no showing of a lack of intent to abandon the water right, but for the filing of the change application.

**Parcels 3 and 5** - The State Engineer has already found there is not clear and convincing evidence of non-use for the statutory 5-year period; therefore, there is no evidence to support a claim of abandonment.

**Parcel 6** - The State Engineer has already found that no water was placed to beneficial use on the area described as a ditch from 1948 through 1987. The State Engineer finds that the ditch area is a use inconsistent with irrigation and the applicant made no showing of a lack of intent to abandon the water right, but for the filing of the change application.

**Parcels 1, 2, 3, 4, 5, 6, 7, 8** - The State Engineer has already found from the review of the evidence presented that all the existing and proposed places of use under Application 51041 are within the same family farm unit which has been a farm unit since at least 1943, and perhaps earlier. The State Engineer finds all the transfers requested under Application 51041 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>252</sup>

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<sup>252</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcels 1, 2, 3, 5, 6, 7 and 8.

**III.**

**FORFEITURE**

The State Engineer concludes as to Parcels 1, 2, 3, 4, 5, 6, 7 and 8 that the water right transfers are an intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcels 1, 2, 3, 5 and 7 that the following existing places of use under these parcels are covered by vested water rights pre-dating March 22, 1913, and thereby are not subject to the forfeiture provision of NRS § 533.060. As to Parcel 1 the portion of the existing place of use in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060. As to Parcel 2 the portion of the existing place of use in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060. As to Parcels 3 and 5 the entire existing place of use is not subject to the forfeiture provision of NRS § 533.060. As to Parcel 7 the portion of the existing place of use in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SW $\frac{1}{4}$  is not subject to the forfeiture provision of NRS § 533.060. In addition, the State Engineer concludes as to Parcels 3 and 5 there is not clear and convincing evidence of non-use for the statutory 5-year period to support a claim of forfeiture.

**IV.**

**ABANDONMENT**

The State Engineer concludes as to Parcels 1, 2, 3, 4, 5, 6, 7 and 8 that the requests for transfer are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcels 3 and 5 there is not clear and convincing evidence of non-use for a substantial period of time or of a use

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inconsistent with irrigation.

**RULING**

The protest to Application 51041 is overruled and the State Engineer's decision granting Application 51041 is hereby affirmed.

**APPLICATION 51054**

**GENERAL**

**I.**

Application 51054 was filed on June 18, 1987, by Bernard and Barbara Ponte to change the place of use of 69.75 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 442, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>253</sup> The proposed point of diversion is described as being located at Lahontan Dam.

The existing places of use are described as:

**Parcel 1** - 9.07 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.19N., R.27E., M.D.B.&M.

**Parcel 2** - 6.43 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.19N., R.27E., M.D.B.&M.

The proposed places of use are described as 3.12 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , and 12.38 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , both in Section 24, T.19N., R.28E., M.D.B. & M.

**II.**

Application 51054 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>254</sup> and more specifically on the grounds as follows:<sup>255</sup>

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

**Parcel 2** - Forfeiture, abandonment.

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<sup>253</sup> Exhibit No. 1113, public administrative hearing before the State Engineer, March 7, 2000.

<sup>254</sup> Exhibit No. 1114, public administrative hearing before the State Engineer, March 7, 2000.

<sup>255</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51054**

Exhibit LLL from the 1989 administrative hearing contains contracts covering the existing places of use under Application 51054.<sup>256</sup>

**Parcels 1 and 2** - Exhibit LLL contains a "Water-right Application for Lands in Private Ownership" dated August 3, 1920, covering the W½ NE¼ of Section 24, T.19N., R.27E., M.D.B.& M. The State Engineer finds the contract dates are August 3, 1920.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is August 3, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>257</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

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<sup>256</sup> Exhibit No. 1115, public administrative hearing before the State Engineer, March 7, 2000.

<sup>257</sup> Exhibit No. 1118, public administrative hearing before the State Engineer, March 7, 2000.

III.

**FORFEITURE**

**Parcel 1** - The contract date is August 3, 1920, and therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>258</sup> which indicates from aerial photographs that in 1948 the land uses on this parcel was described as natural vegetation and portion irrigated. In 1962, 1973, 1974, 1975, 1977 and 1980 the land use was described as bare land and portion irrigated. In 1984, 1985, 1986 and 1987 the land use was described as bare land. The analysis as to this existing place of use needs to be separated into the distinct pieces of land encompassed in the Parcel 1 existing place of use.

The first piece is what was called at the administrative hearing a "blade" shaped piece in the northern portion of the NW¼ NE¼ of Section 24, T.19N., R.27E., M.D.B.&M. The evidence indicates that in 1948 this land was covered by sagebrush, but from 1962 through 1987 the land was cleared.<sup>259</sup> At the 1989 administrative hearing, the applicant identified this land as barren land in both 1948 and 1989.<sup>260</sup> It was noted that in all the existing places of use there was evidence that looked as if the land had been worked, but it was more difficult to see in the "blade".<sup>261</sup> No evidence was provided to show this land had been irrigated in many years. The State Engineer finds no water was placed to beneficial use on the 4.52 acre "blade" for the 39-year

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<sup>258</sup> Exhibit No. 1118, public administrative hearing before the State Engineer, March 7, 2000.

<sup>259</sup> Exhibit No. 1118; Transcript, pp. 5447-5450, 5468, public administrative hearing before the State Engineer, March 7, 2000.

<sup>260</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>261</sup> Transcript, pp. 5477-5478, public administrative hearing before the State Engineer, March 7, 2000.

period from 1948 through 1987.

As to the second area in Parcel 1, the protestant provided evidence that the entire parcel was irrigated from 1948 through 1980<sup>262</sup>, but alleges that in 1984, 1985, 1986 and 1987 the land use was bare land. Mr. Ponte testified that he has lived in the area all his life and that when he bought the water rights off this parcel in 1987 the land had a crop of alfalfa growing on it.<sup>263</sup> It was noted by the hearing officer, that it was very difficult to ascertain whether the land was irrigated or not.<sup>264</sup> In the review of the aerial and infrared photographs it could be seen that the land remained cleared and there was evidence of the ground appearing to be worked. While the infrared photographs from the 1980's, as a instant snapshot in time, may not have shown a lush green crop at that moment, crops are harvested and one snapshot may not be enough evidence in instances where it is questionable as to whether the land was irrigated or not.

Furthermore, if the land was irrigated late in the season in 1983 and Mr. Ponte filed change Application 51045 in June 1987 five consecutive years had not run to bring the non-use under the requirements of the forfeiture statute. The State Engineer finds the evidence as to the 4.55-acre portion of the Parcel 1 existing place of use did not rise to the level of clear and convincing evidence that no water was applied to this part of the existing place of use during the time frame of the photographs.

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<sup>262</sup> Exhibit No. 1120, public administrative hearing before the State Engineer, March 7, 2000.

<sup>263</sup> Transcript, pp. 5467-5468, public administrative hearing before the State Engineer, March 7, 2000.

<sup>264</sup> Transcript, pp. 5477-5478, public administrative hearing before the State Engineer, March 7, 2000.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>265</sup> which indicates from aerial photographs that in 1948, 1962, 1973, and 1974 the land uses on this parcel was described as irrigated, but that in 1975 a small farm structure came into existence taking up 0.25 of an acre of land. As to the rest of the existing place of use, the protestant's witness believed that from 1984 through 1987 the land use was bare land. As with Parcel 1, Mr. Ponte testified that he has lived in the area all his life and that when he bought the water rights off this parcel in 1987 the land had a crop of alfalfa growing on it.<sup>266</sup> It was noted by the hearing officer, that it was very difficult to ascertain whether the land was irrigated or not.<sup>267</sup> In the review of the aerial and infrared photographs it could be seen that the land remained cleared and there was evidence of the ground appearing to be worked. While the infrared photographs from the 1980's, as a instant snapshot in time, may not have shown a lush green crop at that moment, crops are harvested and one snapshot may not be enough evidence in instances where it is questionable as to whether the land was irrigated or not.

Furthermore, if the land was irrigated late in the season in 1983 and Mr. Ponte filed change Application 51045 in June 1987 five consecutive years had not run to bring the non-use under the requirements of the forfeiture statute, except for that 0.25 of an acre portion that was covered by a structure. The State Engineer finds the evidence provided did not rise to the level of clear and convincing evidence that no water was applied to this part of the

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<sup>265</sup> Exhibit No. 1118, public administrative hearing before the State Engineer, March 7, 2000.

<sup>266</sup> Transcript, pp. 5467-5468, public administrative hearing before the State Engineer, March 7, 2000.

<sup>267</sup> Transcript, pp. 5477-5478, public administrative hearing before the State Engineer, March 7, 2000.

existing place of use during the time frame of the photographs, except for that 0.25 of an acre portion that was covered by a structure.

#### IV.

##### 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.<sup>268</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>269</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>270</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was

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<sup>268</sup> 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).

<sup>269</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>270</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

placed to beneficial use on the 4.52 acre "blade" for the 39 year period from 1948 through 1987, and that the evidence as to the 4.55 acre portion of the Parcel 1 existing place of use did not rise to the level of clear and convincing evidence that no water was applied to this part of the existing place of use during the time frame of the photographs. The applicant in 1989 identified the "blade" as barren land, therefore, the State Engineer finds the land use is inconsistent with irrigation and the applicant made no showing of a lack of intent to abandon the water right.

**Parcel 2** - The State Engineer has already found the protestant's evidence did not rise to the standard of clear and convincing to support a forfeiture, except for that 0.25 of an acre portion that was covered by a structure, therefore, the State Engineer finds it is also not sufficient to support a claim of abandonment. As to the 0.25 of an acre in Parcel 2, the State Engineer finds there is a substantial period of non-use of 12 years from 1975 to 1987, that the land use is inconsistent with irrigation, that insufficient evidence was provided to demonstrate a lack of intent to abandon the water right.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>271</sup>

##### II.

#### **PERFECTION**

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

##### III.

#### **FORFEITURE**

The State Engineer concludes as to Parcel 1 the protestant proved the statutory period of non-use as to the 4.52 acres that

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<sup>271</sup> NRS chapter 533 and Order of Remand from Federal District Court.

make up the "blade", but did not provide clear and convincing evidence of non-use as to the remaining portion of that parcel. The State Engineer concludes as to the 0.25 of an acre in Parcel 2 that the protestant proved the statutory period of non-use, but as to the remaining part of Parcel 2 did not provide clear and convincing evidence of non-use.

**IV.**

**ABANDONMENT**

As to Parcel 1, the State Engineer concludes that as to the 4.52 acres that makes up the "blade" the protestant proved its claim of abandonment, but did not prove its claim of abandonment to the remaining portion of Parcel 1. The State Engineer concludes as to Parcel 2, that as to the 0.25 of an acre the protestant proved its claim of abandonment, but did not prove its claim of abandonment as to the remaining portion of Parcel 2.

**RULING**

The protest to Application 51054 is hereby upheld in part and overruled in part. The water rights appurtenant to 4.52 acres in Parcel 1 and 0.25 of an acre in Parcel 2 are hereby declared forfeited and abandoned. The State Engineer's decision granting Application 51054 as to the remaining 4.55-acre portion of Parcel 1 and the remaining 6.18-acre portion of Parcel 2 is hereby affirmed. Therefore, the permit granted under Application 51054 is amended to allow the transfer of water rights appurtenant to 10.73 acres of land totaling 48.29 acre-feet of water to be perfected at the proposed place of use. There are issues regarding bench-land and bottom-land designations which could require adjustment of these numbers. The State Engineer suggests the applicants may want to consult regarding those numbers before filing the map that is ordered below. The applicants are hereby

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ordered to file with the State Engineer within 90 days a map which designates which portion of the proposed place of use is excluded as to the water rights that were declared forfeited and/or abandoned.

**APPLICATION 51057**

**GENERAL**

**I.**

Application 51057 was filed on June 18, 1987, by Gordon and Janice Southfield<sup>272</sup> to change the place of use of 33.84 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 584, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>273</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 5.16 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.19N., R.28E., M.D.B.&M.

**Parcel 2** - 2.36 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 7.52 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 32, T.19N., R.28E., M.D.B. & M. By letter dated January 12, 2000, a map was filed which slightly shifted an existing place of use in Parcel 1 to adjust for discrepancies between the Bureau of Reclamation field section lines and the TCID water right maps.<sup>274</sup>

**II.**

Application 51057 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>275</sup> and more specifically on the grounds as follows:<sup>276</sup>

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<sup>272</sup> A record of conveyance has been filed in the office of the State Engineer requesting assignment of Application 51057 into the name of Lakey Brothers General Tire, Inc. To date, that assignment has not been completed.

<sup>273</sup> Exhibit No. 1470, public administrative hearing before the State Engineer, October 17, 2000.

<sup>274</sup> Exhibit No. 1471, public administrative hearing before the State Engineer, October 17, 2000.

<sup>275</sup> Exhibit No. 1472, public administrative hearing before the State Engineer, October 17, 2000.

<sup>276</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

- Parcel 1** - Partial lack of perfection, abandonment  
**Parcel 2** - Lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51057**

Exhibit LLL from the 1989 administrative hearing contains contracts covering the existing places of use under Application 51057.<sup>277</sup>

**Parcel 1** - Exhibit LLL contains a "Certificate of Filing Water Right Application" under the name of John Williams dated October 6, 1909, covering the existing place of use. The State Engineer finds the contract date is October 6, 1909.

**Parcel 2** - Exhibit LLL contains a "Water-right Application" under the name of John Machin dated June 1, 1920, covering the existing place of use. The State Engineer finds the contract date is June 1, 1920.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is October 6, 1909. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>278</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a portion irrigated and a drain ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1909 and 1948, and in fact provided evidence that a water right was perfected on a 3.38 acres of the 5.16 acres comprising Parcel 1.<sup>279</sup> The State

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<sup>277</sup> Exhibit No. 1473, public administrative hearing before the State Engineer, October 17, 2000.

<sup>278</sup> Exhibit No. 1476, public administrative hearing before the State Engineer, October 17, 2000.

<sup>279</sup> Exhibit No. 1478, public administrative hearing before the State Engineer, October 17, 2000.

Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1909 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is June 1, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>280</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

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<sup>280</sup> Exhibit No. 1476, public administrative hearing before the State Engineer, October 17, 2000.

**Parcel 2** - The contract date is June 1, 1920, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>281</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use on the parcel was described as a road. The State Engineer finds that no water was placed to beneficial use on Parcel 2 from 1948 through 1987.

However, the applicant provided sufficient evidence to support a claim that the existing and proposed places had become a farm unit around 1917-1920 when John Williams sold Parcel 1 to John Machin on March 14, 1917, and John Machin got his water right contract for the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 32, T.19N. R.28E., M.D.B.&M. in 1920.<sup>282</sup> While parts of the farm which comprised the W $\frac{1}{2}$  SW $\frac{1}{4}$  of said Section 32 were given to children, and then came back into common ownership under one child, the evidence strongly supports that the W $\frac{1}{2}$  SW $\frac{1}{4}$  of said Section 32 has been one farm since at least 1920 when John Machin got his water right on the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 32.<sup>283</sup> The evidence also shows that the proposed places of use under Application 51057 had been irrigated since at least 1948,<sup>284</sup> which indicates that the application was most likely filed to merely bring the records into compliance as to where the water had been used for almost 40 years on this particular farm.

The State Engineer finds sufficient evidence was provided that the transfer from this parcel is an intrafarm transfer not

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<sup>281</sup> Exhibit No. 1476, public administrative hearing before the State Engineer, October 17, 2000.

<sup>282</sup> Exhibit No. 1484, Tabs 6 & 8, public administrative hearing before the State Engineer, October 17, 2000.

<sup>283</sup> Exhibit No. 1484, Tabs 6 - 19, public administrative hearing before the State Engineer, October 17, 2000.

<sup>284</sup> Transcript, pp. 6152-6155, public administrative hearing before the State Engineer, October 17, 2000.

subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

#### IV.

##### 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.<sup>285</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>286</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>287</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use

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<sup>285</sup> 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).

<sup>286</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>287</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Descriptions for Existing Place(s) of Use"<sup>288</sup> which indicates from aerial photographs that in 1948 and 1962 the land use was described as a portion irrigated and a drain ditch. In 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use was described as a road, drain ditch, farmyard and farm structures. The State Engineer finds that no water was placed to beneficial use on Parcel 1 from 1973 through 1987, and that the existing place of use is covered by improvements inconsistent with irrigation.

However, the State Engineer further finds that evidence was provided to support a claim that the existing and proposed places are within the same farm unit, that these lands have been a farm unit since at least 1920, and that the water was used on other portions of the farm unit since at least 1948. The State Engineer finds evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that use of the water on the proposed place of use since at least 1948 indicates a lack of intent to abandon the water right.

**Parcel 2** - The State Engineer has already found that no water was placed to beneficial use on Parcel 2 from 1948 through 1987, and that the existing place of use is covered by improvements inconsistent with irrigation. However, the State Engineer further finds that evidence was provided to support a claim that the existing and proposed places are within the same farm unit, that these lands have been a farm unit since at least 1920, and that the water was used on other portions of the farm unit since at least 1948. The State Engineer finds evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that use of the water on the proposed

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<sup>288</sup> Exhibit No. 1476, public administrative hearing before the State Engineer, October 17, 2000.

place of use since at least 1948 indicates a lack of intent to abandon the water right.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>289</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcel 1 or its claim of lack of perfection as to Parcel 2.

**III.**

**FORFEITURE AND ABANDONMENT**

The State Engineer concludes as to Parcels 1 and 2 that the transfer is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that use of the water rights on other parts of the farm since 1948 indicates a lack of intent to abandon the water rights.

**RULING**

The protest to Application 51057 is hereby overruled and the State Engineer's decision granting Application 51057 is hereby affirmed.

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<sup>289</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 51231**

**GENERAL**

**I.**

Application 51231 was filed on August 27, 1987, by Atilio and Mariellen Capurro to change the place of use of 28.57 acre-feet annually (however, upon analysis the State Engineer determined 25.88 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 84, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>290</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 5.23 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 5, T.18N., R.28E., M.D.B.&M.

**Parcel 2** - 1.10 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 5, T.18N., R.28E., M.D.B.&M.

**Parcel 3** - 0.02 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 5, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.23 of an acre in the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 0.70 of an acre in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , 2.70 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 2.02 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , and 0.70 of an acre in the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , all in Section 5, T.18N., R.28E., M.D.B. & M.

**II.**

Application 51231 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>291</sup> and more specifically on the grounds as follows:<sup>292</sup>

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

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<sup>290</sup> This application is being processed pursuant to a petition to certify the application as an intrafarm transfer, therefore, no administrative hearing was held. However, for ease of record keeping the State Engineer marked the documents with exhibit numbers. Exhibit No. 1456, official records in the office of the State Engineer.

<sup>291</sup> Exhibit No. 1457, official records of the office of the State Engineer.

<sup>292</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

- Parcel 2** - Lack of perfection, forfeiture, abandonment  
**Parcel 3** - Partial lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51231**

Exhibit LLL from the 1989 administrative hearing contains contracts covering the existing places of use under Application 51231.<sup>293</sup>

**Parcel 1** - Exhibit LLL contains a "Water-right Application" under the name of Walter Dressler dated July 13, 1915, covering the existing place of use. This contract notes that a James C. Bradley assigned to Walter Dressler his interest under his water right application for the lands described in the 1915 contract indicating an earlier contract date. Exhibit LLL also contains a "Water-right Application" under the name of James C. Bradley dated November 9, 1914, covering the existing place of use. The State Engineer finds there is sufficient evidence to tie the two documents together and finds the contract date is November 9, 1914.

**Parcel 2** - Exhibit LLL contains an "Application for Permanent Water Right" dated April 27, 1954, covering the existing place of use. This contract notes there are no other water rights in this  $\frac{1}{4}$  section of land. The State Engineer finds the contract date is April 27, 1954.

**Parcel 3** - Exhibit LLL contains a "Water-right Application" under the name of Martin Strasdin dated May 20, 1916, covering the existing place of use. This contract notes that a John Mathews assigned to Martin Strasdin his interest under his water right application for the lands described in the 1916 contract indicating an earlier contract date. Exhibit LLL also contains a "Water-right Application" under the name of John Mathews dated

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<sup>293</sup> Exhibit No. 1458, official records in the office of the State Engineer.

October 28, 1914, covering the existing place of use. The State Engineer finds there is sufficient evidence to tie the two documents together and finds the contract date is October 28, 1914.

## II.

### PERFECTION

**Parcel 1** - The contract date is November 9, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>294</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as an on-farm supply ditch, road, canal and farm structure. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is April 27, 1954. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>295</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a portion irrigated, bare land and farm yard. The protestant provided evidence that a water right was perfected on 0.34 of an acre of this parcel. The State Engineer finds the protestant proved that no water right was perfected on the portion described as a farm

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<sup>294</sup> Exhibit No. 1462, official records in the office of the State Engineer.

<sup>295</sup> Exhibit No. 1462, official records in the office of the State Engineer.

yard, but that the evidence is not clear and convincing that no water was placed to beneficial use on that portion described as bare land between 1954 and 1964. The State Engineer finds the protestant did not provide sufficient evidence to specifically quantify or locate that portion identified as a farmyard, therefore, the protestant did not prove its claim of lack of perfection by clear and convincing evidence.

**Parcel 3** - The contract date is October 28, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>296</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as farm structures. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is November 9, 1914, therefore, the

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<sup>296</sup> Exhibit No. 1462, official records in the office of the State Engineer.

water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>297</sup> which indicates from aerial photographs that in 1948, 1973, 1977 and 1985 the land use on this parcel was described as an on-farm supply ditch, road, canal and farm structure. In 1962, 1974, 1975, 1980, 1984 and 1987 the land use on this parcel was described as an on-farm supply ditch, canal and farm structure. The protestant provided evidence that the on-farm supply ditch occupied 0.74 of an acre from 1962 through 1987.<sup>298</sup> The State Engineer finds that no water was placed to beneficial use on the 4.49-acre portion of the parcel covered by the canal and farm structure for the 39 year period from 1948 through 1987. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted, the evidence demonstrates beneficial use of that water from 1948 through 1987.

**Parcel 2** - The contract date is April 27, 1954, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>299</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use on this parcel was described as a portion irrigated, bare land and farm yard. The protestant provided evidence that a water right was beneficially used on 0.34 of an acre of this parcel from 1948 through 1987. The State Engineer finds that no water was placed to beneficial use on the 0.76-acre portion of the parcel covered by the bare land and farmyard for the 39-year period from 1948 through 1987.

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<sup>297</sup> Exhibit No. 1462, official records in the office of the State Engineer.

<sup>298</sup> Exhibit No. 1465, official records in the office of the State Engineer.

<sup>299</sup> Exhibit No. 1462, official records in the office of the State Engineer.

**Parcel 3** - The contract date is October 28, 1914, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>300</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use on this parcel was described as farm structures. The State Engineer finds that no water was placed to beneficial use on Parcel 3 for the 39-year period from 1948 through 1987.

The applicant filed a petition to certify Application 51231 as an intrafarm transfer, but failed to include any of the evidence that supported that petition in the documentation filed with the State Engineer. Therefore, the State Engineer, while believing this is an intrafarm transfer, cannot so rule as there is no evidence in the record to support the claim, but for the petition, which alleges so.

#### IV.

#### 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.<sup>301</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>302</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>303</sup> however,

<sup>300</sup> Exhibit No. 1462, official records in the office of the State Engineer.

<sup>301</sup> 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).

<sup>302</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>303</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on the 4.49 acre portion of the parcel covered by the canal and farm structure for the 39 year period from 1948 through 1987, and further finds those land uses are inconsistent with irrigation.

**Parcel 2** - The State Engineer has already found that no water was placed to beneficial use on the 0.76 acre portion of the parcel covered by the bare land and farm yard for the 39 year period from 1948 through 1987, and further finds that the farm yard is a use inconsistent with irrigation, but does not so find as to the bare land description.

**Parcel 3** - The State Engineer has already found that no water was placed to beneficial use on Parcel 3 for the 39-year period from 1948 through 1987, and further finds the land use is inconsistent with irrigation.

The applicant filed a petition to certify Application 51231 as an intrafarm transfer, but failed to include any of the evidence that supported that petition in the documentation filed with the State Engineer. Therefore, the State Engineer, while believing this is an intrafarm transfer, cannot so rule as there

is no evidence in the record to support the claim, but for the petition, which alleges so.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>304</sup>

**II.**

**PERFECTION**

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1, 2 and 3.

**III.**

**FORFEITURE**

The State Engineer concludes the protestant proved the statutory period of non-use as to 4.49 acres of Parcel 1, as to 0.76 of an acre as to Parcel 2 and as to all of Parcel 3.

**IV.**

**ABANDONMENT**

The State Engineer concludes that the protestant proved its claims of abandonment as to 4.49 acres of Parcel 1, as to 0.76 of an acre as to Parcel 2 and as to all of Parcel 3.

**RULING**

The protest to Application 51231 is hereby upheld in part and overruled in part. The water rights appurtenant to 4.49 acres in Parcel 1, appurtenant to 0.76 of an acre in Parcel 2, and appurtenant to Parcel 3 are hereby declared forfeited and abandoned. The State Engineer's decision granting Application 51231 as to 0.74 of an acre in Parcel 1 and as to 0.34 of an acre in Parcel 2 is hereby affirmed. Therefore, the permit granted under Application 51231 is amended to allow the transfer of water rights appurtenant to 1.08 acres of land totaling 4.52 acre-feet

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<sup>304</sup> NRS chapter 533 and Order of Remand from Federal District Court.

of water to be perfected at the proposed place of use. The applicants are hereby ordered to file with the State Engineer a map which designated which portion of the proposed place of use is excluded as to the water rights that were declared forfeited and abandoned. There are issues regarding bench land bottom land designations which could require adjustments to this permit. Such adjustments will be dealt with at the time of filing proof of beneficial use and certificating the water right.

**APPLICATION 51235**

**GENERAL**

**I.**

Application 51235 was filed on August 27, 1987, by Barbara L. Andrae to change the place of use of 37.45 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 321, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>305</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 4.46 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 35, T.18N., R.29E., M.D.B.&M.

**Parcel 2** - 6.24 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 35, T.18N., R.29E., M.D.B.&M

The proposed places of use are described as 3.70 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , and 7.00 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , both in Section 35, T.18N., R.29E., M.D.B. & M.

**II.**

Application 51235 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>306</sup> and more specifically on the grounds as follows:<sup>307</sup>

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

**Parcel 2** - Lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51235**

Exhibit LLL from the February 1989 administrative hearing contains a contract covering the existing places of use under

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<sup>305</sup> Exhibit No. 1153, public administrative hearing before the State Engineer, March 9, 2000.

<sup>306</sup> Exhibit No. 1154, public administrative hearing before the State Engineer, March 9, 2000.

<sup>307</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

Application 51235.<sup>308</sup>

**Parcels 1 and 2** - Exhibit LLL contains a "Water-right Application" dated June 18, 1918, under the name of Paolo Magri, which covers the land described as Parcels 1 and 2. At the March 2000 administrative hearing, the applicant provided a "Water-right Application" dated May 21, 1921, under the name of Barni Macari which covers the land described as Parcels 1 and 2. Both the 1918 and 1921 applications indicate that the serial number is 723 and the 1921 document indicates that Paul Magri sold and assigned to Barney Macari all rights Magri had under his water right application serial number 723. The State Engineer finds the 1921 document is adequately tied to the 1918 document and finds the contract dates are June 18, 1918.

## II.

### LOCATION OF EXISTING PLACES OF USE

This application presents a unique and complex set of facts for which the State Engineer may not be able to find resolution for all issues. There are deed issues and discrepancies which make it very difficult for the State Engineer to resolve what should have and appeared to have been a simple question of an intrafarm transfer, or resolve whether there is an error in the map as filed or whether the map reflects the true intentions of the applicant. The TCID said the applicant owns the water rights, the applicant owns what she believes to be both the existing and proposed places of use, and had been using the water for years to irrigate fields when she was told by the TCID that she needed to get the records into conformance with her actual water use. The gist of the problem for the State Engineer arose from document review after the 2000 administrative hearing as to land that is along the northern and eastern borders of the two existing places of use under the application map as filed.

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<sup>308</sup> Exhibit No. 1155, public administrative hearing before the State Engineer, March 9, 2000.

The protestant's witness testified using the map, which accompanied Application 51235, and having found what they believed to be a survey spike in the center of the road which runs along the northern border of Parcels 1 and 2,<sup>309</sup> that the existing place of use along the northern border of Parcels 1 and 2 is an area covered by a road. The applicant does not believe she is moving water rights off the road, as she is not even sure whether she owns the road or not, she believes she bought property up to 15 feet south of the center line of the road and is moving water rights from the area between the road/fence and her line of headgates.

The map, which accompanied Application 51235,<sup>310</sup> shows two 40-acre sections of land (NW $\frac{1}{4}$  SE $\frac{1}{4}$  and NE $\frac{1}{4}$  SE $\frac{1}{4}$ ) with a portion of the existing places of use being along the northern section line of both parcels. The water right contracts found in Exhibit Nos. 1155 and 1165 show that within the 80-acre parcel described as Farm Unit "C", that is the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 35, T.18N., R.29E., M.D.B.&M., there were 78 acres of irrigable land for which a water right was applied for under the Department of Interior applications in 1918 and 1921.

As noted in General Finding of Fact V, the State Engineer will refer to the TCID maps when necessary as a tool in finding the location of lands to which water rights are appurtenant. The TCID maps show that the portion of the existing places of use along the northern and eastern borders of the two parcels is water-righted ground. The TCID verified that Mrs. Andrae is the owner of those water rights.<sup>311</sup>

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<sup>309</sup> Transcript, pp. 5576-5578, public administrative hearing before the State Engineer, March 9, 2000.

<sup>310</sup> Transcript, pp. 5606, 5608; Exhibit No. 1156, public administrative hearing before the State Engineer, March 9, 2000.

<sup>311</sup> File No. 51235, official records in the office of the State Engineer.

However, in 1928 Barni Macari sold a right-of-way and easement to Churchill County over a 15-foot wide section of land along the northern edge of Parcels 1 and 2 for a public road. This would equate to approximately 0.90 of an acre. The protestant's witness guesstimated at the administrative hearing that along the northern border approximately 25-30 feet occupies the center of the road to the fence line and 20 feet from the fence line to the line of headgates.<sup>312</sup> Using an engineering scale, the State Engineer determined the existing place of use along the northern border covers approximately 2.40 acres of land.

An easement, of which a right-of-way is one, sometimes is used to describe a right belonging to a party to pass over the land of another, but it is also used to describe that strip of land upon which railroad companies construct their road bed, and when so used, the term refers to the land itself, not the right of passage over it.<sup>313</sup> An easement is distinguishable from an estate in land, in that it does not give the holder a right of possession, but a right to use or take something from the land, the possessory estates, which are owned by others.<sup>314</sup> From the evidence presented, the State Engineer first assumes that a true right-of-way and easement and not a possessory estate in land was granted by Macari to Churchill County. Since there is no mention in the indenture of water rights or appurtenances the State Engineer is further assuming the ownership of the water rights under that right-of-way and easement remained in Macari.

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<sup>312</sup> Transcript, p. 5583; Exhibit No. 1161, photographs 12-82, 12-83 and 12-84, public administrative hearing before the State Engineer, March 9, 2000.

<sup>313</sup> *Black's Law Dictionary* (5th ed. 1979) citing Bouche v. Wagner, 206 Or. 621, 293 P.2d 203, 209.

<sup>314</sup> Cunningham, R.A.; Stoebuck, W.B.; Whitman, D.A., *The Law of Property*, West Publishing Co. 435 (1984).

In July 1943 Barni Macari filed a Final Affidavit<sup>315</sup> (which appears to go to the issuance of a patent and does not go to the water right applications) with the Department of Interior which indicates that he filed an application for 78 acres of irrigable land within the 80 acres of Farm Unit "C" (N $\frac{1}{2}$  SE $\frac{1}{4}$  Section 35, T.18N., R.29E., M.D.B.&M.). In 1944 Macari received a patent for the full 80 acres of land.<sup>316</sup> Since he got a patent in 1944 for the full 80 acres of land, the State Engineer assumes this indicates that when he granted the right of way and easement in 1928 he believed that he retained ownership of the soil and because one cannot sell in fee simple what one does not own.

However, in 1946 Barni and Anna Macari sold to the O'Rourke a parcel described as 75 acres more or less in the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 35, T.18N., R.29E., M.D.B.&M., excluding out of the 80 acres 5 acres for ditch rights-of-way.<sup>317</sup> There is no description as to the location of those 5 acres excluded. There is a ditch seen on these 80 acres that was identified by the protestant's witness in Exhibit No. 1158 as the J1 Deep Drain, and which runs along the eastern border of the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 35, T.18N., R.29E., M.D.B.&M. Using a scale and the application map, the area taken up by this drain ditch appears to occupy approximately 2.49 acres of land.

In 1963 the O'Rourke property was sold to the Woodcocks<sup>318</sup> and was described as Farm Unit "C" or the N $\frac{1}{2}$  SE $\frac{1}{4}$  of said Section 35, excepting therefrom the parcel described in the 1928 deed from

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<sup>315</sup> Exhibit No. 1166, public administrative hearing before the State Engineer, March 9, 2000.

<sup>316</sup> Exhibit No. 1167, public administrative hearing before the State Engineer, March 9, 2000.

<sup>317</sup> Exhibit No. 1169, public administrative hearing before the State Engineer, March 9, 2000.

<sup>318</sup> Exhibit No. 1171, public administrative hearing before the State Engineer, March 9, 2000.

Macari to Churchill County, which is the road right-of-way and easement. The deed does not except out the 5 acres for a ditch right-of-way as seen in the 1946 deed, but rather changes and excepts out the 0.91 of an acre right-of-way given to Churchill County for a public road. It is unclear to the State Engineer as to why only this parcel would have been excepted out since the 1946 deed excepted out 5 acres for a ditch right-of-way. This same exception is carried through to the conveyance to the Woodcocks and the Andraes in 1974. Mrs. Andrae testified she does not know if she owns the land under the road or not; one version is that she owns from the center of the road and the other is that Churchill County owns the road, but that "they never got done arguing about it".<sup>319</sup> She testified that in her mind she is not moving water from the road, but off the area north of the irrigation ditch between the ditch and the road (in that case the application map was incorrectly drawn), and she testified that she cannot believe water rights were left under the road when the original easement was granted.<sup>320</sup> She was told when they purchased the property they were purchasing 80 acres, but she does not believe the paved road is part of her property.<sup>321</sup> Mrs. Andrae also testified that if you measured the outside boundaries of her property you might get 80 acres, but that 68 or 70 is a much more logical figure because of the road easement, drain ditch and irrigation ditches, and that she is only charged for 68 acres of water rights when in fact she believed she bought 78 acres of

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<sup>319</sup> Transcript, pp. 5573-5574, public administrative hearing before the State Engineer, March 9, 2000.

<sup>320</sup> Transcript, pp. 5575-5576, public administrative hearing before the State Engineer, March 9, 2000.

<sup>321</sup> Transcript, pp. 5604-5607, public administrative hearing before the State Engineer, March 9, 2000.

water rights.<sup>322</sup> The TCID verified that Mrs. Andrae is the owner of the water rights requested for transfer in this application.<sup>323</sup>

The State Engineer is not the person authorized by law to resolve the title issue as to what land was actually excepted out from the original 80 acres in Farm Unit "C", but because of those issues it makes it very difficult to determine whether this is entirely an intrafarm transfer or not. The question raised is whether the land under the J1 Deep Drain ditch on the eastern boundary of the property was the land excepted out in 1946, whether the land under the road easement should have or is excepted out, or whether both or neither properties were or should have been excepted out as may be reflected in the reduced number of water righted acres or the 1946 deed for only 75 acres.

Because TCID verified that the applicant is the owner of the water rights requested for transfer, it makes one wonder if the application map is wrong. The State Engineer believes this is entirely an intrafarm transfer, but the evidence presented in the application map and deeds leaves him in a position unable to resolve that question in its entirety. The application map as drawn shows water rights being transferred from lands that under the applicant's 1974 deed to the property are shown as being excepted out of her property ownership. That in itself means that this cannot be entirely an intrafarm transfer. However, the TCID has verified that she is the owner of the water rights being requested for transfer, the applicant believes both the existing and proposed places of use are within her property and she had been using the water for years again raising the question as to whether the water rights map was misdrawn. The State Engineer must take the evidence as found on the application map as filed

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<sup>322</sup> Transcript, pp. 5602-5605, public administrative hearing before the State Engineer, March 9, 2000.

<sup>323</sup> File No. 51235, official records in the office of the State Engineer.

which shows that along the northern border of Parcels 1 and 2 water rights on land covering both the road and the area between the road and line of headgates is where the application requests that water be transferred from as well as the land under the J1 Deep Drain on the eastern border.

The State Engineer finds that while the applicant does not believe she owns the land or water rights under the road along the northern border of Parcels 1 and 2, the application as filed and the TCID believes she does. The State Engineer finds that the application indicates it was prepared by the Truckee-Carson Irrigation District which appears to believe that the water rights on the northern and eastern portion of Parcels 1 and 2 still belong to the owners of Farm Unit "C", but it is unclear from the deeds whether those parcels of land are actually part of the farm unit or not thereby precluding the analysis of this application as one entirely for an intrafarm transfer.

### III.

#### PERFECTION

**Parcel 1** - The contract date is June 18, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>324</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch (J1 Deep Drain) and road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1918 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II, which held that for lands which have a water right contract dated

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<sup>324</sup> Exhibit No. 1158, public administrative hearing before the State Engineer, March 9, 2000.

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

**Parcel 2** - The contract date is June 18, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>325</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as farm structures, road and on-farm supply ditch. The protestant provided evidence that an on-farm, dirt-lined, supply ditch takes up 0.73 of an acre of the existing place of use.<sup>326</sup> The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1918 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted, the evidence demonstrates perfection of the water right and beneficial use of that water from 1948 through 1987.

#### IV.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3 held that if the evidence showed that any of the applications were solely intrafarm

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<sup>325</sup> Exhibit No. 1158, public administrative hearing before the State Engineer, March 9, 2000.

<sup>326</sup> Exhibit No. 1160, public administrative hearing before the State Engineer, March 9, 2000.

transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is June 18, 1918, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>327</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a drain ditch (J1 Deep Drain) and road. While the protestant's evidence indicated the existing place of use along the northern border was only a road, if one takes measurements off the application map as to the width of the northern existing place of use, which indicates a width of 35-40 feet, that width is greater than the 15 foot easement given by Macari to Churchill County. (This is a good example of the limitations of using aerial photographs for the type of fine line interpretation the State Engineer is being asked to make in these cases.) The applicant believes she is transferring water off the area between the road and her headgates, which area the protestant's evidence shows also includes another on-farm, dirt-lined, supply ditch.<sup>328</sup> This means there is another unquantified area along the northern border of Parcel 1 where water was beneficially used.

The State Engineer finds no water was placed to beneficial use on that portion of Parcel 1 taken up by the road (0.46 of an acre) and that portion taken up by the drain ditch (2.49 acres) for the 39 year period from 1948 through 1987. As to the rest of the parcel, the protestant did not prove non-use by clear and

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<sup>327</sup> Exhibit No. 1158, public administrative hearing before the State Engineer, March 9, 2000.

<sup>328</sup> Exhibit No. 1161, photographs 12-84 and 12-94, public administrative hearing before the State Engineer, March 9, 2000.

convincing evidence.

**Parcel 2** - The contract date is June 18, 1918, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>329</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as farm structures, road and on-farm supply ditch. The protestant provided evidence that an on-farm, dirt-lined, supply ditch has taken up 0.73 of an acre on the west side of the existing place of use from 1948 through 1987.<sup>330</sup> While the protestant's evidence indicated the existing place of use along the northern border was only a road, if one takes measurements off the application map as to the width of the northern existing place of use, which indicates a width of 35-40 feet, that width is greater than the 15 foot easement given by Macari to Churchill County. (This is a good example of the limitations of using aerial photographs for the type of fine line interpretation the State Engineer is being asked to make in these cases.) The applicant believes she is transferring water off the area between the road and her headgates, which area the protestant's evidence shows also includes another on-farm, dirt-lined, supply ditch.<sup>331</sup> This means there is an unquantified area along the northern border of Parcel 2 where water was beneficially used. The State Engineer finds no water was placed to beneficial use on that portion of Parcel 2 taken up by the road (0.44 of an acre) and that portion taken up by farm structures (4.33 acres) for the 39-year period

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<sup>329</sup> Exhibit No. 1158, public administrative hearing before the State Engineer, March 9, 2000.

<sup>330</sup> Exhibit No. 1160, public administrative hearing before the State Engineer, March 9, 2000.

<sup>331</sup> Exhibit No. 1161, photographs 12-84 and 12-94, public administrative hearing before the State Engineer, March 9, 2000.

from 1948 through 1987. As to the rest of the parcel, the protestant did not prove non-use by clear and convincing evidence. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted, the evidence demonstrates beneficial use of that water from 1948 through 1987.

The testimony and evidence show that in 1918 these 80 acres were known as Farm Unit "C", thus, all the existing and proposed places of use would be within land owned by the applicant.<sup>332</sup> However, because of the problems noted with the deeds and the lands excepted out, the State Engineer will only take into account the actual deed this applicant received, that deed found in Exhibit No. 1174, and by reviewing that deed it shows that the approximately 0.90 of an acre comprising the road along the northern boundary of the NW $\frac{1}{4}$  SE $\frac{1}{4}$  and the NE $\frac{1}{4}$  SE $\frac{1}{4}$  is not part of the land the applicant purchased, therefore, it is not part of her farm.<sup>333</sup> The remaining portions of Farm Unit "C" are shown by the applicant's deed as belonging to applicant. The applicant testified that she has been using all water rights allotted to her and was irrigating the proposed places of use when she was told to file this change application.

The State Engineer finds that the water rights requested for transfer under Application 51235 in both Parcels 1 and 2 are all intrafarm transfers (except for the 0.90 of an acre along the northern portion of the existing places of use<sup>334</sup>) not subject to

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<sup>332</sup> Transcript, pp. 5587-5603; Exhibit Nos. 1155, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, public administrative hearing before the State Engineer, March 9, 2000.

<sup>333</sup> The State Engineer notes his belief that the deeds mistakenly began to except this property out from purchase when only an easement was granted to Churchill County.

<sup>334</sup> Note that the existing place of use in Parcel 2 does not go completely across the northern edge of the parcel.

the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998, and are transfers that the applicant was instructed to file in order to bring the records into conformance with where water had been used within the farm unit for decades.

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.<sup>335</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>336</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>337</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

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<sup>335</sup> 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).

<sup>336</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>337</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Testimony was provided at the 2000 administrative hearing that the owner of the water rights under Application 51235 had continually paid the assessments and taxes due on these water rights and that none were delinquent.<sup>338</sup>

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>339</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a drain ditch (J1 Deep Drain) and road. The State Engineer has already found that no water was placed to beneficial use on 0.46 of an acre under the road in the northern portion of the parcel and on the 2.49 acres under the drain in Parcel 1 for the 39-year period from 1948 through 1987, however, but for the road the transfer is an intrafarm transfer. The State Engineer finds the land uses as to these two parcels are inconsistent with irrigation. However, the evidence shows that the water was being used on other parts of the farm and had been for years when the applicant was instructed to file the change application to bring the records into compliance with actual usage of water rights owned by the applicant on the applicant's farm. The State Engineer finds there is evidence of a lack of intent to abandon the water rights appurtenant to Parcel 1.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>340</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as farm structures, road and on-farm supply ditch.

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<sup>338</sup> Transcript, p. 5611, public administrative hearing before the State Engineer, March 9, 2000.

<sup>339</sup> Exhibit No. 1158, public administrative hearing before the State Engineer, March 9, 2000.

<sup>340</sup> Exhibit No. 1158, public administrative hearing before the State Engineer, March 9, 2000.

The State Engineer has already found that no water was placed to beneficial use on that portion of Parcel 2 taken up by the road (0.44 of an acre) and that portion taken up by farm structures (4.33 acres) for the 39 year period from 1948 through 1987, and that the protestant did not prove non-use as to the remaining portions by clear and convincing evidence. However, but for the road the transfer is an intrafarm transfer. The State Engineer finds the road and farm structures to be uses inconsistent with irrigation. However, the evidence shows that the water was being used on other parts of the farm and had been for years when the applicant was instructed to file the change application to bring the records into compliance with actual usage of water rights owned by the applicant on the applicant's farm. The State Engineer finds there is evidence of a lack of intent to abandon the water rights appurtenant to Parcel 2. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted, the evidence demonstrates beneficial use of that water from 1948 through 1987.

The State Engineer finds that the water rights requested for transfer under Application 51235 in both Parcels 1 and 2 are all intrafarm transfers (except for the 0.90 of an acre along the northern portion of the existing places of use covered by the road) not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998, and are transfers that the applicant was instructed to file in order to bring the records into conformance with where water had been used within the farm unit for decades.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>341</sup>

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<sup>341</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcel 1 and 2.

**III.**

**FORFEITURE**

The State Engineer concludes, except for the 0.90 of an acre upon which Churchill County has an easement, and was excepted out of the applicant's deed, that this is an intrafarm transfer not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. As to the 0.90 of an acre on the northern 15 foot boundary of Parcels 1 and 2 along the section line, the protestant proved the statutory period of non-use and the water right is subject to forfeiture.

**IV.**

**ABANDONMENT**

The State Engineer concludes, except for the 0.90 of an acre upon which Churchill County has an easement, and which was excepted out of the applicant's deed, that this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the evidence does not support a claim of intent to abandon the water rights. As to the 0.90 of an acre on the northern 15 foot boundary of Parcels 1 and 2 along the section line, the protestant proved a substantial period of non-use, and a land use inconsistent with irrigation, however, since the water was being used on other parts of the farm unit and had been for decades there is evidence to support a lack of intent to abandon the water right.

**RULING**

The protest to Application 51235 is hereby overruled in part and upheld in part. The State Engineer's decision granting Application 51235 is hereby affirmed as to all but 0.90 of an acre, which is the 15 feet along the section line in the northern

boundary of Parcels 1 and 2. As to the 0.90 of an acre the State Engineer declares the water right forfeited. Therefore, the permit granted under Application 51235 is amended to allow the transfer of water rights appurtenant to 9.80 acres of land totaling 34.3 acre-feet of water to be perfected at the proposed place of use. The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were declared forfeited.

**APPLICATION 51368**

**GENERAL**

**I.**

Application 51368 was filed on September 28, 1987, by Albaugh Ranch to change the place of use of 206.75 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 622-6, 2196-B, 622, 622-4 and 622-5,<sup>342</sup> Claim No. 3 Orr Ditch Decree, and Alpine Decree and Permit 47807. The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 1.57 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 03, T.19N., R.29E., M.D.B.&M.
- Parcel 2 - 25.55 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 31, T.18N., R.30E., M.D.B.&M.
- Parcel 3 - 8.45 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 31, T.18N., R.30E., M.D.B.&M.
- Parcel 4 - 1.13 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 5 - 1.17 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 6 - 0.17 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 7 - 1.24 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 8 - 3.74 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 9 - 6.15 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 10 - 1.50 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 11 - 1.85 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 12 - 1.01 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 13 - 1.11 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.
- Parcel 14 - 4.43 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 34, T.20N., R.29E., M.D.B.&M.

The proposed places of use are described as 16.76 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 1.99 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 1.41 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , and 2.41 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , all in Section 3, T.19N., R.29E., M.D.B. & M., and 6.49 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 2.57 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 7.25 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 5.43 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , 7.27 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , 0.41 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 1.48 acres in the

<sup>342</sup> Exhibit No. 1024, public administrative hearing before the State Engineer, January 26, 2000.

SE $\frac{1}{4}$  NW $\frac{1}{4}$ , 1.43 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 2.68 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 0.39 acres in the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , and 1.10 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , all in Section 34, T.20N., R.29E., M.D.B.&M.

By letter dated June 27, 1994, the applicant withdrew 0.50 of an acre from the transfer request in Parcel 10.<sup>343</sup> The records of the State Engineer indicate that the area withdrawn was not correctly noted pictorially on the original application map, but was moved according to the acreage tabulation. To correct the mistake, 0.50 of an acre was withdrawn from the proposed places of use and reverted back to the area shown as withdrawn on Exhibit No. 1025 which is the area found between the existing place of use and the proposed place of use in the NE corner of Parcel 10.<sup>344</sup>

## II.

Application 51368 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>345</sup> and more specifically on the grounds as follows:<sup>346</sup>

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 3 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 6 - Lack of perfection, abandonment
- Parcel 7 - Lack of perfection, abandonment
- Parcel 8 - Partial lack of perfection, partial abandonment
- Parcel 9 - Partial lack of perfection, abandonment

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<sup>343</sup> Exhibit No. 1025, public administrative hearing before the State Engineer, January 26, 2000.

<sup>344</sup> File No. 51368, official records in the office of the State Engineer.

<sup>345</sup> Exhibit No. 1026, public administrative hearing before the State Engineer, January 26, 2000.

<sup>346</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

- Parcel 10 - Lack of perfection, abandonment
- Parcel 11 - Partial lack of perfection, partial abandonment
- Parcel 12 - Partial lack of perfection, partial abandonment
- Parcel 13 - Abandonment
- Parcel 14 - Partial lack of perfection, partial forfeiture,  
partial abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51368**

Exhibit LLL from the February 1989 administrative hearing contains contracts covering some of the existing places of use under Application 51368.<sup>347</sup>

**Parcel 1** - Exhibit LLL contains two documents covering the section of land containing the existing place of use. The first is an "Agreement" dated June 19, 1903, which describes 550 acres of land contained within 6 sections of land, including Section 3, T.19N., R.29E., M.D.B.&M., those 550 acres noted as being under irrigation and cultivation at that time, thereby being pre-Project vested water rights. The second is an "Application for Permanent Water Right" dated January 7, 1957, which indicates that in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 3, T.19N., R.29E., M.D.B.&M. there were 39 irrigable acres, there were no vested water rights claimed in the  $\frac{1}{4}$   $\frac{1}{4}$  section and 19 acres of water rights were applied for under the 1957 application. The protestant's witnesses believed the evidence as to the contract date was inconclusive and testified that is because a 1907 and 1957 contract covered this existing place of use.<sup>348</sup> The State Engineer finds the 1907 contract in Exhibit No. 1027 does not cover the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 3, but rather the 1903 contract covers said Section 3, and it can be very

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<sup>347</sup> Exhibit No. 1027, public administrative hearing before the State Engineer, January 26, 2000.

<sup>348</sup> Transcript, p. 5180; Exhibit No. 1029, public administrative hearing before the State Engineer, January 26, 2000.

readily determined from the 1957 contract that this  $\frac{1}{4}$   $\frac{1}{4}$  section of land is not covered by any vested water rights. Therefore, the contract date is not inconclusive and can be determined. The State Engineer finds the contract date is January 7, 1957.

**Parcels 2 and 3** - Exhibit LLL contains a "Water-right Application" dated June 24, 1922, covering the land described as Parcels 2 and 3. The State Engineer finds the contract dates are June 24, 1922.

**Parcel 4** - Exhibit LLL contains three documents covering the section of land containing the existing place of use. The first is an "Agreement" under the name George Ernst dated June 19, 1903, which describes 550 acres of land contained within 6 sections of land, including Section 34, T.20N., R.29E., M.D.B.&M., those 550 acres noted as being under irrigation and cultivation at that time, thereby being pre-Project vested water rights. The second is an "Agreement" under the names of Albert H. and Marie Heppner dated May 9, 1907, which covers parts of the  $W\frac{1}{2}$   $NE\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B.&M. The third is an "Application for Permanent Water Right" dated January 7, 1957, which indicates that in the  $SW\frac{1}{4}$   $NE\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B.&M. there were 33 irrigable acres, 13 acres of which were covered by vested water rights and 14 acres of water rights were applied for under the 1957 application.

The State Engineer specifically adopts and incorporates General Finding of Fact V and finds the TCID maps used in the office of the State Engineer for review of water right applications show that the existing place of use is within the area of land covered by the 14 acres of applied for water rights and is not within the area shown as covered by the 13 acres of vested water rights. The State Engineer finds the contract date is January 7, 1957.

**Parcel 5** - Exhibit LLL contains three documents covering the section of land containing the existing place of use. The first is an "Agreement" under the name George Ernst dated June 19, 1903,

which describes 550 acres of land contained within 6 sections of land, including Section 34, T.20N., R.29E., M.D.B.&M., those 550 acres noted as being under irrigation and cultivation at that time, thereby being pre-Project vested water rights. The second is an "Agreement" under the names of Albert H. and Marie Heppner dated May 9, 1907, which covers the SE $\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B.&M., and also evidences the water rights are based on pre-Project vested water rights. The applicant introduced into evidence a contract that assigned the land in question from George Ernst to A.H. Heppner,<sup>349</sup> and a payment receipt under a "Water Right Application" under the name of Albert H. Heppner dated April 22, 1908.<sup>350</sup> The third document is an "Application for Permanent Water Right" dated January 7, 1957, which indicates that in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B.&M. there were 33 irrigable acres, 26 acres of which were covered by vested water rights and 4 acres of water rights were applied for under the 1957 application.

The State Engineer specifically adopts and incorporates General Finding of Fact V and finds the TCID maps used in the office of the State Engineer for review of water right applications show that the existing place of use along the northern boundary of the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B. & M. is within the area of land covered by the 26 acres of vested water rights on the left portion of that existing place of use and is within the area shown as covered by the 4 acres of applied for water rights on the right portion of that exiting place of use. The map shows that the existing place of use on the eastern side of the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B. & M. is within the area of land covered by the 26 acres of vested

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<sup>349</sup> Exhibit No. 1040, public administrative hearing before the State Engineer, January 26, 2000.

<sup>350</sup> Exhibit No. 1041, public administrative hearing before the State Engineer, January 26, 2000.

water rights.

This 1.17 acre parcel demonstrates how minute a determination the protestant is asking the State Engineer to make in some instances and how nearly impossible that determination is to make. This entire existing place of use comprises only 1.17 acres. A portion of the existing place of use (that portion along the northern edge of the  $\frac{1}{4}$   $\frac{1}{4}$  section) is covered by two contract dates, that portion being at a guesstimate  $\frac{1}{3}$ rd of the total area of the existing place of use in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land. Using a scale on the TCID map the total area of the northern portion of the existing place of use is approximately  $\frac{1}{3}$ rd of an acre. The protestant provided evidence that this area is 0.29 of an acre.<sup>351</sup> Again using a scale, the portion of the northern existing place of use covered by the applied for water right is  $\frac{4}{5}$ ths of  $\frac{1}{3}$ rd of an acre or  $\frac{4}{15}$ ths of an acre of land. The State Engineer finds based on the assignment that there is sufficient evidence to tie the 1903 and 1907 contract dates to each other, and finds as to the approximately 0.88 of an acre in the eastern existing place of use in this  $\frac{1}{4}$   $\frac{1}{4}$  section the contract date is June 19, 1903, and the water rights is based on pre-Project vested water rights. Using the protestant's plimentered figure for the northern portion of the existing place of use, the State Engineer finds as to 0.29 of an acre on the northern edge in this  $\frac{1}{4}$   $\frac{1}{4}$  section, the contract date as to 0.08 of an acre in the western part is June 19, 1903, and the water right is based on pre-Project vested water rights, and the contract date as to 0.21 of an acre in the eastern part is January 7, 1957.

**Parcels 6, 7, 8, 9, 11 and 13** - Exhibit LLL contains two documents covering these existing places of use. The first is an "Agreement" under the name George Ernst dated June 19, 1903, which describes 550 acres of land contained within 6 sections of land,

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<sup>351</sup> Exhibit No. 1033, public administrative hearing before the State Engineer, January 26, 2000.

including Section 34, T.20N., R.29E., M.D.B.&M., those 550 acres noted as being under irrigation and cultivation at that time, thereby being pre-Project vested water rights. The second is an "Agreement" under the names of Albert H. and Marie Heppner dated May 9, 1907, which covers the relevant  $\frac{1}{4}$   $\frac{1}{4}$  sections of land in Section 34, T.20N., R.29E., M.D.B.&M., and also evidences the water rights are based on pre-Project vested water rights. The applicant introduced a deed which assigned the land in question from George Ernst to A.H. Heppner,<sup>352</sup> and a payment receipt under a "Water Right Application" under the name of Albert H. Heppner dated April 22, 1908.<sup>353</sup> The State Engineer finds based on the assignment there is sufficient evidence to tie the 1903 and 1907 contract dates to each other. The State Engineer finds the contract dates are June 19, 1903, and the water rights are based on pre-Project vested water rights.

**Parcels 10 and 12** - Exhibit LLL contains an "Agreement" dated June 19, 1903, which describes 550 acres of land contained within 6 sections of land, including Section 34, T.20N., R.29E., M.D.B.&M., those 550 acres noted as being under irrigation and cultivation at that time, thereby being pre-Project vested water rights. The State Engineer finds the contract dates are June 19, 1903, and the water rights are based on pre-Project vested water rights.

**Parcel 14** - Exhibit LLL contains three documents covering the section of land containing the existing place of use. The first is an "Agreement" under the name of George Ernst dated June 19, 1903, which describes 550 acres of land contained within 6 sections of land, including Section 34, T.20N., R.29E., M.D.B.&M., those 550 acres noted as being under irrigation and cultivation at that time, thereby being pre-Project vested water rights. The

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<sup>352</sup> Exhibit No. 1040, public administrative hearing before the State Engineer, January 26, 2000.

<sup>353</sup> Exhibit No. 1041, public administrative hearing before the State Engineer, January 26, 2000.

second is an "Agreement" under the names of Albert H. and Marie Heppner dated May 9, 1907, which covers the S $\frac{1}{2}$  SW $\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B.&M., and also evidences the water rights are based on pre-Project vested water rights. The applicant introduced a deed which assigned the land in question from George Ernst to A.H. Heppner,<sup>354</sup> and a payment receipt under a "Water Right Application" under the name of Albert H. Heppner dated April 22, 1908.<sup>355</sup> The third document is an "Application for Permanent Water Right" dated December 26, 1929, for 12 acres of irrigable land out of the 20 acres found in the E $\frac{1}{2}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.20N., R.29.E., M.D.B.&M. On the bottom of the application, it is noted that the application should actually be for 13 acres of which 1 acre was covered by a vested water right.

The State Engineer specifically adopts and incorporates General Finding of Fact V and finds the TCID maps used in the office of the State Engineer for review of water right applications show that the 1 acre of vested water rights is a triangular piece in the southeastern corner of the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.20N., R.29E., M.D.B.&M., and that a portion of the existing place of use is covered by the applied for water and a portion by the vested water right. This existing place of use also demonstrates how minute a determination the protestant is asking the State Engineer to make in some instances and how nearly impossible that determination is to make. This entire existing place of use comprises 4.43 acres. The portion of the existing place of use within the area covered by the vested water right is approximately at a guesstimate 1/3rd of the area covered by the 1 acre of vested water right in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land. The State Engineer finds based on the assignment that there is sufficient

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<sup>354</sup> Exhibit No. 1040, public administrative hearing before the State Engineer, January 26, 2000.

<sup>355</sup> Exhibit No. 1041, public administrative hearing before the State Engineer, January 26, 2000.

evidence to tie the 1903 and 1907 contract dates to each other, and finds the contract date as to the triangular piece that is approximately 0.333 of an acre in the southeastern part of the existing place in this  $\frac{1}{4}$   $\frac{1}{4}$  section is June 19, 1903, and the water right is based on pre-Project vested water rights. The State Engineer finds as to the remaining 4.097 acres in the rest of the existing place of use the contract date is December 26, 1929.

## II.

### PERFECTION

**Parcel 1** - The contract date is January 7, 1957. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>356</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a road and canal. The State Engineer finds it incongruous as to why a water right was granted for an area that at the time of the application was not considered an irrigable area. However, not being given additional evidence than that provided, based on the fact that the land use description never changes from 1948 through 1987, on the fact that the contract date is 1957, and on the fact that no evidence was provided by the applicant to challenge the land use description or to show the water right was perfected, the State Engineer finds that a water right was never perfected on this parcel from the time of the contract in 1957 through the time of the filing of the change application in 1987, a period of 30 years. The State Engineer further finds, in the absence of evidence to the contrary, a lapse of 30 years does not demonstrate due diligence in placing the water to beneficial use, therefore, there is no water right available to be transferred from this parcel.

**Parcels 2 and 3** - The contract dates are June 24, 1922. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

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<sup>356</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

Place(s) of Use"<sup>357</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 2 was described as a portion irrigated, natural vegetation, drain ditch, creek or natural drainage, on-farm supply ditch. In 1948 the land use on Parcel 3 was described as a portion irrigated, natural vegetation, and on-farm supply ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that water rights were not perfected on these parcels between 1922 and 1948. At the 1989 administrative hearing the applicant described the land use on these parcels as marginal land.<sup>358</sup> At the January 2000 administrative hearing, the applicant supplied evidence and testimony that brought into doubt the protestant's land use descriptions. That being evidence that showed irrigation supply ditches, borders, patterns of irrigation which would cover the entire existing places of use, and testimony as to seeing the existing places of use being irrigated.<sup>359</sup> The protestant provided evidence that out of the 34 acres that comprise Parcels 2 and 3 21.67 acres were irrigated from 1948 through 1986,<sup>360</sup> that 2.48 acres were covered by on-farm supply ditches<sup>361</sup> for a total of 24.15 acres out of the 34 acres in these two existing places of use.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water rights were never

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<sup>357</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>358</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>359</sup> Transcript, pp. 5209-5219, 5227-5229; Exhibit No. 1053, public administrative hearing before the State Engineer, January 26, 2000.

<sup>360</sup> Exhibit No. 1031, public administrative hearing before the State Engineer, January 26, 2000.

<sup>361</sup> Exhibit No. 1032, public administrative hearing before the State Engineer, January 26, 2000.

perfected on these parcels between 1915 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on these parcels. The State Engineer finds there is not clear and convincing evidence of non-use of the water rights on these parcels from 1948 through 1986. 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. The State Engineer finds the protestant proved perfection on 24.15 acres out of the 34 acres that comprise Parcels 2 and 3. The State Engineer finds the protestant provided evidence that the on-farm, dirt-lined, supply ditch takes up 2.48 acres of the existing places of use.<sup>362</sup> The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those ditches were historically required to be water righted the evidence demonstrates beneficial use and/or perfection of the waters to the date of the photograph.

**Parcel 4** - The contract date is January 7, 1957. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>363</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as natural vegetation. Based on the fact that the land use description never changes from 1948 through 1987, on the fact that the contract date is 1957, and on the fact that no evidence was provided by the applicant to challenge the land use description or to show the water right was perfected, the State Engineer finds that a water right was never perfected on this parcel from the time of the contract in 1957 through the time of the filing of the change application in 1987, a period of 30 years. The State Engineer

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<sup>362</sup> Exhibit No. 1032, public administrative hearing before the State Engineer, January 26, 2000.

<sup>363</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

further finds, in the absence of evidence to the contrary, a lapse of 30 years does not demonstrate due diligence in placing the water to beneficial use, therefore, there is no water right available to be transferred from this parcel.

**Parcel 5** - The contract date as to the approximately 0.88 of an acre in the eastern existing place of use in this  $\frac{1}{4}$   $\frac{1}{4}$  section is June 19, 1903, and the water right is based on pre-Project vested water rights. The contract date as to 0.08 of an acre in the western part of the northern part of the existing place of use is June 19, 1903, and the water right is based on pre-Project vested water rights, and the contract date as to 0.21 of an acre in the eastern part of the northern part is January 7, 1957.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>364</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a road, canal and natural vegetation. In 1973 the land use description is a road, canal and on-farm supply ditch. The protestant provided evidence that the 0.29 of an acre portion of the existing place of use on the northern edge of the existing place of use in Parcel 5 is an on-farm supply ditch, and was used from 1973 through 1987.<sup>365</sup> The State Engineer finds as to 0.21 of an acre in the eastern part of northern existing place when the contract was granted in January 7, 1957, the area at the time of the application must have been considered an irrigable area and further finds support for his determination that on-farm supply ditches are water righted areas.

The State Engineer finds from the 1973 photograph and the protestant's evidence that the northern portion of the existing place of use in Parcel 5 is covered by an on-farm supply ditch.

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<sup>364</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>365</sup> Exhibit No. 1033, public administrative hearing before the State Engineer, January 26, 2000.

The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those ditches were historically required to be water righted, or were within areas considered irrigable, that the evidence demonstrates beneficial use and/or perfection of the waters on 0.29 of an acre of the Parcel 5 existing place of use. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the remaining portion of the Parcel 5 existing places of use between 1903 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel, and in fact proved perfection on 0.29 of an acre. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 6** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>366</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 6 was described as an on-farm supply ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer finds there is not clear and convincing evidence of non-use of the water rights on this parcel from 1948 through 1987. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-

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<sup>366</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds the protestant proved perfection on Parcel 6 since on-farm supply ditches were historically required to be water righted, therefore, the evidence demonstrates beneficial use and/or perfection of the waters.

**Parcel 7** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>367</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 7 was described as a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 8** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>368</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 8 was described as a farm yard, natural vegetation, portion irrigated, on-farm supply ditch and drain ditch. The protestant did not provide any evidence other than a

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<sup>367</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>368</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948. The protestant provided evidence that a 0.18 of an acre portion of the 3.74 acres comprising the existing place of use was irrigated from 1977 to 1987.<sup>369</sup>

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer finds the protestant proved perfection on a portion of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 9** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>370</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 9 was described as natural vegetation and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948. The protestant provided evidence that a 0.15 of an acre portion of the 6.15 acres comprising the existing place of use was irrigated from 1948 to 1987.<sup>371</sup>

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never

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<sup>369</sup> Exhibit No. 1034, public administrative hearing before the State Engineer, January 26, 2000.

<sup>370</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>371</sup> Exhibit No. 1035, public administrative hearing before the State Engineer, January 26, 2000.

perfected on this parcel between 1903 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer finds the protestant proved perfection on a portion of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 10** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>372</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 10 was described as natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 11** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>373</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 10 was described as a portion irrigated, natural vegetation and canal. The protestant did not

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<sup>372</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>373</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 12** - The contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>374</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 10 was described as bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903 and 1948.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

**Parcel 14** - As to the 0.333 of an acre in the southeastern part of the existing place of use the contract date is June 19, 1903, and the water right is based on pre-Project vested water rights. The contract date as to the remaining 4.097 acres in the existing

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<sup>374</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

place of use is December 26, 1929. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>375</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 14 was described as a farmyard, road and farm structure. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903/1929 and 1948.

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903/1929 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

### III.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The State Engineer found above that a water right was never placed to beneficial use on this particular parcel under the contract, and that as due diligence was not demonstrated no water right was available to be transferred. The State Engineer finds the doctrine of forfeiture does not apply to a water right that has never been perfected as only a perfected water right can be forfeited; therefore, the protestant's forfeiture claim is moot.

**Parcels 2 and 3** - The contract dates are June 24, 1922, and

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<sup>375</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

thereby are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>376</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on Parcel 2 was described as a portion irrigated, natural vegetation, drain ditch, creek or natural drainage and on-farm supply ditch. In 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land use on Parcel 3 was described as a portion irrigated, natural vegetation, and on-farm supply ditch. In 1987 the land use was described as bare land and natural vegetation. At the 1989 administrative hearing the applicant described the land use on these parcels as marginal land.<sup>377</sup> At the January 2000 administrative hearing, the applicant supplied evidence and testimony that brought into doubt the protestant's land use descriptions. That being evidence that showed irrigation supply ditches, borders, patterns of irrigation which would cover the entire existing places of use, and testimony as to seeing the existing places of use being irrigated up through and close to the time the Albaugh Ranch purchased the water rights in 1987.<sup>378</sup> The protestant provided evidence that out of the 34 acres that comprise Parcels 2 and 3 21.67 acres were irrigated from 1948 through 1986,<sup>379</sup> that 2.48 acres were covered by on-farm supply

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<sup>376</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>377</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>378</sup> Transcript, pp. 5209-5219, 5227-5229; Exhibit No. 1053, public administrative hearing before the State Engineer, January 26, 2000.

<sup>379</sup> Exhibit No. 1031, public administrative hearing before the State Engineer, January 26, 2000.

ditches<sup>380</sup> for a total of 24.15 acres out of the 34 acres in these two existing places of use.

The State Engineer finds there is not clear and convincing evidence of non-use of the water rights on these parcels from 1948 through 1987. The State Engineer finds the protestant proved beneficial use of the water rights on 24.15 acres out of the 34 acres that comprise Parcels 2 and 3 through 1986. The State Engineer finds the applicant brought into doubt the protestant's land use descriptions as to the remaining portion of the existing places of use and provided evidence sufficient to support use of the water rights on those parcels through the time the transfer application was filed in 1987. The State Engineer finds the protestant did not prove its claim of non-use of the water rights on Parcels 2 and 3 by clear and convincing evidence.

**Parcel 4** - The State Engineer found above that water was never placed to beneficial use on this particular parcel under the contract, and that as due diligence was not demonstrated no water right was available to be transferred. The State Engineer finds the doctrine of forfeiture does not apply to a water right that has never been perfected as only a perfected water right can be forfeited; therefore, the protestant's forfeiture claim is moot.

**Parcel 5** - The contract date as to the approximately 0.88 of an acre in the eastern existing place of use and as to 0.08 of an acre in the western part of the northern part of the existing place of use in this  $\frac{1}{4}$   $\frac{1}{4}$  section is June 19, 1903, therefore, the water rights are not subject to the forfeiture provision of NRS § 533.060. The contract date as to 0.21 of an acre in the eastern part of the northern part is January 7, 1957, and therefore, is subject to the forfeiture provision of NRS § 533.060.

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<sup>380</sup> Exhibit No. 1032, public administrative hearing before the State Engineer, January 26, 2000.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>381</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a road, canal and natural vegetation. In 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use was described as a road, canal and on-farm supply ditch. The protestant provided evidence that the 0.29 of an acre portion of the existing place of use on the northern edge of the existing place of use in Parcel 5 is an on-farm supply ditch and was used from 1977 through 1987.<sup>382</sup> A witness for the applicant testified that drains and ditches were considered water righted acreage in Nevada because water was consumptively used just as in a field and the banks of said structures provided forage for cattle grazing.<sup>383</sup>

The State Engineer specifically adopts and incorporates General Finding of Fact X and notes that in that finding the State Engineer then found 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 as referenced in General Finding of Fact V includes 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.

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<sup>381</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>382</sup> Exhibit No. 1033, public administrative hearing before the State Engineer, January 26, 2000.

<sup>383</sup> Transcript, p. 5219, public administrative hearing before the State Engineer, January 26, 2000.

The State Engineer finds the protestant did not prove non-use of the water right as to the 0.29 of an acre on the northern edge of the existing place of use. At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands comprising the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>384</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>385</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and increase productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>386</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer finds since the contract dates as to the approximately 0.88 of an acre in the eastern existing place of use and the 0.08 of an acre in the western part of the northern part of the existing place of use is in this  $\frac{1}{4}$   $\frac{1}{4}$  section are June 19, 1903, the water rights are not subject to the forfeiture provision of NRS § 533.060.

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<sup>384</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>385</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>386</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

**Parcel 14** - As to the 0.333 of an acre in the southeastern part of the existing place of use the contract date is June 19, 1903, and the water right is based on pre-Project vested water rights, and is not subject to the forfeiture provision of NRS § 533.060. The contract date as to 4.097 acres in the rest of the existing place of use is December 26, 1929, and is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>387</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 14 was described as a farmyard, road and farm structure. In 1962, 1973, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a farmyard, road, farm structure(s) and portion irrigated. In 1974 and 1975 the land use was described as a farmyard, road, structure and portion irrigated. The protestant provided evidence that 0.32 of an acre of the 4.43 acres comprising the existing place of use was irrigated from 1948 through 1987.<sup>388</sup>

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>389</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E.,

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<sup>387</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>388</sup> Exhibit No. 1035, public administrative hearing before the State Engineer, January 26, 2000.

<sup>389</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>390</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used on the farm.<sup>391</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

#### IV.

##### 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.<sup>392</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>393</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>394</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

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<sup>390</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>391</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>392</sup> 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).

<sup>393</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>394</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer found above that water was never placed to beneficial use on this particular parcel under the contract, and that as due diligence was not demonstrated no water right was available to be transferred. The State Engineer finds the doctrine of abandonment does not apply to a water right that has never been perfected as only a perfected water right can be abandoned; therefore, the protestant's abandonment claim is moot.

**Parcels 2 and 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>395</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on Parcel 2 was described as a portion irrigated, natural vegetation, drain ditch, creek or natural drainage and on-farm supply ditch. In 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land use on Parcel 3 was described as a portion irrigated, natural vegetation, and on-farm supply ditch. In 1987 the land use was described as bare land and natural vegetation. At the 1989 administrative hearing the applicant described the

<sup>395</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

land use on these parcels as marginal land.<sup>396</sup> At the January 2000 administrative hearing, the applicant supplied evidence and testimony that brought into doubt the protestant's land use descriptions. That being evidence that showed irrigation supply ditches, borders, patterns of irrigation which would cover the entire existing places of use, and testimony as to seeing the existing places of use being irrigated up through and close to the time the Albaugh Ranch purchased the water rights in 1987.<sup>397</sup> The protestant provided evidence that out of the 34 acres that comprise Parcels 2 and 3 21.67 acres were irrigated from 1948 through 1986,<sup>398</sup> that 2.48 acres were covered by on-farm supply ditches<sup>399</sup> for a total of 24.15 acres out of the 34 acres in these two existing places of use.

The State Engineer finds there is not clear and convincing evidence of non-use of the water rights on these parcels from 1948 through 1987. The State Engineer finds the protestant proved beneficial use of the water rights on 24.15 acres out of the 34 acres that comprise Parcels 2 and 3 through 1986. The State Engineer finds the applicant brought into doubt the protestant's land use descriptions as to the remaining portion of the existing places of use and provided evidence sufficient to support use of the water rights on those parcels through the time the transfer application was filed in 1987. The State Engineer finds the protestant did not prove its claim of non-use of the water rights on Parcels 2 and 3 by clear and convincing evidence.

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<sup>396</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>397</sup> Transcript, pp. 5209-5219, 5227-5229; Exhibit No. 1053, public administrative hearing before the State Engineer, January 26, 2000.

<sup>398</sup> Exhibit No. 1031, public administrative hearing before the State Engineer, January 26, 2000.

<sup>399</sup> Exhibit No. 1032, public administrative hearing before the State Engineer, January 26, 2000.

**Parcel 4** - The State Engineer found above that water was never placed to beneficial use on this particular parcel under the contract, and that as due diligence was not demonstrated no water right was available to be transferred. The State Engineer finds the doctrine of abandonment does not apply to a water right that has never been perfected as only a perfected water right can be abandoned; therefore, the protestant's abandonment claim is moot.

**Parcel 5** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>400</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a road, canal and natural vegetation. In 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use description is a road, canal and on-farm supply ditch. The protestant provided evidence that the 0.29 of an acre portion of the existing place of use on the northern edge of the existing place of use in Parcel 5 is an on-farm supply ditch and was used from 1977 through 1987.<sup>401</sup> A witness for the applicant testified that drains and ditches were considered water righted acreage in Nevada because water was consumptively used just as in a field and the banks of said structures provided forage for cattle grazing.<sup>402</sup>

The State Engineer specifically adopts and incorporates General Finding of Fact X and notes that in that finding the State Engineer then found 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

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<sup>400</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>401</sup> Exhibit No. 1033, public administrative hearing before the State Engineer, January 26, 2000.

<sup>402</sup> Transcript, p. 5219, public administrative hearing before the State Engineer, January 26, 2000.

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 as referenced in General Finding of Fact V includes 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 finds the protestant did not prove non-use of the water right as to the 0.29 of an acre portion of the existing place of use on the northern edge of the existing place of use. The State Engineer finds the protestant proved that no water was placed to beneficial use on the 0.88 of an acre eastern portion of the existing place of use in Parcel 5 identified as a road and canal from 1948 through 1987, a period of 39 years. However, at the 2000 administrative hearing, the applicant provided testimony and evidence that the lands comprising the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>403</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>404</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and

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<sup>403</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>404</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>405</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 6** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>406</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987, the land use on Parcel 6 was described as an on-farm supply ditch.

The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that there is not clear and convincing evidence of non-use of the water rights on this parcel from 1948 through 1987. The State Engineer finds the protestant provided evidence of beneficial use of the water right from 1948 through 1987 since on-farm supply ditches were historically required to be water righted; therefore, the protestant did not prove its claim of non-use of the water right. The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 7** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>407</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use on Parcel 7 was described

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<sup>405</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>406</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>407</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

as a road. At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>408</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>409</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>410</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 8** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>411</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974 and 1975 the land use on Parcel 8 was described as a farm yard, natural

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<sup>408</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>409</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>410</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>411</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

vegetation, portion irrigated, on-farm supply ditch and drain ditch. In 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a farmyard, road and portion irrigated. The protestant provided evidence that a 0.18 of an acre portion of the 3.74 acres comprising the existing place of use was irrigated from 1977 to 1987.<sup>412</sup>

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>413</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>414</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>415</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to

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<sup>412</sup> Exhibit No. 1034, public administrative hearing before the State Engineer, January 26, 2000.

<sup>413</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>414</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>415</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 9** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>416</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 9 was described as natural vegetation and portion irrigated. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as natural vegetation, delivery ditch and portion irrigated. The protestant provided evidence that a 0.15 of an acre portion of the 6.15 acres comprising the existing place of use was irrigated from 1948 to 1987.<sup>417</sup>

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>418</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>419</sup> The applicant further testified that water had been moved around within the family farm when

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<sup>416</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>417</sup> Exhibit No. 1035, public administrative hearing before the State Engineer, January 26, 2000.

<sup>418</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>419</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>420</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 10** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>421</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 10 was described as natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as natural vegetation and delivery ditch.

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>422</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>423</sup> The applicant further testified that

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<sup>420</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer

<sup>421</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>422</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>423</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>424</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 11** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>425</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on Parcel 10 was described as a portion irrigated, natural vegetation and canal. The protestant provided evidence that a 0.17 of an acre portion of the 1.85 acres comprising the existing place of use was irrigated from 1948 to 1987.<sup>426</sup>

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>427</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and

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<sup>424</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>425</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

<sup>426</sup> Exhibit No. 1035, public administrative hearing before the State Engineer, January 26, 2000.

<sup>427</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>428</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>429</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 12** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>430</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 12 was described as bare land. In 1962, and 1977 the land use on Parcel 12 was described as bare land and a road. In 1973, 1974, 1975, 1980, 1984, 1985, 1986 and 1987 the land use was described as a portion irrigated and road. The protestant did not provide any evidence as to what portion of the 1.01 acres comprising the existing place of use it believed was irrigated from 1980 to 1987.

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm

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<sup>428</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>429</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>430</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

since 1968/1971.<sup>431</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>432</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>433</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 13** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>434</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on Parcel 13 was described as irrigated. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on Parcel 13 was described as a road.

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N.,

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<sup>431</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>432</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>433</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>434</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>435</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>436</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>437</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 14** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>438</sup> which indicates from aerial photographs that in 1948 the land use on Parcel 14 was described as a farmyard, road and farm structure. In 1962, 1973, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a farmyard, road, farm structure(s) and portion irrigated. In 1974 and 1975 the land use was described as a farmyard, road,

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<sup>435</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>436</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>437</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

<sup>438</sup> Exhibit No. 1030, public administrative hearing before the State Engineer, January 26, 2000.

structure and portion irrigated. The protestant provided evidence that 0.32 of an acre of the 4.43 acres comprising the existing place of use was irrigated from 1948 through 1987.<sup>439</sup>

At the 2000 administrative hearing, the applicant provided testimony and evidence that the lands within the existing places of use and the proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., and within Section 34, T.20N., R.29E., M.D.B.&M. are the family farm, and have been farmed as one farm since 1968/1971.<sup>440</sup>

Upon review of Exhibit Nos. 1045 and 1052 it can be determined that the Albaugh Family owned all of the existing and proposed places of use within Section 3, T.19N., R.29E., M.D.B.&M., since 1968, and within Section 34, T.20N., R.29E., M.D.B.&M. since 1968 and 1971, and have operated the same as one farm since those years.<sup>441</sup> The applicant further testified that water had been moved around within the family farm when improvements had been made to increase efficiency and productivity, and that the application was filed to clarify the records as to where water was actually being used.<sup>442</sup> The State Engineer finds that testimony and evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

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<sup>439</sup> Exhibit No. 1035, public administrative hearing before the State Engineer, January 26, 2000.

<sup>440</sup> Transcript, pp. 5229-5238; Exhibit Nos. 1039, 1040, 1041, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, public administrative hearing before the State Engineer, January 26, 2000.

<sup>441</sup> Transcript, p. 5236, public administrative hearing before the State Engineer, January 26, 2000.

<sup>442</sup> Transcript, pp. 5237-5238, public administrative hearing before the State Engineer, January 26, 2000.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>443</sup>

**II.**

**PERFECTION**

The State Engineer concludes that the protestant proved its claims of lack of perfection as to Parcels 1 and 4 and water rights are not available to be transferred from those parcels. The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 2, 3, 5, 6, 7, 8, 9, 10, 11, 12 and 14.

**III.**

**FORFEITURE**

The State Engineer concludes as to Parcels 1 and 4 the protestant's claims of forfeiture are moot, as the State Engineer has concluded the water rights were never perfected and are not available to be transferred. The State Engineer concludes as to Parcels 2, 3 and a 0.29 of an acre portion of Parcel 5 that the protestant did not provide clear and convincing evidence of non-use of the water right. The State Engineer concludes as to Parcel 5 that 0.88 of an acre is not subject to the forfeiture provision of NRS § 533.060 and all of Parcel 5 is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcel 14 that 0.333 of an acre is not subject to the forfeiture provision of NRS § 533.060 and all of Parcel 14 is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

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<sup>443</sup> NRS chapter 533 and Order of Remand from Federal District Court.

IV.

**ABANDONMENT**

The State Engineer concludes as to Parcels 1 and 4 the protestant's claims of abandonment are moot as the State Engineer has concluded the water rights were never perfected and are not available to be transferred. The State Engineer concludes as to Parcels 2, 3, a 0.29 of an acre portion of Parcel 5, and Parcel 6 that the protestant did not provide clear and convincing evidence of non-use of the water right. The State Engineer concludes as to Parcels 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 that these are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**RULING**

The protest to Application 51368 is hereby upheld in part and overruled in part. The State Engineer's decision granting the transfer of water rights from Parcels 1 and 4 is hereby rescinded and water rights are not available to be transferred from those parcels as water rights were never perfected. The State Engineer's decision granting the transfer of water rights appurtenant to Parcels 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 is hereby affirmed. Therefore, the permit granted under Application 51368 is amended to allow the transfer of water rights appurtenant to 55.87 acres of land totaling 195.545 acre-feet to be perfected at the proposed place of use. The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were declared never perfected.

APPLICATION 51369

GENERAL

I.

Application 51369 was filed on September 28, 1987, by Kenneth L. and D.L. Henry<sup>444</sup> to change the place of use of 29.93 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 70-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>445</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 3.30 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 4, T.18N., R.28E., M.D.B.&M.

**Parcel 2** - 3.35 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 4, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 3.95 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  and 2.70 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , both in Section 4, T.18N., R.28E., M.D.B. & M.

II.

Application 51369 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>446</sup> and more specifically on the grounds as follows:<sup>447</sup>

**Parcel 1** - Partial lack of perfection, partial forfeiture, partial abandonment

**Parcel 2** - Partial lack of perfection, partial forfeiture, partial abandonment.

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<sup>444</sup> Application 51369 has been assigned in the records of the State Engineer to William O. Davig.

<sup>445</sup> Exhibit No. 1176, public administrative hearing before the State Engineer, March 9, 2000.

<sup>446</sup> Exhibit No. 1177, public administrative hearing before the State Engineer, March 9, 2000.

<sup>447</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51369**

**Parcels 1 and 2** - Exhibit LLL from the 1989 administrative hearing contains two documents covering these existing places of use. The first is a "Water-right Application" dated November 9, 1914, filed by Earle Eichner and the second is also a "Water-right Application" dated August 10, 1922, filed by Pio Ascargorta.<sup>448</sup> The 1922 documents indicates that Earle Eichner assigned all his right under his water right application serial number 578 to Ascargorta, and the 1922 contract also has the 578 serial number on it. The State Engineer finds there is sufficient evidence to tie the 1914 contract to the 1922 contract date and finds the contract dates are November 9, 1914.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is November 9, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>449</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch (Sheckler 1), road, portion irrigated, bare land and structures. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The protestant provided evidence that 0.19 of an acre of Parcel 1 was irrigated.<sup>450</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this

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<sup>448</sup> Exhibit No. 1178, public administrative hearing before the State Engineer, March 9, 2000.

<sup>449</sup> Exhibit No. 1181, public administrative hearing before the State Engineer, March 9, 2000.

<sup>450</sup> Exhibit No. 1183, public administrative hearing before the State Engineer, March 9, 2000.

parcel between 1914 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is November 9, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>451</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch (Sheckler 1), portion irrigated, drain ditch (Sheckler 2) and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The protestant provided evidence that 0.19 of an acre of Parcel 2 was irrigated.<sup>452</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the

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<sup>451</sup> Exhibit No. 1181, public administrative hearing before the State Engineer, March 9, 2000.

<sup>452</sup> Exhibit No. 1183, public administrative hearing before the State Engineer, March 9, 2000.

Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture. The State Engineer believes this is most likely an intrafarm transfer, but no one appeared at the time and place noticed for the hearing to present any evidence as to that issue.<sup>453</sup>

**Parcel 1** - The contract date is November 9, 1914, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>454</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch (Sheckler 1), road, portion irrigated, bare land and structures. In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a drain ditch (Sheckler 1), road, portion irrigated, on-farm supply ditch and bare land. The protestant provided evidence that 0.19 of an acre of Parcel 1 was irrigated and that 0.49 of an acre was covered by an on-farm supply ditch.<sup>455</sup> The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted, the evidence demonstrates beneficial use of that water from 1948 through 1987. The State Engineer finds that no water was placed to beneficial use on the remaining 2.62 acres of Parcel 1 for the 39-year period from 1948 through 1987.

**Parcel 2** - The contract date is November 9, 1914, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use

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<sup>453</sup> Transcript, pp. 5612-5613, public administrative hearing before the State Engineer, March 9, 2000.

<sup>454</sup> Exhibit No. 1181, public administrative hearing before the State Engineer, March 9, 2000.

<sup>455</sup> Exhibit Nos. 1183 and 1184, public administrative hearing before the State Engineer, March 9, 2000.

Descriptions for Existing Place(s) of Use"<sup>456</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a drain ditch (Sheckler 1), portion irrigated, drain ditch (Sheckler 2) and natural vegetation. The protestant provided evidence that 0.19 of an acre of Parcel 2 was irrigated.<sup>457</sup> The State Engineer finds that no water was placed to beneficial use on the remaining 3.16 acres of Parcel 2 for the 39-year period from 1948 through 1987.

### 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.<sup>458</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>459</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>460</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there

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<sup>456</sup> Exhibit No. 1181, public administrative hearing before the State Engineer, March 9, 2000.

<sup>457</sup> Exhibit No. 1183, public administrative hearing before the State Engineer, March 9, 2000.

<sup>458</sup> 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).

<sup>459</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>460</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on 2.62 acres of Parcel 1 for the 39-year period from 1948 through 1987. No evidence was presented as to a lack of intent to abandon the water rights. The State Engineer finds since 2.62 acres of the water right is below declared forfeited the claim of abandonment is moot.

**Parcel 2** - The State Engineer has already found that no water was placed to beneficial use on 3.16 acres of Parcel 2 for the 39-year period from 1948 through 1987. No evidence was presented as to a lack of intent to abandon the water rights. The State Engineer finds since 3.16 acres of the water right is below declared forfeited the claim of abandonment is moot.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>461</sup>

##### II.

#### **LACK OF PERFECTION**

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcels 1 and 2.

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<sup>461</sup> NRS Chapter 533 and Order of Remand from Federal District Court.

**III.**

**FORFEITURE**

The State Engineer concludes as to Parcel 1 that 2.62 acres of water rights are subject to forfeiture, and as to Parcel 2 that 3.16 acres of water rights are subject to forfeiture.

**IV.**

**ABANDONMENT**

The State Engineer concludes since the water rights appurtenant to portions of Parcels 1 and 2 are below declared forfeited the protestant's claims of partial abandonment are moot.

**RULING**

The protest as to Application 51369 is hereby upheld in part and overruled in part. As to Parcel 1, the State Engineer declares that 2.62 acres of water rights are forfeited, and as to Parcel 2 that 3.16 acres of water rights are forfeited. The permit granted under Application 51369 is amended to allow the transfer of water rights appurtenant to 0.87 of an acre of land totaling 3.915 acre-feet of water to be perfected at the proposed place of use. There are issues regarding bench-land and bottom-land designations which could require adjustment of these numbers. The applicants may want to consult regarding these numbers before filing the map that is ordered below. The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were declared forfeited.

**APPLICATION 51371**

**GENERAL**

**I.**

Application 51371 was filed on September 28, 1987, by Roger and Debora Boehner<sup>462</sup> to change the place of use of 5.22 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 680-3, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>463</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - 1.49 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 25, T.19N., R.29E., M.D.B.&M.

The proposed place of use is described as 1.49 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 25, T.19N., R.29E., M.D.B.&M.

**II.**

Application 51371 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>464</sup> and more specifically on the grounds as follows:<sup>465</sup>

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATE 51371**

**Parcel 1** - Exhibit LLL from the 1989 administrative hearing contains a "Certificate of Filing Water Right Application" dated

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<sup>462</sup> Walter Reep and Katherine Ryon have filed paperwork in the office of the State Engineer requesting assignment of Application 51371 to them.

<sup>463</sup> Exhibit No. 1189, public administrative hearing before the State Engineer, April 11, 2000.

<sup>464</sup> Exhibit No. 1190, public administrative hearing before the State Engineer, April 11, 2000.

<sup>465</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

April 9, 1908, covering the existing place of use.<sup>466</sup> An issue arose at the April 2000 administrative hearing as to an "Application for Permanent Water Right" dated August 31, 1981, pursuant to which a previous owner of the property applied for an additional one acre of water rights.<sup>467</sup>

The protestant raised a concern that under Application 51371 the applicants were transferring water rights to lands already covered by water rights under the 1981 application. The records of the State Engineer and those found in Attachment 21 to Exhibit No. 1198 show that in 1981 the previous owner applied for water rights out of a group of water rights that were allotted in what was known as the lottery of TCID water rights. Pursuant to Permit 47804 (granted in 1985) that one acre of water rights was transferred into these applicants' property and mapping in the office of the State Engineer shows it to be east of the parcels at issue in this application. Therefore, there is no issue as to overlapping water rights. The State Engineer finds the contract date is April 9, 1908.

## II.

### PERFECTION

**Parcel 1** - The contract date is April 9, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>468</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State

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<sup>466</sup> Exhibit No. 1191, public administrative hearing before the State Engineer, April 11, 2000.

<sup>467</sup> Exhibit No. 1198, Attachment 21, public administrative hearing before the State Engineer, April 11, 2000.

<sup>468</sup> Exhibit No. 1194, public administrative hearing before the State Engineer, April 11, 2000.

Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### 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.<sup>469</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>470</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>471</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer.

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<sup>469</sup> 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).

<sup>470</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>471</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>472</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a delivery ditch and natural vegetation. In 1972, 1973, 1974, 1975, 1977 and 1980 the land use was described as a delivery ditch and bare land. In 1984, 1985, 1986 and 1987 the land use was described as a delivery ditch, bare land and farm structures. At the 1989 administrative hearing, the applicant provided evidence that in 1948 the land use was described as a road, barren land and ditch, and in 1988 it was described as a road and barren land.<sup>473</sup> Evidence was provided during the administrative hearing that the ditch that runs down the west side of this property was moved further west during its lifetime,<sup>474</sup> which could explain why the applicant in 1948 describes a ditch and in 1988 describes a road. While the descriptions of land uses vary slightly, and the State Engineer is not completely convinced that the existing place of use is the ditch and adjacent road or only the road adjacent to the ditch, neither the ditch nor the road was being used as irrigated land. Evidence was provided which shows that both the existing and proposed places of use are within the same farm unit.<sup>475</sup>

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<sup>472</sup> Exhibit No. 1194, public administrative hearing before the State Engineer, April 11, 2000.

<sup>473</sup> Exhibit No. 424, public administrative hearing before the State Engineer, April 11, 2000.

<sup>474</sup> Exhibit No. 1198, Attachment 20, public administrative hearing before the State Engineer, April 11, 2000.

<sup>475</sup> Exhibit No. 1198, Attachments 1, 2, 3, 4, 5, 15, 16, 18, 19, 20, 23 and 26, public administrative hearing before the State Engineer, April 11, 2000.

The State Engineer finds that no water was placed to beneficial use on Parcel 1 for the 39-year period from 1948 through 1987 and the land use is inconsistent with irrigation. No evidence was provided as to a lack of intent to abandon the water right. However, the State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>476</sup>

**II.**

**PERFECTION**

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

**III.**

**ABANDONMENT**

The State Engineer concludes that the transfer from Parcel 1 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**RULING**

The protest to Application 51371 is hereby overruled and the State Engineer's decision granting Application 51371 is hereby affirmed.

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<sup>476</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 51374**

**GENERAL**

**I.**

Application 51374 was filed on September 28, 1987, by Maie and Myrl Nygren to change the place of use of 28.49 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 565-5, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>477</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - 8.14 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 29, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 8.14 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 8, T.19N., R.29E., M.D.B.&M.

Application 51374 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>478</sup> and more specifically on the grounds as follows:<sup>479</sup>

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATE 51374**

**Parcel 1** - Exhibit LLL from the 1989 administrative hearing contains one document, an "Application for Permanent Water Right", and that document does not cover this existing place of use nor is it the right serial number as it indicates it covers serial number 565-2 and the serial number at issue in this application is 565-5. No contract covering this parcel of land was introduced into

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<sup>477</sup> Exhibit No. 1239, public administrative hearing before the State Engineer, April 12, 2000.

<sup>478</sup> Exhibit No. 1240, public administrative hearing before the State Engineer, April 12, 2000.

<sup>479</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

evidence. The only evidence before the State Engineer of the underlying contract is that the water is being transferred from contract file serial number 565-5. The State Engineer makes no finding as to the correct contract date as no evidence was presented upon which to rule.

## II.

### PERFECTION

**Parcel 1** - The protestant only contends partial lack of perfection and presented evidence that 6.89 acres out of the 8.14 acres requested for transfer have been irrigated from 1948 through 1987. The State Engineer finds as to the 1.25 acres under dispute that since no contract was put into evidence, he does not know what date a contract was obtained, therefore, he is unable to make a determination as to perfection or lack thereof regarding the parcel areas for which the protestant alleges that no water right was perfected.

The applicant argues that since it is the protestant's burden to establish a forfeiture of the water right, the protestant should have the burden of proving the contract date and since the TCID certified this is a valid water right, the State Engineer should rule that the Tribe has not met its burden and should approve the transfer application. The State Engineer finds that under State Engineer's Ruling No. 4591 (Application 47840 Parcels 11 and 12) when a underlying water right contract was not put into evidence the State Engineer did not allow the transfer as he could not rule on the protest claims. When Judge McKibben remanded that application to the State Engineer pursuant to his Order of September 3, 1998, his instructions were that Parcels 11 and 12 were remanded for consideration of the issue of perfection based on the applicant or the TCID providing a water right contract covering these parcels.

The State Engineer finds in light of Judge McKibben's ruling that the applicant or the TCID was to provide the water right

contract, that since no determination can be made as to contract date or perfection, the State Engineer finds he cannot rule on the protestant's claim of partial lack of perfection. Therefore, there is insufficient information in the record to deal with the protestant's claims or to allow the transfer of the protested water rights, i.e., to allow the transfer of the 1.25 acres under dispute. The protestant has no protest allegations as to the remaining 6.89 acres.

**III.**

**FORFEITURE AND ABANDONMENT**

The State Engineer finds that he cannot rule on the protestant's allegations of partial forfeiture and partial abandonment as to the 1.25 acres under dispute since no contract was put into evidence as to the water right under challenge. Therefore, only the water rights on the 6.89 acres that are not under challenge can be transferred.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>480</sup>

**II.**

**PERFECTION, FORFEITURE AND ABANDONMENT**

The State Engineer concludes the protestant only alleged partial lack of perfection, partial forfeiture and partial abandonment on 1.25 acres and since no underlying water right contract was put into evidence the State Engineer cannot rule on the protest claims or allow the transfer of those 1.25 acres.

**RULING**

The protest to Application 51374 is not upheld or overruled due to the fact that insufficient evidence was presented as the 1.25 acres under challenge for the State Engineer to rule on the

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<sup>480</sup> NRS chapter 533 and Order of Remand from Federal District Court.

protest claims. However, the State Engineer's decision granting Application 51374 as to the 6.89 acres that are not under protest is hereby affirmed. No water right can be transferred from the 1.25 acres under challenge under this application as no water right contract was ever put into evidence in order for the State Engineer to rule on the protest claims. Therefore, the permit granted under Application 51374 is amended to allow the transfer of water rights appurtenant to 6.89 acres of land totaling 24.12 acre-feet of water to be perfected at the proposed place of use. The applicants are hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the 1.25 acres of water rights which the State Engineer cannot rule upon.

**APPLICATION 51377**

**GENERAL**

**I.**

Application 51377 was filed on September 28, 1987, by Emil H. & Agnes S. Buckingham to change the place of use of 55.86 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 622-2, 599-4, 3310, 549-1 and 274<sup>481</sup>, Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 6.13 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 18, T.18N., R.29E., M.D.B.&M.
- Parcel 2 - 0.87 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 26, T.19N., R.28E., M.D.B.&M.
- Parcel 3 - 0.34 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.19N., R.28E., M.D.B.&M.<sup>482</sup>
- Parcel 4 - 0.52 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.19N., R.28E., M.D.B.&M.
- Parcel 5 - 0.18 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.&M.
- Parcel 6 - 0.72 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 4, T.19N., R.29E., M.D.B.&M.<sup>483</sup>
- Parcel 7 - 1.03 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 4, T.19N., R.29E., M.D.B.&M.
- Parcel 8 - 0.13 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 5, T.19N., R.29E., M.D.B.&M.
- Parcel 9 - 1.72 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 5, T.19N., R.29E., M.D.B.&M.
- Parcel 10 - 3.72 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 5, T.19N., R.29E., M.D.B.&M.
- Parcel 11 - 0.60 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 5, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as being 4.63 acres in

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<sup>481</sup> Exhibit No. 1006, public administrative hearing before the State Engineer, January 26, 2000.

<sup>482</sup> The State Engineer notes that as to this parcel the book record entered as Exhibit No. 1006 indicates that the 0.34 acres is in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.19N. R.28E., M.D.B.&M.; however, the actual application found in File No. 51377 indicates that the 0.34 acres is in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 34, T.19N. R.28E., M.D.B.&M.

<sup>483</sup> The State Engineer notes that as to this parcel the book record entered as Exhibit No. 1006 indicates that the 0.72 acres is in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4, T.19N. R.28E., M.D.B.&M.; however, the actual application found in File No. 51377 indicates that the 0.72 acres is in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 4, T.19N. R.28E., M.D.B.&M.

the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 4, T.19N., R.29E., M.D.B.&M., 0.74 of an acre in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 5, T.19N., R.29E., M.D.B.&M., 5.32 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 5, T.19N., R.29E., M.D.B.&M., and 5.27 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 5, T.19N., R.29E., M.D.B.&M. By letter dated March 30, 1993, the applicant withdrew 2.13 acres from the transfer request, that being all of Parcel 7, 0.40 of an acre from Parcel 6 and 0.70 of an acre from Parcel 10.<sup>484</sup>

## II.

Application 51377 were protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>485</sup> and more specifically on the grounds as follows:<sup>486</sup>

- Parcel 1 - Partial lack of perfection, partial abandonment
- Parcel 2 - Lack of perfection, forfeiture, abandonment
- Parcel 3 - Lack of perfection, forfeiture, abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Abandonment
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - None
- Parcel 8 - Lack of perfection, forfeiture, abandonment
- Parcel 9 - Lack of perfection, forfeiture, abandonment
- Parcel 10 - Lack of perfection, forfeiture, abandonment
- Parcel 11 - Lack of perfection, forfeiture, abandonment.

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<sup>484</sup> Exhibit Nos. 1008 and 1009, public administrative hearing before the State Engineer, January 26, 2000. The State Engineer notes that the PLPT's Table 2 identified as Exhibit No. 1013 only shows 1.73 acres as withdrawn apparently not catching the mistake on Exhibit No. 1008, that being that one area in Parcel 10 was only identified as a single hatch mark instead of a cross-hatch mark. The records of the State Engineer show that the 0.40 of an acre area along the northern border of Parcel 10 was also withdrawn.

<sup>485</sup> Exhibit No. 1007 public administrative hearing before the State Engineer, January 26, 2000.

<sup>486</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

FINDINGS OF FACT

I.

**CONTRACT DATES 51377**

**Parcel 1** - Exhibit LLL from the 1989 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 20, 1907, covering the existing place of use.<sup>487</sup> The State Engineer finds the contract date is December 20, 1907.

**Parcel 2** - Exhibit LLL from the 1989 administrative hearing contains a "Water-Right Application" covering the existing place of use for which the State Engineer was unable to discern a date on the line of the application for a date, however, on page 2 of the document it can be faintly seen that the official officer signed the application on June 21, 1915.<sup>488</sup> The protestant's witness testified without rebuttal that the contract date is June 21, 1915.<sup>489</sup> The State Engineer finds the contract date is June 15, 1915.

**Parcels 3 and 4** - Exhibit LLL from the 1989 administrative hearing contains two documents covering the existing place of use.<sup>490</sup> The first is a "Certificate of Filing Water Right Application" dated December 20, 1907. This document describes 127 acres of irrigable land in the N $\frac{1}{2}$  NE $\frac{1}{4}$  and the S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 34, T.19N., R.28E., M.D.B.&M. The second is a "Water-right Application for Lands in Private Ownership" dated November 28, 1913. The 1913 document indicates that it covers all that portion of the S $\frac{1}{2}$  NW $\frac{1}{4}$  (containing 8 acres of vested water rights) lying north of the "L"

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<sup>487</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

<sup>488</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

<sup>489</sup> Exhibit No. 1012, public administrative hearing before the State Engineer, January 26, 2000.

<sup>490</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

line canal in Section 34, T.19N., R.28E., M.D.B.&M. containing a total area of "about 39 acres". The State Engineer specifically adopts and incorporates General Finding of Fact V and finds the TCID maps used in the office of the State Engineer for review of water right applications show that the existing places of use are north of a canal or some structure and that the 8 acres of vested water rights are west of the existing places of use, and that the existing places of use are covered by applied for water rights. However, this still does not resolve the question of whether the applied for water rights are those under the 1907 or 1913 contract.

It is likely that the 1907 document is the correct document because from the TCID maps it shows that in the N $\frac{1}{2}$  NE $\frac{1}{4}$  and S $\frac{1}{2}$  NW $\frac{1}{4}$  of said Section 34 between the vested and applied for water rights there are 124.9 acres of water rights which is very close to the 127 irrigable acre number found under the 1907 contract. The 1913 contract appears to have broken out the lands north of the "L" line canal into a new owner, therefore, perhaps the owner sold the lands in the S $\frac{1}{2}$  NW $\frac{1}{4}$  of said Section to a new owner who then filed a new water right application. Upon review of the TCID maps it appears by excluding the 8 acres of vested water rights to the west of these existing places of use that the applied for water rights cover approximately 20 acres. Since both the 1907 and 1913 contracts cover these existing places of use and both documents are so close in time to be able to allow the 1913 document to relate back to the 1907 document, the State Engineer finds water rights were initiated on these parcels on December 20, 1907.

**Parcel 5** - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated December 6, 1907, covering the existing place of use, and which evidences the water rights were based on pre-Project vested water rights.<sup>491</sup> The State Engineer

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<sup>491</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

finds the contract date is December 7, 1907.

**Parcel 6** - Exhibit LLL from the 1989 administrative hearing contains an "Application for Permanent Water Right" dated February 20, 1950, covering the existing place of use.<sup>492</sup> The State Engineer finds the contract date is February 20, 1950.

**Parcels 8 and 9** - Exhibit LLL from the 1989 administrative hearing contains three documents covering the existing places of use.<sup>493</sup> The first is an "Application for Permanent Water Right" dated June 2, 1948. The second is an "Application for Permanent Water Right" dated May 31, 1949, which indicates it is to correct the 1948 document. The third is an "Application for Permanent Water Right" dated February 20, 1950. The 1949 document is directly tied to the 1948 document and both cover 60 irrigable acres, and the 1950 document merely adds 2 additional acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  and 2.6 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of said section. The State Engineer finds the documents are close enough in time to warrant application of the doctrine of relation back, and finds the contract dates are June 2, 1948.

**Parcel 10** - Exhibit LLL from the 1989 administrative hearing contains an "Application for Permanent Water Right" dated March 31, 1934, covering the existing place of use.<sup>494</sup> The State Engineer finds the contract date is March 31, 1934.

**Parcel 11** - Exhibit LLL from the 1989 administrative hearing contains an "Water-right Application" dated February 13, 1915, covering the existing place of use.<sup>495</sup> The document indicates that

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<sup>492</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

<sup>493</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

<sup>494</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

<sup>495</sup> Exhibit No. 1010, public administrative hearing before the State Engineer, January 26, 2000.

the land at issue was assigned to a Taylor under a homestead application dated August 7, 1906, and that all credits paid under another water right application were paid for the described land indicating that a water right was initiated on this parcel prior to the February 1915 date and perhaps as early as 1906. However, no evidence was provided to show what that date might have been. The State Engineer finds the contract date is February 13, 1915.

## II.

### PERFECTION

**Parcel 1** - The contract date is December 20, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>496</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal, drain ditch and portion irrigated. The PLPT provided further evidence that in 1948 5.14 acres out of the 6.13 acres comprising the existing place of use had been irrigated.<sup>497</sup> The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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 2** - The contract date is June 21, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>498</sup> which indicates from aerial photographs that in 1948 the

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<sup>496</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>497</sup> Exhibit No. 1014, public administrative hearing before the State Engineer, January 26, 2000.

<sup>498</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

land use on this parcel was described as natural vegetation. The applicants presented evidence and testimony showing the location of a conveyance ditch near to the existing place of use and allege that because this conveyance structure is near to the existing place of use the property appears to have irrigated at one time.<sup>499</sup> The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer finds the fact that a conveyance structure is close to a piece of property in no way provides evidence that water was ever applied to that specific property. 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.

**Parcels 3 and 4** - The contract dates are December 20, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>500</sup> which indicates from aerial photographs that in 1948 the land use on these parcels was described as residential. The State Engineer finds a 1948 photograph is not sufficient evidence to prove that water rights were never perfected on these parcels between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on these parcels. 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.

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<sup>499</sup> Transcript, p. 5148; Exhibit No. 1023 photographs B1 and B2, public administrative hearing before the State Engineer, January 26, 2000.

<sup>500</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

**Parcel 6** - The contract date is February 20, 1950. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>501</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a creek or natural drainage. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was barren land.<sup>502</sup> Taking the facts together that a water right was granted for this land, and that the applicants later described that land as barren appears to indicate that at some time someone tried to farm it or at least place water to beneficial use on it. The State Engineer finds he is not convinced that no water was ever placed to beneficial use on this parcel; therefore, the protestant did not prove its claim of lack of perfection.

**Parcel 8** - The contract date is June 2, 1948. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>503</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a creek or natural drainage. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was barren land.<sup>504</sup> Taking the facts together that a water right was granted for this land, and that the applicants later described that land as barren appears to indicate that at some time someone tried to farm it or at least place water to beneficial use on it. The State Engineer finds he is not convinced that no water was ever placed to beneficial use on this parcel; therefore, the

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<sup>501</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>502</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>503</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>504</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

protestant did not prove its claim of lack of perfection.

**Parcel 9** - The contract date is June 2, 1948. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>505</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal, drain ditch and natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a canal and drain ditch. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was a road and ditch.<sup>506</sup> The State Engineer finds it incongruous as to why a water right was granted for an area that at the time of the application was not considered an irrigable area and the hearing officer noted for the record when being asked to examine the aerial photographs that she was not sure she was convinced by the land use descriptions.<sup>507</sup> However, not being giving additional evidence than that provided, based on the fact that the land use description never changes from 1948 through 1987, on the fact that the contract date is 1948, and on the fact that no evidence was provided by the applicants to challenge the land use description or to show the water right was perfected, the State Engineer finds that a water right was never perfected on this parcel from the time of the contract in 1948 through the time of the filing of the change application in 1987, a period of 39 years. The State Engineer further finds, in the absence of evidence to the contrary, a lapse of 39 years does not demonstrate due diligence in placing the water to beneficial use and there is no water right available to be transferred from this parcel.

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<sup>505</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>506</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>507</sup> Transcript, pp. 5106-5107, public administrative hearing before the State Engineer, January 26, 2000.

**Parcel 10** - The contract date is March 31, 1934. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>508</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch, canal, natural vegetation, structures, on-farm supply ditch and road. The State Engineer first notes that the protestant's witness did not pick up the error in the markings on the withdrawal request;<sup>509</sup> therefore, the State Engineer will ignore the witness' description of a road.

At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was roads and a farmstead.<sup>510</sup> No mention is made of supply ditches, drain ditches or canals. The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1934 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

The State Engineer finds the protestant provided evidence that the on-farm, dirt-lined, supply ditch takes up 0.47 of an acre of the existing place of use.<sup>511</sup> The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those ditches were historically required to be water righted the evidence demonstrates beneficial use and/or perfection

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<sup>508</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>509</sup> Exhibit Nos. 1008 and 1009, public administrative hearing before the State Engineer, January 26, 2000.

<sup>510</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>511</sup> Exhibit No. 1015, public administrative hearing before the State Engineer, January 26, 2000.

of that water to the date of the photograph.<sup>512</sup>

**Parcel 11** - The contract date is February 13, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>513</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was a stackyard.<sup>514</sup> The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 2** - The contract date is June 21, 1915, and is thereby subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

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<sup>512</sup> Transcript, p. 2942, public administrative hearing before the State Engineer, September 23, 1997.

<sup>513</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>514</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

Place(s) of Use"<sup>515</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975 and 1977 the land use on this parcel was described as natural vegetation. In 1980, 1984, 1985, and 1987 the land use was described as bare land (cleared for housing). The applicants provided evidence that the house now found on Parcel 2 was finished on November 19, 1986;<sup>516</sup> however, this still does not provide any evidence to demonstrate use of water on the property. The State Engineer finds that no water was placed to beneficial use on Parcel 2 for the 7-year period from 1980 through 1987.

**Parcels 3 and 4** - The contract dates are December 20, 1907; therefore, the water rights are not subject to the forfeiture provision of NRS § 533.060.

**Parcel 6** - The contract date is February 20, 1950, and the water right is thereby subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>517</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a creek or natural drainage. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was barren land.<sup>518</sup> At the 2000 administrative hearing, the applicants provided evidence that the Parcel 6 transfer is an intrafarm transfer in that both the existing place of use and the proposed place of use are within

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<sup>515</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>516</sup> Exhibit No. 1019, public administrative hearing before the State Engineer, January 26, 2000.

<sup>517</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>518</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

land owned by the applicants.<sup>519</sup>

The State Engineer finds that no water was placed to beneficial use on Parcel 2 for the 25-year period from 1962 through 1987. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 8** - The contract date is June 2, 1948, and the water right is thereby subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>520</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described a creek or natural drainage. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was barren land.<sup>521</sup> At the 2000 administrative hearing, the applicants provided evidence that the Parcel 8 transfer is an intrafarm transfer in that both the existing place of use and the proposed place of use are within land owned by the applicants.<sup>522</sup>

The State Engineer finds that no water was placed to beneficial use on Parcel 2 for the 25-year period from 1962 through 1987. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to

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<sup>519</sup> Exhibit Nos. 1020 and 1021, public administrative hearing before the State Engineer, January 26, 2000.

<sup>520</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>521</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>522</sup> Exhibit Nos. 1020 and 1021, public administrative hearing before the State Engineer, January 26, 2000.

Judge McKibben's Order of September 3, 1998.

**Parcel 9** - The State Engineer found above that water was never placed to beneficial use on this particular parcel under the contract, and that as due diligence was not demonstrated no water right was available to be transferred. The State Engineer finds the doctrine of forfeiture does not apply to a water right that has never been perfected as only a perfected water right can be forfeited; therefore, the protestant's forfeiture claim is moot.

**Parcel 10** - The contract date is March 31, 1934, and is thereby subject to the forfeiture provision of NRS § 533.060. As noted above, the protestant's witness did not pick up the error in markings on the withdrawal request;<sup>523</sup> therefore, the State Engineer will ignore the witness' description of a road. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>524</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a drain ditch, canal, natural vegetation, structure, on-farm supply ditch and road.

At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was roads and farmstead.<sup>525</sup> No mention is made of supply ditches or canals. At the 2000 administrative hearing, the hearing officer noted for the record when being asked to examine the aerial photographs that she was not completely convinced by the land use descriptions, and when the witnesses attempted to corroborate their descriptions by using a TCID map that names the canals, drains and ditches

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<sup>523</sup> Exhibit Nos. 1008 and 1009, public administrative hearing before the State Engineer, January 26, 2000.

<sup>524</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>525</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

(composite drainage and distribution map dated August 1981) a drain does not appear on the map and it also does not appear on the United States Geological Survey map.<sup>526</sup> At the 2000 administrative hearing, the applicants provided evidence that the Parcel 10 transfer is an intrafarm transfer in that both the existing place of use and the proposed place of use are within land owned by the applicants.<sup>527</sup>

The State Engineer finds protestant provided evidence that the on-farm, dirt-lined, supply ditch takes up 0.47 of an acre of the existing place of use.<sup>528</sup> The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water throughout the time frame of the photographs. The State Engineer finds the protestant's witness' description of a road is a mistake because that portion of the transfer was withdrawn. The State Engineer finds the protestant's land use descriptions do not rise to the level of clear and convincing evidence. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 11** - The contract date is February 13, 1915, and the water right is thereby subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use

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<sup>526</sup> Transcript, pp. 5110-5114, public administrative hearing before the State Engineer, January 26, 2000.

<sup>527</sup> Exhibit Nos. 1020 and 1021, public administrative hearing before the State Engineer, January 26, 2000.

<sup>528</sup> Exhibit No. 1015, public administrative hearing before the State Engineer, January 26, 2000.

Descriptions for Existing Place(s) of Use"<sup>529</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as natural vegetation and farmyard. At the 1989 administrative hearing, the applicants' evidence indicated that the existing place of use was a stackyard.<sup>530</sup> At the 2000 administrative hearing, the applicants provided evidence that the Parcel 11 transfer is an intrafarm transfer in that both the existing place of use and the proposed place of use are within land owned by the applicants.<sup>531</sup> The State Engineer finds that no water was placed to beneficial use on Parcel 11 for the 25-year period from 1962 through 1987. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

#### IV.

##### 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.<sup>532</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

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<sup>529</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>530</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>531</sup> Exhibit Nos. 1020 and 1021, public administrative hearing before the State Engineer, January 26, 2000.

<sup>532</sup> 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).

surrounding circumstances."<sup>533</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>534</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>535</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal, drain ditch and portion irrigated. The PLPT provided evidence that in 1948 5.14 acres out of the 6.13 acres comprising the existing place of use had been irrigated.<sup>536</sup> In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a canal, drain ditch, portion irrigated and farm structures. The protestant's witness provided evidence that from 1962 through 1975 3.97 acres

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<sup>533</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>534</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>535</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>536</sup> Exhibit No. 1014, public administrative hearing before the State Engineer, January 26, 2000.

of the existing place of use had been irrigated, but indicated that from 1977 through 1987 only 0.29 of an acre had been irrigated.<sup>537</sup> The applicants provided testimony<sup>538</sup> and evidence to support an opinion by their witness that the land use was not inconsistent with irrigation. That evidence consisted of photographs<sup>539</sup> that were attempting to show that the buildings on the property were "portable" as they did not have foundations under them, that the corrals were temporary structures, that the sheds were temporary, and that the entire area could be irrigated without much work. No evidence was provided as to a lack of intent to abandon the water right or to the payment of taxes or assessments.

The State Engineer finds the applicants' evidence to be lacking in credibility as to the temporary nature of the buildings or that the entire property could be irrigated. The evidence is not in the spirit of what the Federal District Court intended as a use consistent with irrigation. Just by looking at the pictures one can readily tell this property has been covered by these structures and "stuff" for a long time and that the use has been inconsistent with irrigation. Just because land could be cleared of "tons of stuff" and converted to an irrigated field does not mean the use is consistent with irrigation.

The State Engineer finds that from 1977 through 1987 only 0.29 of an acre was irrigated out of the total 6.13-acre parcel, that the land use on those areas not irrigated is inconsistent with irrigation, and the applicant has not made a sufficient showing of a lack of intent to abandon the water right.

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<sup>537</sup> Exhibit No. 1014, public administrative hearing before the State Engineer, January 26, 2000.

<sup>538</sup> Transcript, pp. 5157-5160, public administrative hearing before the State Engineer, January 26, 2000.

<sup>539</sup> Exhibit No. 1023, public administrative hearing before the State Engineer, January 26, 2000.

**Parcel 2** - The State Engineer declares below that the water right on Parcel 2 is forfeited; therefore, the protestant's claim of abandonment is moot.

**Parcels 3 and 4** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>540</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land uses on these parcels were described as residential. The applicants provided evidence and testimony to show that at the end of the field adjacent to the existing places of use there are openings in the borders, which could allow water to go into the existing place of use to irrigate trees and ornamental plants on the property. However, there are no turnouts visible at this time and there is a structure at the end of the borders that would affect the ability to irrigate the existing place of use today.<sup>541</sup> The applicants' witness said that one of the former owners, Littlefield, said that his wife used to irrigated the roses she grew commercially on the property and irrigated the shade trees, and that it was the witness' opinion that the property, but for the house and other out buildings (which he described as temporary), was irrigated within the last 10 years. No evidence was provided as to a lack of intent to abandon the water right or to the payment of taxes or assessments.

The State Engineer finds that the applicants' testimony that the outbuildings were temporary because they are not on foundations does not go the spirit of what the Federal District Court meant when it talked about a land use inconsistent with irrigation. Just because a structure can be removed without tearing out a foundation, and the land could be converted to a use

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<sup>540</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

<sup>541</sup> Transcript, pp. 5152-5154, 5166-5169; Exhibit No. 1023, public administrative hearing before the State Engineer, January 26, 2000.

that would allow irrigation, does not mean the land use is consistent with irrigation. The State Engineer does not find the applicants' witness's testimony that a former owner grew roses on the property and irrigated those plants to be sufficiently convincing evidence of use of the water for irrigation within the last 5 to 10 years, particularly in light of the fact that if the applicants' witness was able to talk to this man why was he not produced as a witness to so testify himself. The statement is not corroborated by any other evidence and is not of sufficient quality to be accepted as credible evidence. If one looks at the pictures the applicants provided in Exhibit No. 1023, that house has been there a long time by the size of the trees, there is no evidence of how any irrigation water applied to the property would not flood the house, there is no credible evidence that water was actually applied to portions of this property, it is merely an opinion without any corroborating evidence. The State Engineer finds that for the 39 year period from 1948 through 1987 no water was placed to beneficial use on Parcels 3 and 4, the land use was inconsistent with irrigation, and the applicant has not made a sufficient showing of a lack of intent to abandon the water right.

**Parcel 5** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>542</sup> which indicates from aerial photographs that in 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as residential. No evidence was provided as to a lack of intent to abandon the water right or to the payment of taxes or assessments. The State Engineer finds that for the 25 year period from 1962 through 1987 no water was placed to beneficial use on Parcel 5, the land use was inconsistent with irrigation, and the applicant has not made a sufficient showing of a lack of intent to abandon the water right.

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<sup>542</sup> Exhibit No. 1013, public administrative hearing before the State Engineer, January 26, 2000.

**Parcel 6** - The State Engineer has already found that no water was placed to beneficial use on Parcel 2 for the 25-year period from 1962 through 1987. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 8** - The State Engineer has already found that no water was placed to beneficial use on Parcel 2 for the 25-year period from 1962 through 1987. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 9** - The State Engineer found above that water was never placed to beneficial use on this particular parcel under the contract, and that as due diligence was not demonstrated no water right was available to be transferred. The State Engineer finds the doctrine of abandonment does not apply to a water right that has never been perfected as only a perfected water right can be abandoned; therefore, the protestant's claim of abandonment is moot.

**Parcel 10** - The State Engineer has already found that the protestant's land use descriptions do not rise to the level of clear and convincing evidence. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

**Parcel 11** - The State Engineer has already found that no water was placed to beneficial use on Parcel 11 for the 25-year period from 1962 through 1987. The State Engineer further finds that evidence was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>543</sup>

**II.**

**PERFECTION**

The State Engineer concludes as to Parcels 1, 2, 3, 4, 6, 8, 10 and 11 that the protestant did not prove its claims of partial lack of perfection or lack of perfection. The State Engineer concludes the protestant proved its claim of lack of perfection as to Parcel 9.

**III.**

**FORFEITURE**

The State Engineer concludes as to Parcel 2 that the protestant proved the statutory period of non-use, the water rights are subject to the forfeiture provision of NRS § 533.060, and the water right appurtenant to Parcel 2 is subject to forfeiture. The State Engineer concludes as to Parcels 3 and 4 that the contract dates alone demonstrate the water rights are not subject to the forfeiture provision of NRS § 533.060. The State Engineer concludes that the transfer requests from Parcels 6, 8, 10 and 11 are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcel 9 that the forfeiture claim is moot as no water right was ever perfected on this parcel. The State Engineer concludes as to Parcel 10 that the protestant did not prove non-use by clear and convincing evidence.

**IV.**

**ABANDONMENT**

The State Engineer concludes as to Parcel 1 that the

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<sup>543</sup> NRS chapter 533 and Order of Remand from Federal District Court.

protestant proved non-use for a substantial period of time, and as to all but 0.29 of an acre of land proved a land use inconsistent with irrigation and the applicants did not sufficiently prove a lack of intent to abandon the water right, therefore, the water right (except for 0.29 of an acre) appurtenant to Parcel 1 is subject to abandonment. The State Engineer concludes as to Parcel 2 that the abandonment claim is moot, as the water right is below declared forfeited. As to Parcels 3, 4 and 5, the State Engineer concludes that the protestant proved non-use for the statutory period, a land use inconsistent with irrigation and that the applicants did not sufficiently prove a lack of intent to abandon the water rights, therefore, the water rights appurtenant to Parcels 3, 4 and 5 are subject to abandonment. As to Parcels 6, 8, 10 and 11, the State Engineer concludes the transfer requests are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. As to Parcel 9, the State Engineer concludes that the abandonment claim is moot as no water right was ever perfected on this parcel. The State Engineer concludes as to Parcel 10 that the protestant did not prove non-use by clear and convincing evidence.

**RULING**

The protest claims are upheld in part and overruled in part. The State Engineer's decision granting Application 51377 as to Parcels 6, 8, 10 and 11 is hereby affirmed. The water rights appurtenant to Parcels 1 (except of 0.29 of an acre), 3, 4 and 5 are hereby declared abandoned. The water right appurtenant to Parcel 2 is hereby declared forfeited. The water right requested to be transferred from Parcel 9 was never perfected and is not available for transfer. Therefore, the permit granted under Application 51377 is amended to allow the transfer of water rights appurtenant to 4.36 acres of land totaling 15.26 acre-feet of water to be perfected at the proposed place of use. The applicants are hereby ordered to file with the State Engineer within 90 days

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a map, which designates which portion of the proposed place of use is excluded as to the water rights that were declared never perfected, forfeited and/or abandoned.

**APPLICATION 51599**

**GENERAL**

**I.**

Application 51599 was filed on December 4, 1987, by A.W., Jr., and Mae Lofthouse to change the place of use of 28.00 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 807 and 2176, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>544</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

**Parcel 1** - 8.00 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 27, T.19N., R.30E., M.D.B.&M.

The proposed place of use is described as 8.00 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 28, T.19N., R.30E.

**II.**

Application 51599 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>545</sup> and more specifically on the grounds as follows:<sup>546</sup>

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATE 51599**

Exhibit LLL from the 1989 administrative hearing contains a contract covering the existing place of use under Application 51599.<sup>547</sup>

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<sup>544</sup> Exhibit No. 1133, public administrative hearing before the State Engineer, March 7, 2000.

<sup>545</sup> Exhibit No. 1134, public administrative hearing before the State Engineer, March 7, 2000.

<sup>546</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

<sup>547</sup> Exhibit Nos. 1135 and 1137, public administrative hearing before the State Engineer, March 7, 2000.

**Parcel 1** - Exhibit LLL contains a "Water-right Application" dated September 11, 1920, covering the lands described as Parcel 1. The State Engineer finds the contract date is September 11, 1920.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is September 11, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>548</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a creek or natural drainage, natural vegetation and portion irrigated. The protestant provided evidence that out of the 8.00 acres comprising this existing place of use 7.50 acres were irrigated from 1962 through 1987.<sup>549</sup> The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

**III.**

**FORFEITURE**

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the

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<sup>548</sup> Exhibit No. 1138, public administrative hearing before the State Engineer, March 7, 2000.

<sup>549</sup> Exhibit No. 1140, public administrative hearing before the State Engineer, March 7, 2000.

Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is September 11, 1920, and therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>550</sup> which indicates from aerial photographs that from 1948 through 1987 the land use was described as a creek or natural drainage, natural vegetation and portion irrigated. At the 1989 administrative hearing, the applicants indicated in 1948 and 1986 the land use on this parcel was cultivated and barren land.<sup>551</sup> The protestant provided evidence that out of the 8.00 acres comprising this existing place of use 7.50 acres were irrigated from 1962 through 1987.<sup>552</sup> The applicant did not present any case at all, instead preferring to rely solely on the evidence submitted by the protestant. The applicant in closing argument alleged this is an intrafarm transfer, but presented no evidence in support of that contention.

The only evidence as to a farm unit is that found in the 1920 contract and that contract does not cover the land in Section 28, T.19N., R.30E., M.D.B.&M., which contains the proposed place of use. Exhibit No. 1139, which contains the 1985, 1986 and 1987 aerial photographs, makes it appear that both the existing and proposed places of use are within one field, but that is the only evidence aside from the water right application to support a claim of intrafarm transfer. The State Engineer finds no water was placed to beneficial use on 0.5 of an acre from 1948 through 1987, and the applicant did not provide sufficient evidence to support a

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<sup>550</sup> Exhibit No. 1138, public administrative hearing before the State Engineer, March 7, 2000.

<sup>551</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>552</sup> Exhibit No. 1140, public administrative hearing before the State Engineer, March 7, 2000.

claim that this is an intrafarm transfer.

IV.

**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.<sup>553</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>554</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>555</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on 0.50 of an acre from 1948 through 1987, and the applicant did not provide sufficient evidence to

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<sup>553</sup> 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).

<sup>554</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>555</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

support a claim that this is an intrafarm transfer. The protestant provided evidence that the 0.50 of an acre is covered by a slough (drain)<sup>556</sup> and this evidence was not rebutted by the applicant. The State Engineer finds this is a land use inconsistent with irrigation and the applicant did not provide any evidence to demonstrate a lack of intent to abandon the water right.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>557</sup>

##### **II.**

#### **PERFECTION**

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

##### **III.**

#### **FORFEITURE**

The State Engineer concludes the protestant proved the statutory period of non-use, the water right is subject to the forfeiture provision of NRS § 533.060, the applicant did not prove this is an intrafarm transfer and the water right appurtenant to 0.50 of an acre of Parcel 1 is subject to forfeiture.

##### **IV.**

#### **ABANDONMENT**

The State Engineer concludes that the protestant proved non-use for a substantial period and a land use inconsistent with irrigation, and that the applicant did not prove this is an intrafarm transfer or a lack of intent to abandon, therefore, the water right appurtenant to 0.50 of an acre of Parcel 1 is subject

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<sup>556</sup> Transcript, p. 5538, public administrative hearing before the State Engineer, March 7, 2000.

<sup>557</sup> NRS chapter 533 and Order of Remand from Federal District Court.

to abandonment.

**RULING**

The protest claims are upheld in part and overruled in part. The State Engineer's decision granting Application 51599 as to Parcel 1 is hereby affirmed in part. As to Parcel 1, 0.50 of an acre is declared forfeited and/or abandoned. Therefore, the permit granted under Application 51599 is amended to allow the transfer of water rights appurtenant to 7.50 acres of land totaling 26.25 acre-feet of water to be perfected at the proposed place of use. The applicants are hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water right that was declared forfeited and/or abandoned.

APPLICATION 51605

GENERAL

I.

Application 51605 was filed on December 4, 1987, by Lewis T. and Dolores Furgeson<sup>558</sup> to change the place of use of 24.08 acre-feet annually (however, upon analysis the State Engineer determined 20.93 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 342, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>559</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 3.15 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 24, T.19N., R.26E., M.D.B.&M.

**Parcel 2** - 2.20 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 24, T.19N., R.26E., M.D.B.&M.

The proposed places of use are described as 5.00 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  and 0.35 of an acre in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , both in Section 24, T.19N., R.26E., M.D.B.&M.

II.

Application 51605 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>560</sup> and more specifically on the grounds as follows:<sup>561</sup>

**Parcel 1** - Partial lack of perfection, partial forfeiture,  
partial abandonment

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<sup>558</sup> Application 51605 has been assigned in the records of the office of the State Engineer to the Trust Estate of B. Lorraine Griffin dated September 20, 1994, B. Lorraine Griffin, Trustee.

<sup>559</sup> Exhibit No. 1420, public administrative hearing before the State Engineer, April 13, 2000.

<sup>560</sup> Exhibit No. 1421, public administrative hearing before the State Engineer, April 13, 2000.

<sup>561</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

**Parcel 2** - Lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51605**

Exhibit LLL from the 1989 administrative hearing contains contracts covering the existing places of use under Application 51605.<sup>562</sup>

**Parcels 1 and 2** - Exhibit LLL contains a "Water-right Application for Lands in Private Ownership" under the name of Ernesto Dondero dated August 28, 1919, covering these existing places of use. The application notes on page 2 that on these lands there were 25 acres of vested water rights. Exhibit LLL also contains a document from the Churchill County Recorder dated March 28, 1918, which evidences a conveyance of the relevant property to Ernesto Dondero by deed dated February 1, 1918, along with 20 acres of vested water rights in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 24, and 2 $\frac{1}{2}$  acres of vested water rights in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 24, T.19N., R.26E., M.D.B.&M. The applicants provided a copy of the first page of an "Agreement" dated January 8, 1907, which indicates that in these two  $\frac{1}{4}$   $\frac{1}{4}$  sections of land there existed pre-Project vested water rights.<sup>563</sup>

By review of the TCID maps that are referenced in General Finding of Fact V, the State Engineer finds that the pre-Project vested water rights cover the existing places of use found in Parcel 2 and covers the southern existing place of use in Parcel 1. The northern existing place of use in Parcel 1 is indicated as being covered by an applied for water right. The State Engineer finds as to the northern existing place of use in Parcel 1 the contract date is August 28, 1919, and finds as to the remaining

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<sup>562</sup> Exhibit No. 1422, public administrative hearing before the State Engineer, April 13, 2000.

<sup>563</sup> Exhibit No. 1429, attachment B, public administrative hearing before the State Engineer, April 13, 2000.

existing places of use in Parcel 1 and as to Parcel 2 that the contract dates are January 8, 1907, and the water rights are based on pre-Project vested water rights.

II.

**PERFECTION**

**Parcel 1** - The contract dates are August 28, 1919, and January 8, 1907, but the 1907 water rights are based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>564</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as farm structures, natural vegetation, creek or natural drainage. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907/1919 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907/1919 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law. 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 2** - The contract date is January 8, 1907, but the water rights are based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

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<sup>564</sup> Exhibit No. 1425, public administrative hearing before the State Engineer, April 13, 2000.

Place(s) of Use"<sup>565</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as farm structures and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date as to the northern existing place of use in Parcel 1 is August 28, 1919, and therefore the water right is subject to the forfeiture provision of NRS § 533.060. The contract date as to southern existing place of use is January 8, 1907, the water right is based on pre-Project vested water rights and is not subject to the forfeiture provision of NRS § 533.060.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>566</sup> which indicates from

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<sup>565</sup> Exhibit No. 1425, public administrative hearing before the State Engineer, April 13, 2000.

<sup>566</sup> Exhibit No. 1425, public administrative hearing before the State Engineer, April 13, 2000.

aerial photographs that in 1948, 1962, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987, the land use on this parcel was described as farm structures, natural vegetation, creek or natural drainage. The State Engineer finds that no water was placed to beneficial use on the northern portion of the existing place of use from 1948 through 1987.

**Parcel 2** - The contract date is January 8, 1907; the water right is based on pre-Project vested water rights and is not subject to the forfeiture provision of NRS § 533.060.

The applicant provided evidence to support a claim that the existing and proposed places of use are within the same farm unit and these lands have been a farm unit since at least 1907.<sup>567</sup> The State Engineer finds evidence was provided that the transfers from Parcels 1 and 2 are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

#### IV.

##### 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.<sup>568</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

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<sup>567</sup> Exhibit No. 1429, attachments B through T, public administrative hearing before the State Engineer, April 13, 2000.

<sup>568</sup> 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).

surrounding circumstances."<sup>569</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>570</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>571</sup> which indicates from aerial photographs that in 1948, 1962, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as farm structures, natural vegetation, creek or natural drainage. The State Engineer finds that no water was placed to beneficial use on Parcel 1 from 1948 through 1987, and finds but for the farm structures, the land is not covered by an improvement inconsistent with irrigation.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>572</sup> which indicates from

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<sup>569</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>570</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>571</sup> Exhibit No. 1425, public administrative hearing before the State Engineer, April 13, 2000.

<sup>572</sup> Exhibit No. 1425, public administrative hearing before the State Engineer, April 13, 2000.

aerial photographs that in 1948, 1962, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as farm structures and natural vegetation. The State Engineer finds that no water was placed to beneficial use on Parcel 2 from 1948 through 1987, and finds but for the farm structures, the land is not covered by an improvement inconsistent with irrigation.

The applicant provided evidence to support a claim that the existing and proposed places of use under this application are within the same farm unit and these lands have been a farm unit since at least 1907.<sup>573</sup> The State Engineer finds evidence was provided that the transfer from Parcels 1 and 2 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>574</sup>

##### **II.**

#### **PERFECTION**

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcel 1 and lack of perfection as to Parcel 2.

##### **III.**

#### **FORFEITURE AND ABANDONMENT**

The State Engineer concludes as to Parcels 1 and 2 that the transfers are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

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<sup>573</sup> Exhibit No. 1429, attachments B through T, public administrative hearing before the State Engineer, April 13, 2000.

<sup>574</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**RULING**

The protest to Application 51605 is hereby overruled and the State Engineer's decision granting Application 51605 is hereby affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustments as to duty or acreages. Such adjustment will be dealt with at the time of filing proof of beneficial use and certificating the water right.

**APPLICATION 51735**

**GENERAL**

**I.**

Application 51735 was filed on January 5, 1988, by John Achurra<sup>575</sup> to change the place of use of 46.90 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 1, 2 and 3, Claim No. 3 Orr Ditch Decree, and Alpine Decree and Permit 47805.<sup>576</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 0.70 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 1, T.17N., R.28E., M.D.B.&M.

**Parcel 2** - 0.90 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 1, T.17N., R.28E., M.D.B.&M.<sup>577</sup>

**Parcel 3** - 3.90 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 1, T.17N., R.28E., M.D.B.&M.

**Parcel 4** - 0.90 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 1, T.17N., R.28E., M.D.B.&M.

**Parcel 5** - 6.10 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 1, T.17N., R.28E., M.D.B.&M.

**Parcel 6** - 0.90 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 1, T.17N., R.28E., M.D.B.&M.

The proposed places of use are described as 8.10 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 1.30 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , and 4.00 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , all in Section 1, T.17N., R.28E., M.D.B.&M.

**II.**

Application 51735 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>578</sup> and more specifically on the grounds as follows:<sup>579</sup>

<sup>575</sup> Application 51735 has been assigned in the records of the State Engineer to John J. and Norma J. Achurra.

<sup>576</sup> Exhibit Nos. 1102 and 1105, public administrative hearing before the State Engineer, March 7, 2000.

<sup>577</sup> Acreage moved to this existing place of use under Application/Permit 47805 granted pursuant to State Engineer's Ruling No. 3147, dated March 15, 1985, official records in the office of the State Engineer.

<sup>578</sup> Exhibit No. 1103, public administrative hearing before the State Engineer, March 7, 2000.

<sup>579</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

- Parcel 1** - Lack of perfection, forfeiture, abandonment  
**Parcel 2** - Partial lack of perfection, partial forfeiture,  
partial abandonment  
**Parcel 3** - Partial lack of perfection, forfeiture, abandonment  
**Parcel 4** - Lack of perfection, forfeiture, abandonment  
**Parcel 5** - Lack of perfection, forfeiture, abandonment  
**Parcel 6** - Partial lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51735**

Exhibit RRR from the 1991 administrative hearing contains contracts covering the existing places of use under Application 51735.<sup>580</sup>

**Parcel 1** - Exhibit RRR contains an "Application for Permanent Water Right" under the name of John Achurra dated April 19, 1950, covering this existing place of use. At the time of the administrative hearing, the hearing officer did not believe the contract covered this existing place of use, but upon further review, the State Engineer finds the contract does cover the  $\frac{1}{4}$   $\frac{1}{4}$  section of land and finds the contract date is April 19, 1950.

**Parcel 2** - Exhibit RRR contains an "Application for Permanent Water Right" under the name of John Achurra dated April 19, 1950, covering 10 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 1, T.17N., R.28E. M.D.B.&M. Attached to the 1950 application is a plat showing the location of the lands and acreages covered by the application, and the existing place of use in Parcel 2 is not covered by that 1950 application. This is because this water right was moved onto this existing place of use under Permit 47805, which was approved by the State Engineer in 1985,<sup>581</sup> which is part of those applications

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<sup>580</sup> Exhibit No. 1104, public administrative hearing before the State Engineer, March 7, 2000.

<sup>581</sup> State Engineer's Ruling No. 3147, dated March 15, 1985, official records in the office of the State Engineer.

the State Engineer refers to as Group 1. (See Footnote 1.) The Ninth Circuit Court of Appeals precluded the protestant from challenging the water rights granted in Group 1 on grounds not raised in its original protest and no court reversed the State Engineer's decision as to the water rights in Group 1; therefore, the State Engineer's decisions as to those water rights stand.

The State Engineer finds that under Permit 47805 multiple water right contracts with various contract dates were used to support the water rights moved to the proposed place of use under Application 47805 and then became commingled in that proposed place of use preventing one from then determining exactly which contract then supports the movement of water out of the proposed place of use authorized under Permit 47805. From an historical perspective it might be interesting to know, however, it has little to no relevance to the analysis to be performed as to this water right.

**Parcel 3** - Exhibit RRR contains a "Water-right Application for Lands in Private Ownership" dated August 14, 1915, covering this existing place of use. The State Engineer finds the contract date is August 14, 1915.

**Parcel 4** - Exhibit RRR contains an "Application for Permanent Water Right" dated November 20, 1929, covering the existing place of use in Parcel 4. The State Engineer finds the contract date is November 20, 1929.

**Parcels 5 and 6** - Exhibit RRR contains a "Water-right Application for Lands in Private Ownership" dated June 24, 1920, covering these existing places of use. The State Engineer finds the contract dates are June 24, 1920.

## II.

### PERFECTION

**Parcel 1** - The contract date is April 19, 1950. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

of Use"<sup>582</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as an on-farm supply ditch. The protestant did not provide any evidence other than a 1948 and 1962 photograph as its evidence that a water right was not perfected on this parcel between 1950 and 1962. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that by identifying the existing place of use as an on-farm supply ditch the protestant proved perfection of the water right since those ditches were historically required to be water righted.

**Parcel 2** - The State Engineer finds the water right was moved on to this parcel under Permit 47805, which was granted in 1985. The water right that was moved onto this existing place of use under Permit 47805 was requested to be moved again under Application 51735 before proof of beneficial use of the waters was even due to be filed under Permit 47805.<sup>583</sup> The State Engineer finds that Nevada water law allows for the filing of a change application based on a permitted water right where the water has not been applied to beneficial use before the change application is filed.<sup>584</sup> The State Engineer finds the protestant's evidence as to historical contract date and historical use from the 1940's through the mid-1980's at the existing place of use under Parcel 2 is completely irrelevant and makes no sense in light of the fact that a water right was not moved onto this parcel until Permit 47805 was granted in 1985.

**Parcel 3** - The contract date is August 14, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

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<sup>582</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

<sup>583</sup> File No. 47805, official records in the office of the State Engineer.

<sup>584</sup> NRS § 533.324 and 533.325.

Place(s) of Use"<sup>585</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, farm structures, delivery ditch, portion irrigated and on-farm supply ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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 4** - The contract date is November 20, 1929. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>586</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1929 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1929 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The applicant argues ditches that can be changed by the farmer are considered to be part of the irrigable area,<sup>587</sup> but did not cite to any specific

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<sup>585</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

<sup>586</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

<sup>587</sup> Transcript, p. 5433, public administrative hearing before the State Engineer, March 7, 2000.

section of 43 Code of Federal Regulations to support said contention nor was a copy of said alleged section provided to the Hearing Officer. The State Engineer finds it is not his job to do the applicant's legal research and if there is a regulation, which contradicts General Finding of Fact X, it should have been specifically cited to and brought to his attention at the administrative hearing. As set forth in General Finding of Fact X, the delivery ditch must not have been in existence at the time of the 1929 contract since delivery ditches were excluded by Reclamation Service Regulations from being considered irrigable areas.

**Parcel 5** - The contract date is June 24, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>588</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as an on-farm supply ditch, bare land, natural vegetation and another on-farm supply ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted, the evidence demonstrates perfection of that water right.

**Parcel 6** - The contract date is June 24, 1920. The PLPT provided

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<sup>588</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>589</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920 and 1948. Furthermore, as set forth in General Finding of Fact X, the delivery ditch must not have been in existence at the time of the 1920 contract as delivery ditches were excluded by Reclamation Service Regulations from being considered irrigable areas. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcels 1, 2, 3, 4, 5 and 6** - The applicant argues that since the application map found in Exhibit No.1105<sup>590</sup> is under the applicant's name the State Engineer should find this to be an

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<sup>589</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

<sup>590</sup> Exhibit No. 1105, public administrative hearing before the State Engineer, March 7, 2000.

intrafarm transfer. In these proceedings, the State Engineer has seen a water right being moved from lands not owned by an applicant, but which may be right next door to land owned by an applicant. In that instance the transfer does not qualify for the equitable treatment found in Judge McKibben's Order of September 3, 1998, as the water right is not being moved within the farm unit owned by the applicant. The State Engineer needs proof that all the lands are owned by the applicant and that proof was not given in this case. The applicant was present at the administrative hearing and could have been requested to so testify, but a strategy was chosen not to have him do so. The State Engineer finds sufficient evidence was not provided to support a claim that the water right transfers under Application 51735 are intrafarm transfers.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>591</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987, the land use on this parcel was described as an on-farm supply ditch. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that by identifying the existing place of use as an on-farm supply ditch the protestant proved beneficial use of the water right from 1948 through 1987, thereby precluding a claim of non-use.

**Parcel 2** - The State Engineer finds the water right being transferred under Application 51735 was moved onto the existing place of use under Permit 47805. Permit 47805 had not yet been certificated, and the doctrine of forfeiture does not apply to a permitted water right that has not yet been certificated. Therefore, the protestant's claim of forfeiture makes no sense as to this water right.

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<sup>591</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

**Parcel 3** - The contract date is August 14, 1915, and is therefore subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>592</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, farm structures, delivery ditch, portion irrigated and on-farm supply ditch. In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a farm yard, farm structures, delivery ditch and on-farm supply ditch. The protestant provided evidence that the on-farm supply ditch covers 0.30 of an acre along the northern border of the  $\frac{1}{4}$   $\frac{1}{4}$  of the section of land.<sup>593</sup> The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that by identifying the existing place of use as an on-farm supply ditch the protestant proved beneficial use of the water right from 1948 through 1987 thereby precluding a claim of non-use. The State Engineer finds that no water was placed to beneficial use on the 3.60-acre area described as a farmyard, farm structures or delivery ditch from 1948 through 1987.

**Parcel 4** - The contract date is November 20, 1929, and is therefore subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>594</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a delivery ditch. The State Engineer finds that no water was placed to beneficial use under the area described as a

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<sup>592</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

<sup>593</sup> Exhibit No. 1110, public administrative hearing before the State Engineer, March 7, 2000.

<sup>594</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

delivery ditch from 1948 through 1987.

**Parcel 5** - The contract date is June 24, 1920, and is therefore subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>595</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as an on-farm supply ditch, bare land, natural vegetation and another on-farm supply ditch. In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as an on-farm supply ditch, road and farm yard. The protestant provided evidence that the on-farm supply ditch covers 0.86 of an acre along the western border of the  $\frac{1}{4}$   $\frac{1}{4}$  of the section of land.<sup>596</sup> The State Engineer finds that no water was placed to beneficial use the on 5.24 acres described as a road and farmyard from 1962 through 1987. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that by identifying the existing place of use as an on-farm supply ditch the protestant proved beneficial use of the water right from 1948 through 1987, thereby precluding a claim of non-use as to the 0.86 of an acre along the western border of the  $\frac{1}{4}$   $\frac{1}{4}$  section of land.

**Parcel 6** - The contract date is June 24, 1920, and is therefore subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>597</sup> which indicates from aerial photographs that in 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a delivery ditch. The State Engineer finds that no water was placed to

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<sup>595</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

<sup>596</sup> Exhibit No. 1110, public administrative hearing before the State Engineer, March 7, 2000.

<sup>597</sup> Exhibit No. 1107, public administrative hearing before the State Engineer, March 7, 2000.

beneficial use under the area described as a delivery ditch from 1962 through 1987.

#### IV.

##### 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.<sup>598</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>599</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>600</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcels 1 - 6** - The State Engineer has already found sufficient evidence was not provided to support a claim that the transfers

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<sup>598</sup> 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).

<sup>599</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>600</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

under Application 51735 are intrafarm transfers.

**Parcel 1** - The State Engineer already found the protestant proved beneficial use of the water right from 1948 through 1987 thereby precluding a claim of non-use.

**Parcel 2** - The State Engineer finds that since the applicant filed change Application 51735 before the proof of beneficial use was even due under Permit 47805 there is insufficient evidence to support a claim of non-use at this existing place of use and there is evidence demonstrating a lack of intent to abandon the water right.

**Parcel 3** - The State Engineer already found that no water was placed to beneficial use on the 3.60 acres described as a farm yard, farm structures or delivery ditch from 1948 through 1987, and finds these land uses to be incompatible with irrigation. The State Engineer finds beneficial use of water on the 0.30 of an acre along the northern border of the  $\frac{1}{4}$   $\frac{1}{4}$  of the section of land thereby precluding a claim of non-use. The State Engineer finds the applicant did not provide any evidence to demonstrate a lack of intent to abandon the water right.

**Parcel 4** - The State Engineer already found that no water was placed to beneficial use under the area described as a delivery ditch from 1948 through 1987, and finds the land use incompatible with irrigation. The State Engineer finds the applicant did not provide any evidence to demonstrate a lack of intent to abandon the water right.

**Parcel 5** - The State Engineer already found that no water was placed to beneficial use on the 5.24 acre area described as a road and farm yard from 1962 through 1987, and finds these land uses to be incompatible with irrigation. The State Engineer finds beneficial use of water on the 0.86 of an acre along the western border of the  $\frac{1}{4}$   $\frac{1}{4}$  of the section of land thereby precluding a claim of non-use. The State Engineer finds the applicant did not provide any evidence to demonstrate a lack of intent to abandon

the water right.

**Parcel 6** - The State Engineer already found that no water was placed to beneficial use under the area described as a delivery ditch from 1962 through 1987, and finds the land use incompatible with irrigation. The State Engineer finds the applicant did not provide any evidence to demonstrate a lack of intent to abandon the water right.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>601</sup>

##### II.

#### **PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4, 5 and 6.

##### III.

#### **FORFEITURE**

The State Engineer concludes as to Parcel 1 the protestant proved use of the water thereby precluding a claim of forfeiture. The State Engineer concludes as to Parcel 2 that under Nevada water law a claim of forfeiture is irrelevant as the water right under Permit 47805 since it has not yet gone to certificate and the law allows for the filing of a change application on a permitted water right. The State Engineer concludes as to Parcel 3 that the protestant proved use of the water as to the 0.30 of an acre portion along the northern border thereby precluding a claim of forfeiture; however, as to the remaining 3.60 acres the protestant proved its claim of non-use for the statutory period. As to Parcel 4 the protestant proved non-use of the water for the statutory period. As to Parcel 5 the protestant proved use of the water as to the 0.86 of an acre portion along the western border

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<sup>601</sup> NRS chapter 533 and Order of Remand from Federal District Court.

thereby precluding a claim of forfeiture; however, as to the remaining 5.24 acres the protestant proved its claim of non-use for the statutory period. As to Parcel 6 the protestant proved non-use of the water for the statutory period.

**IV.**

**ABANDONMENT**

The State Engineer concludes as to Parcel 1 the protestant proved use of the water thereby precluding a claim of abandonment. The State Engineer concludes as to Parcel 2 that Nevada water law allows for the filing of a change application, it was done within a timely manner, there is no evidence of an intent to abandon the water right and the protestant did not prove its claim of abandonment. The State Engineer concludes as to Parcel 3 the protestant proved use of the water as to the 0.30 of an acre portion along the northern border thereby precluding a claim of abandonment; however, as to the remaining 3.60 acres the protestant proved its claim of abandonment. As to Parcel 4 the protestant proved its claim of abandonment. As to Parcel 5 the protestant proved use of the water as to the 0.86 of an acre portion along the western border thereby precluding a claim of forfeiture; however, as to the remaining 5.24 acres the protestant proved its claim of abandonment. As to Parcel 6 the protestant proved its claim of abandonment.

**RULING**

The protest to Application 51735 is hereby upheld in part and overruled in part. The State Engineer's decision granting Application 51735 as to Parcel 1, Parcel 2, 0.30 of an acre in Parcel 3, and 0.86 of an acre in Parcel 5 is hereby affirmed. The water rights appurtenant to the remaining 3.60 acres in Parcel 3, to Parcel 4, to the remaining 5.24 acres in Parcel 5 and to Parcel 6 are hereby declared forfeited and abandoned. Therefore, the permit granted under Application 51735 is amended to allow the transfer of water rights appurtenant to 2.76 acres of land

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totaling 9.66 acre-feet of water to be perfected at the proposed place of use. The applicants are hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were declared forfeited and/or abandoned.

**APPLICATION 51737**

Application 51737 was filed on January 5, 1988, by Corkill Brothers Inc., to change the place of use of 63.00 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 134, 306, 284 Orr Ditch Decree, and Alpine Decree and Permit 47869.<sup>602</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 0.73 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 13, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 3.97 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.
- Parcel 3 - 3.70 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.
- Parcel 4 - 1.80 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.
- Parcel 5 - 2.20 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.
- Parcel 6 - 1.10 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 19, T.18N., R.29E., M.D.B.&M.
- Parcel 7 - 4.50 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 29, T.18N., R.29E., M.D.B.&M.<sup>603</sup>

The proposed places of use are described as 1.60 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  and 2.50 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , both in Section 19, T.18N., R.29E., M.D.B.&M., 0.70 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$  and 6.00 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , both in Section 29, T.18N., R.29E., M.D.B.&M., and 6.40 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  and 0.80 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , both in Section 33, T.18N., R.29E., M.D.B.&M.

**II.**

Application 51737 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>604</sup> and more specifically on the grounds as follows:<sup>605</sup>

<sup>602</sup> Exhibit No. 1220, public administrative hearing before the State Engineer, April 11, 2000.

<sup>603</sup> Water transferred to this existing place of use under Permit 47869.

<sup>604</sup> Exhibit No. 1221, public administrative hearing before the State Engineer, April 11, 2000.

<sup>605</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Partial lack of perfection, forfeiture, abandonment
- Parcel 3 - Lack of perfection, forfeiture, abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 6 - Lack of perfection, abandonment
- Parcel 7 - Lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51737**

Parcel 1 - Exhibit RRR from the 1991 administrative hearing contains five<sup>606</sup> documents covering the  $\frac{1}{4}$   $\frac{1}{4}$  section of land encompassing this existing place of use.<sup>607</sup> The first is a "Certificate of Filing Water Right Application" dated September 29, 1910, under the name of Arthur Lowe which indicates that it covers land north of the county road in part of the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13 and the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. The second document is an "Agreement" dated August 17, 1917, between Arthur and Mabel Lowe and the United States pursuant to which pre-Project vested water rights were conveyed covering 11 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13, T.18N., R.28E., M.D.B.&M. those acres being north of the public highway or county road. The third is a "Water-right Application for Lands in Private Ownership" dated August 17, 1917, under the name of Arthur and Mabel Lowe which indicates that in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13, T.18N., R.28E., M.D.B.&M. north of the public highway or county road there were 13 acres of irrigable land upon which there were 11 acres of vested water rights. The fourth is an "Agreement" dated March 25, 1918, between Eugene and Susie Howard, J.L. and

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<sup>606</sup> The protestant in its Exhibit No. 1224 only refers to three documents.

<sup>607</sup> Exhibit No. 1222, public administrative hearing before the State Engineer, April 11, 2000.

Millie Cochran and the United States which evidences that within this  $\frac{1}{4}$   $\frac{1}{4}$  section of land there are 16 acres of irrigable land upon which there is a pre-Project vested water right. The fifth is a "Water-right Application for Lands in Private Ownership" filed on April 20, 1918, by Eugene and Susie Howard and J.L. and Millie Cochran which indicates that in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13, T.18N., R.28E., M.D.B.&M., lying south of the county road there were 16 irrigable acres covered by 16 acres of vested water rights.

The element, which appears to be determinative of which contracts are applicable, appears to be whether the existing place of use is north or south of the public highway/county road. By reviewing the TCID maps referenced in General Finding of Fact V, it appears that the existing place of use at issue in this parcel is south of an area which cuts across the  $\frac{1}{4}$   $\frac{1}{4}$  section as a road might. Therefore, the State Engineer believes the water right contracts at issue are those that go to those lands south of the public highway/county road. That is, the Howard/Cochran water right application of April 20, 1918, which ties directly to the agreement of March 25, 1918, which exchanged 16 acres of pre-Project vested water rights for Project water rights. The State Engineer finds that the 1910 certificate and the 1917 agreement and application are not the relevant documents. The State Engineer finds the contract date is March 25, 1918, but evidences that these water rights are based on pre-Project vested water rights, and therefore, are water rights that pre-date-March 22, 1913.

**Parcel 2** - Exhibit RRR from the 1991 administrative hearing contains documents covering the  $\frac{1}{4}$   $\frac{1}{4}$  section of land encompassing this existing place of use. The first is an "Agreement" dated March 25, 1918, between Eugene and Susie Howard, J.L. and Millie Cochran and the United States which evidences that within this  $\frac{1}{4}$   $\frac{1}{4}$  section of land there are 39 acres of irrigable land upon which

there is a pre-Project vested water right.<sup>608</sup> The second is a "Water-right Application for Lands in Private Ownership" filed April 20, 1918, by Eugene and Susie Howard and J.L. and Millie Cochran which indicates that in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. there were 40 irrigable acres of which 39 were covered by vested water rights and 1 acre of water right was applied for under that 1918 water right application.

The State Engineer finds by review of the TCID maps<sup>609</sup> and these contracts that 39 acres of this  $\frac{1}{4}$   $\frac{1}{4}$  section of land is covered by pre-Project vested water rights and that the 1 acre of applied for water rights under the 1918 application is the area covered by the existing place of use that runs along the western edge of the  $\frac{1}{4}$   $\frac{1}{4}$  section, with perhaps a very small portion of the existing place of use on the western edge overlapping in the area covered by the vested water rights. The State Engineer finds that for most of the existing place of use the contract date is March 25, 1918, however, those water rights are pre-Project vested water rights, and therefore, are rights that pre-date-March 22, 1913. As to that portion of the existing place of use along the western edge of the  $\frac{1}{4}$   $\frac{1}{4}$  section, 1 acre of the approximately 1.43<sup>610</sup> acres was that area added under the 1918 contract, and therefore, for the 1 acre on the western edge the contract date is April 20, 1918, and for the remaining acreage the contract date is March 25,

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<sup>608</sup> Exhibit No. 1222, public administrative hearing before the State Engineer, April 11, 2000.

<sup>609</sup> See, General Finding of Fact V.

<sup>610</sup> The numbers used here are a good example of distinctions being made on parcels so small that the numbers do not add up. The existing places of use under this parcel add up to 3.97 acres. The protestant provided evidence that for those parcels except that one found on the western edge of the  $\frac{1}{4}$   $\frac{1}{4}$  section the land amounts to 2.54 acres of land. Subtracting the 2.54 acres from the 3.97-acre total leaves 1.43 acres remaining, however, using an engineer's scale the land on the western edge of the existing place of use is estimated to be between 1.21 and 1.52 acres.

1918, but the water right is based on a pre-Project vested water right.

**Parcel 3** - Exhibit RRR from the 1991 administrative hearing contains documents covering the  $\frac{1}{4}$   $\frac{1}{4}$  section of land encompassing this existing place of use. The first document is a "Certificate of Filing Water Right Application" filed on September 29, 1910, by Arthur Lowe which indicates that within that part of the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13, and the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. lying north of the county road there were 42 irrigable acres.<sup>611</sup> The second document is a "Certificate of Filing Water Right Application" filed on October 17, 1910, by John L. Cochran which indicates that in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. lying south of the county road there were 36 irrigable acres. The third is an "Agreement" dated August 17, 1917, under the name of Arthur and Mabel Lowe which indicates that in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. north of the public highway or county road there was 1 acre of vested water rights. The fourth is a "Water-right Application for Lands in Private Ownership" dated August 17, 1917, between Arthur and Mabel Lowe and the United States which evidences that within this  $\frac{1}{4}$   $\frac{1}{4}$  section of land there were 3 acres of irrigable land that are north of the public highway or county road. The fifth is a "Water-right Application for Lands in Private Ownership" dated April 20, 1918, by Eugene and Susie Howard and J.L. and Millie Cochran which indicates that in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. there were 34 irrigable acres south of the county road that were applied for under an unrecorded water right application dated October 10, 1910.

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<sup>611</sup> The protestant did not identify this document as a relevant document (Exhibit No. 1224), but the applicant did (Exhibit 1231) list it as being related. The State Engineer believes it is related as the existing place of use on the eastern border of the  $\frac{1}{4}$   $\frac{1}{4}$  section has some land north of that area which on the TCID maps appears to be the road and has other land south of the road.

The State Engineer finds the lands on this existing place of use are within the area south of the public highway or county road referenced, they come through the Howard/Cochran chain which shows that in October 1910 there were 36 acres identified as irrigable lying south of the county road. The April 20, 1918, application ties itself directly to the October 1910 certificate. The State Engineer finds the contract date is October 17, 1910.

**Parcel 4** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" filed April 20, 1918, by Eugene and Susie Howard and J.L. and Millie Cochran which indicates that in the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M. there are 40 irrigable acres and that 40 acres of water rights were applied for under this 1918 application. The State Engineer finds the contract date is April 20, 1918.

**Parcel 5** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated April 20, 1918, by Eugene and Susie Howard and J.L. and Millie Cochran which indicates that in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.18N., R.28E., M.D.B.&M., there are 40 irrigable acres, that 2 acres of water rights were applied for under an unrecorded water right application dated October 10, 1910, and that 38 acres of water rights were applied for under this 1918 application. No documentation was entered into evidence as to the October 10, 1910, unrecorded water right application; therefore, the only evidence in the record is the April 20, 1918, contract. The State Engineer finds the contract date is April 20, 1918.

**Parcel 6** - Exhibit RRR from the 1991 administrative hearing contains an "Agreement" dated January 16, 1907, pursuant to which 5 acres of pre-Project water rights located in parts of the SE $\frac{1}{4}$  NW $\frac{1}{4}$  and the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T.18N., R.29E., M.D.B.&M., were exchanged for Project water rights. Exhibit RRR also contains a "Certificate of Filing Water Right Application" filed

by J.C. Bookout on September 29, 1910, which indicates that in the south part of the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T.18N., R.29E., M.D.B.&M. there are 30 irrigable acres. By review<sup>612</sup> of the TCID maps, the State Engineer finds the existing place of use is covered by the applied for water right and not the pre-Project vested water rights. The State Engineer finds the contract date is September 29, 1910.

**Parcel 7** - There are no documents in Exhibit RRR which cover Section 29, T.18N., R.29E., M.D.B.&M. The TCID maps<sup>613</sup> do not show a water right either vested or applied for covering this existing place of use. Water rights were moved on to this parcel under state water right Permit 47869. The State Engineer finds there is no relevant contract for this parcel, as the water rights were not moved on to this parcel until the State Engineer granted Permit 47869 on March 18, 1985.

## II.

### PERFECTION

**Parcel 1** - The contract date is March 25, 1918, but evidences that the water right is based on a pre-Project vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>614</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918/pre-Project and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel.

**Parcel 2** - The contract date for most of the parcel is March 25,

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<sup>612</sup> See, General Finding of Fact V.

<sup>613</sup> See, General Finding of Fact V.

<sup>614</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

1918, but is based on a pre-Project vested water right, and that as to 1 acre of the western edge the contract date is April 20, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>615</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch and portion irrigated. The protestant provided evidence that from 1948 through 1974 2.54 acres of the 3.97 acres comprising this existing place of use were irrigated.<sup>616</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the remaining portion of this parcel between 1918/pre-Project and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel.

**Parcel 3** - The contract date is October 17, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>617</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch and portion irrigated. The protestant provided evidence that from 1948 through 1974 1.45 acres of the 3.70 acres comprising this existing place of use were irrigated.<sup>618</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the remaining portion of this parcel between 1910 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact proved perfection on part of the parcel.

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<sup>615</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>616</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

<sup>617</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>618</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

**Parcel 4** - The contract date is April 20, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>619</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as an on-farm supply ditch, farmyard and portion irrigated. The protestant provided evidence that from 1948 through 1974 0.55 acres of the 1.80 acres comprising this existing place of use were irrigated,<sup>620</sup> and provided evidence that 0.81 of an acre of the existing place of use was covered by an on-farm supply ditch from 1948-1987. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those ditches were historically required to be water righted the evidence demonstrates perfection of that water to the date of the photograph. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact proved perfection on part of the parcel.

**Parcel 5** - The contract date is April 20, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>621</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and portion irrigated. The protestant provided evidence that from 1948 through 1974 1.10 acres of the 2.20 acres comprising this existing place of use were irrigated.<sup>622</sup> The State Engineer finds that a

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<sup>619</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>620</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

<sup>621</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>622</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

1948 photograph is not sufficient evidence to prove that a water right was never perfected on the remaining portion of this parcel between 1918 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact proved perfection on part of the parcel.

**Parcel 6** - The contract date is September 29, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>623</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1910 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel.

**Parcel 7** - There is no contract date for this parcel, as the water right was not moved onto the parcel until the State Engineer granted Permit 47869 on March 18, 1985. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>624</sup> which indicates from aerial photographs that from 1948 through 1985 the land use on this parcel was described as natural vegetation and delivery ditch. The State Engineer finds the protestant's evidence as to historical use from the 1948 through 1985 at the existing place of use on Parcel 7 is completely irrelevant and makes no sense in light of the fact that a water right was not moved on to this parcel until Permit 47869 was granted in 1985. The State Engineer finds the protestant's claim of lack of perfection only goes to the years 1986 and 1987 for which it provided evidence. Proof of beneficial use of the waters under Permit 47869 was not even due to be filed in the office of the State Engineer until April 18, 1989, which is after the date

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<sup>623</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>624</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

that change Application 51737 was filed. The State Engineer finds that Nevada water law allows for the filing of a change application on a valid permitted water right where the water has not been applied to beneficial use before the change application is filed.<sup>625</sup>

**III.**

**FORFEITURE**

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The State Engineer contract date is March 25, 1918, but evidences that the water right is based on pre-Project vested water rights, which are not subject to the forfeiture provision of NRS § 533.060.

**Parcel 2** - The contract date as to all but 1 acre along the western edge of the  $\frac{1}{4}$   $\frac{1}{4}$  of the section is March 25, 1918, but the water rights is based on pre-Project vested water rights, and therefore, is a right that pre-dates March 22, 1913, and is not subject to the forfeiture provision of NRS § 533.060. As to the 1 acre of the approximately 1.43 acres on the western edge the contract date is April 20, 1918.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>626</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch and a portion irrigated. In 1962, 1972, 1973 and 1974 the land use on the parcels making up this

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<sup>625</sup> NRS § § 533.324 and 533.325.

<sup>626</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

existing place of use were described as a delivery ditch, portion irrigated and farm yard. In 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as delivery ditch and farm yard. At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use on this parcel was described as corrals, road and ditch, and in 1989 the land use was described as stackyard, corrals and ditch.<sup>627</sup> The protestant also provided evidence that from 1948 through 1974 2.54 acres of the 3.97 acres comprising this existing place of use were irrigated<sup>628</sup> with the only remaining land use being that delivery ditch which is on the western edge of the existing place of use.

The protestant's evidence appears to contradict itself in that the protestant provided evidence in Table 2 that indicates that in the years 1972, 1973 and 1974 a farm yard occupied a portion of this existing place of use which contradicts its evidence that in these same years this land was irrigated all but for the delivery ditch on the western edge of the parcel. Furthermore, in Exhibit No. 1228, the ditch on the western edge of Parcel 3 is described as an on-farm supply ditch, however, the ditch on the western edge of Parcel 2, which is directly above Parcel 3, is described only as a delivery ditch. In Exhibit No. 1226, the protestant provided copies of aerial photographs from 1985, 1986 and 1987 which show no distinction between the ditch in Parcels 2 and 3.

The State Engineer finds that in light of the protestant's evidence that the ditch in Parcel 3 is an on-farm supply ditch, it is more likely than not that the ditch on the western edge of this parcel, which is connected to it and directly above it, is also an on-farm supply ditch. The State Engineer specifically adopts and

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<sup>627</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>628</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

incorporates General Finding of Fact VI and discounts some of the protestant's land use descriptions in favor of those made by the applicant. The State Engineer finds that from 1948 through 1987 there is not clear and convincing evidence as to the land use on the western edge of this existing place of use in that it is not clear and convincing whether the ditch is a TCID supply ditch or an on-farm, supply ditch. If it is an on-farm supply ditch the State Engineer specifically adopts and incorporates General Finding of Fact X, and finds since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water from 1948 through 1987. The State Engineer finds as to the remaining 2.54-acre portion of the existing place of use that no water was placed to beneficial use for the 12 year period from 1975 through 1987.

**Parcel 3** - The contract date is October 17, 1910, therefore, the water right is not subject to the forfeiture provision of NRS § 533.060.

**Parcel 4** - The contract date is April 20, 1918, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>629</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973 and 1974 the land use on this parcel was described as an on-farm supply ditch, farm yard and portion irrigated. In 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as on-farm supply ditch and farm yard. The protestant provided evidence that from 1948 through 1987 most of the western edge (0.81 of an acre) was covered by an on-farm supply ditch,<sup>630</sup> and that from 1948 through

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<sup>629</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>630</sup> Exhibit No. 1228, public administrative hearing before the State Engineer, April 11, 2000.

1974 0.55 of an acre was irrigated.<sup>631</sup> At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use on this parcel was described as ditch, road, barren land and cultivated land, and in 1989 the land use was described as a ditch and stockyard and road.<sup>632</sup>

The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those on-farm supply ditches were historically required to be water righted the evidence demonstrates beneficial use of that water to the date of the photograph of the 0.81 of an acre occupied by an on-farm supply ditch. The State Engineer finds that no water was placed to beneficial use for the 12 year period from 1975 through 1987 on the remaining 0.99 of an acre portion of this existing place of use.

**Parcel 5** - The contract date is April 20, 1918, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>633</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973 and 1974 the land use on this parcel was described as a road and portion irrigated. In 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a road and farm yard. The protestant provided evidence that from 1948 through 1974 the western portion of this existing place of use was irrigated.<sup>634</sup> At the 1991 administrative hearing, the applicant provided evidence that in

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<sup>631</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

<sup>632</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>633</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>634</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

1948 the land use on this parcel was described as a road and cultivated land, and in 1989 the land use was described as a road and stackyard.<sup>635</sup>

The State Engineer finds that no water was placed to beneficial use on these existing places of use for the 12 year period from 1975 through 1987, and no water was placed to beneficial use on the eastern portion of this existing place of use, which was taken up by the road, for the 39 year period from 1948 through 1987.

**Parcel 7** - The water right on this existing place was moved here under Permit 47869, which was granted by the State Engineer on March 18, 1985. Since Application 47869 was part of those applications known as Group 1, as referenced in Footnote 1, which the Ninth Circuit Court of Appeals held that the protestant was precluded on appeal from challenging on the grounds of forfeiture or abandonment, the State Engineer finds that once Permit 47869 was granted water use at the historic existing place of use under Application 47869 became irrelevant and is not part of the analysis as to forfeiture under Permit 47869.

Proof of beneficial use of the waters under Permit 47869 was not due to be filed in the office of the State Engineer until April 18, 1989, which is after the date that Application 51737 was filed. Under Nevada water law, only a water right that has gone to beneficial use and been issued a certificate is subject to the doctrine of forfeiture. Since proof of beneficial use was not even due to be filed until after this transfer application was filed, there is no issue as to forfeiture as Nevada water law allows for the filing of a change application on a permit that has not yet gone to beneficial use.<sup>636</sup>

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<sup>635</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>636</sup> NRS § § 533.324, 533.325.

IV.

**INTRAFARM**

The applicant provided testimony and evidence that all the existing and proposed places of use under this application are owned by Corkill Brothers, Inc., that he was instructed by the Bureau of Reclamation through the TCID to file the change applications to cover ground that he had already been farming, that TCID got a directive from the Bureau of Reclamation to get the water off the ditches and roads or they were going to lose it and they were given a time frame in which to accomplish said task, and that he has paid all the taxes and assessments.<sup>637</sup> The State Engineer finds the water rights requested for transfer under Application 51737 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 as set forth in Judge McKibben's Order of September 3, 1998.

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.<sup>638</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>639</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>640</sup> however,

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<sup>637</sup> Exhibit Nos. 1236, 1237, 1238; Transcript, pp. 5816-5833, public administrative hearing before the State Engineer, April 11, 2000.

<sup>638</sup> 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).

<sup>639</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>640</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>641</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a delivery ditch. At the 1991 administrative hearing, the applicant provided evidence that in 1948 and 1989 the land use on this parcel was described as a ditch.<sup>642</sup> The protestant's evidence appears to perhaps contradict itself because in this parcel the protestant is merely calling the ditch a delivery ditch, however, the exact same ditch two parcels down (Parcel 4) is called an on-farm supply ditch.<sup>643</sup> In Exhibit No. 1226, the protestant provided copies of aerial photographs from 1985, 1986 and 1987 which show no distinction between the ditch in Parcel 4 and those is Parcels 1 and 2.

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<sup>641</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>642</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>643</sup> Exhibit No. 1228, public administrative hearing before the State Engineer, April 11, 2000.

The State Engineer is not convinced that this is an off-farm delivery ditch, rather than an on-farm supply ditch. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since on-farm supply ditches were historically required to be water righted the evidence perhaps demonstrates beneficial use of that water from 1948 through 1987, therefore, there is not clear and convincing evidence of non-use of the water right or of a land use inconsistent with irrigation.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>644</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a delivery ditch and a portion irrigated. In 1962, 1972, 1973 and 1974 the land use on the parcels making up this existing place of use were described as a delivery ditch, portion irrigated and farm yard. In 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a delivery ditch and farm yard. At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use on this parcel was described as corrals, road and ditch, and in 1989 the land use was described as stackyard, corrals and ditch.<sup>645</sup> The protestant provided evidence that from 1948 through 1974 2.54 acres of the 3.97 acres comprising this existing place of use were irrigated<sup>646</sup> with the only remaining land use being that delivery ditch which is on the western edge of the existing place of use.

The protestant's evidence appears to contradict itself in that the protestant provided evidence in Table 2 that indicates that in the years 1972, 1973 and 1974 a farm yard occupied a

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<sup>644</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>645</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>646</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

portion of this existing place of use which contradicts its evidence that in these same years this land was irrigated all but for the delivery ditch on the western edge of the parcel. Furthermore, in Exhibit No. 1228, the ditch on the western edge of Parcel 4 is described as an on-farm supply ditch, however, the ditch on the western edge of Parcel 2, which is directly above Parcel 4, is described only as a delivery ditch. In Exhibit No. 1226, the protestant provided copies of aerial photographs from 1985, 1986 and 1987 which show no distinction between the ditch in Parcels 1, 2 or 4.

The State Engineer finds that in light of the protestant's evidence that the ditch in Parcel 4 is an on-farm supply ditch, it is more likely than not that the ditch on the western edge of this parcel, which is connected to it and directly above it, is also an on-farm supply ditch. The State Engineer specifically adopts and incorporates General Finding of Fact VI and discounts some of the protestant's land use descriptions in favor of those made by the applicant. The State Engineer finds that from 1948 through 1987 there is not clear and convincing evidence as to the land use on the western edge of this existing place of use in that it is not clear and convincing whether the ditch is a TCID supply ditch or an on-farm supply ditch. If it is an on-farm supply ditch the State Engineer specifically adopts and incorporates General Finding of Fact X, and finds since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water from 1948 through 1987. The State Engineer finds as to the remaining portion of the existing place of use that no water was placed to beneficial use for the 12-year period from 1975 through 1987. The State Engineer finds as to the farmyard that it is a use inconsistent with irrigation.

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>647</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973 and 1974 the land use on this parcel was described as a road and portion irrigated. In 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a road and farmyard. At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use on this parcel was described as cultivated land, ditch and road, and in 1989 the land use was described as stackyard and road.<sup>648</sup> The protestant provided evidence that from 1948 through 1974 1.45 acres of the 3.70 acres comprising this existing place of use were irrigated,<sup>649</sup> with the only remaining land use being that road which is on the eastern edge of the existing place of use. The State Engineer finds that no water was placed to beneficial use for the 39-year period from 1948 through 1987 on the eastern portion of this existing place of use, and that no water was placed to beneficial use for the 12-year period from 1975 through 1987 on the western portion of this existing place of use. The State Engineer finds as to the road and farmyard that it is a use inconsistent with irrigation.

**Parcel 4** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>650</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973 and 1974 the land use on this parcel was described as an on-farm supply ditch, farm yard and portion irrigated. In 1975, 1977, 1980, 1984, 1985,

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<sup>647</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>648</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>649</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

<sup>650</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

1986 and 1987 the land use was described as on-farm supply ditch and farm yard.

The protestant provided evidence that from 1948 through 1987 most of the western edge (0.81 of an acre) was covered by an on-farm supply ditch,<sup>651</sup> and evidence that from 1948 through 1974 the eastern portion of the existing place of use was irrigated.<sup>652</sup> At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use on this parcel was described as ditch, road, barren land and cultivated land, and in 1989 the land use was described as a ditch and stackyard.<sup>653</sup>

The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since those on-farm supply ditches were historically required to be water righted the evidence demonstrates beneficial use of that water to the date of the photograph on the 0.81 of an acre occupied by an on-farm supply ditch. The State Engineer finds that no water was placed to beneficial use for the 12-year period from 1975 through 1987 on the 0.99 of an acre remaining portion of this existing place of use. The State Engineer finds the use is inconsistent with irrigation as to all but the on-farm supply ditch.

**Parcel 5** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>654</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973 and 1974 the land use on this parcel was described as a road and portion irrigated. In 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the

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<sup>651</sup> Exhibit No. 1228, public administrative hearing before the State Engineer, April 11, 2000.

<sup>652</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

<sup>653</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>654</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

land use was described as a road and farmyard. The protestant provided evidence that from 1948 through 1974 the western portion of this existing place of use was irrigated.<sup>655</sup> At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use on this parcel was described as a road and cultivated land, and in 1989 the land use was described as a road and stackyard.<sup>656</sup>

The State Engineer finds that no water was placed to beneficial use on these existing places of use for the 12 year period from 1975 through 1987, and no water was placed to beneficial use on the eastern portion of this existing place of use, which was taken up by the road, for the 39 year period from 1948 through 1987. The State Engineer finds the use is inconsistent with irrigation.

**Parcel 6** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>657</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a road. At the 1991 administrative hearing, the applicant provided evidence that in 1989 the land use was described as a ditch.<sup>658</sup> The State Engineer specifically adopts and incorporates General Finding of Fact VI and taking the applicant's land use description finds no water was placed to beneficial on Parcel 6 for the 39 year period from 1948 through 1987 and the land use is inconsistent with irrigation.

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<sup>655</sup> Exhibit No. 1227, public administrative hearing before the State Engineer, April 11, 2000.

<sup>656</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>657</sup> Exhibit No. 1225, public administrative hearing before the State Engineer, April 11, 2000.

<sup>658</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

**Parcel 7** - The water right on this existing place was moved here under Permit 47869, which was granted by the State Engineer on March 18, 1985. Since Application 47869 was part of those applications known as Group 1, as referenced in Footnote 1, which the Ninth Circuit Court of Appeals held that the protestant was precluded on appeal from challenging on the grounds of forfeiture or abandonment, the State Engineer finds that once Permit 47869 was granted water use at the historic existing place of use under Application 47869 became irrelevant and is not part of the analysis as to abandonment under Permit 47869.

Proof of beneficial use of the waters under Permit 47869 was not due to be filed in the office of the State Engineer until April 18, 1989, which is after the date that Application 51737 was filed. Since proof of beneficial use was not even due to be filed until after this transfer application was filed and the date of proof of beneficial use and the filing of the change application are so close in time, there is no issue as to abandonment as Nevada water law allows for the filing of a change application on a valid permit that has not yet gone to beneficial use.<sup>659</sup>

The State Engineer finds as to all parcels that the evidence demonstrates a lack of intent to abandon the waters rights in that the water rights were being used by Corkill Brothers, Inc. on their land and they were instructed to file the change application in order to get the records in order to reflect the actual water use. The State Engineer finds that the water rights requested for transfer under Application 57137 are intrafarm transfers not subject to the doctrine of abandonment as set forth in Judge McKibben's Order of September 3, 1998.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the

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<sup>659</sup> NRS § 533.324, 533.325.

subject matter of this action and determination.<sup>660</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6, or 7.

The State Engineer finds the protestant proved partial perfection as to Parcels 2, 3, 4 and 5. The State Engineer concludes as to Parcel 7 that perfection is not an issue since Nevada water law allows for the filing of a change application on a valid permit that has not gone to beneficial use.

**III.**

**FORFEITURE**

**Parcel 1** - The State Engineer concludes as to Parcel 1 that the water rights are based on pre-Project vested water rights, therefore, they are not subject to the forfeiture provision of NRS § 533.060.

**Parcel 2** - The State Engineer concludes as to Parcel 2 that most of the existing place of use is covered by water rights, which are based on pre-Project vested water rights, therefore, they are not subject to the forfeiture provision of NRS § 533.060. As to the 1 acre on the western portion of the existing place of use, the water right is subject to the forfeiture provision of NRS § 533.060, however, the evidence as to non-use is not clear and convincing since it is unclear whether the area is covered by a TCID ditch or an on-farm supply ditch.

**Parcel 3** - The State Engineer concludes the water rights are not subject to the forfeiture provision of NRS § 533.060.

**Parcel 4** - The State Engineer concludes the protestant proved non-use on 0.99 of an acre for the statutory period.

**Parcel 5** - The State Engineer concludes the protestant proved non-use for the statutory period.

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<sup>660</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**Parcel 7** - The State Engineer concludes the doctrine of forfeiture is not relevant to the water right at issue here since it was not moved onto this existing place of use until Permit 47869 was granted in 1985, and since Permit 47869 had not gone to certificate by the filing of proof of beneficial use before change Application 51737 was filed, the doctrine of forfeiture is inapplicable since as to permitted water rights the doctrine only applies to those that have gone to certificate.

The State Engineer concludes that all the water rights requested for transfer under Application 51737 are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

#### IV.

#### **ABANDONMENT**

**Parcels 1, 2, 3, 4, 5, 6 and 7** - The State Engineer concludes the water rights requested for transfer are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes the use of water on other portions of the farm unit precludes a finding of an intent to abandon the water right, therefore, the protestant did not prove its claims of abandonment.

#### **RULING**

The protest to Application 51737 is overruled and the State Engineer's decision granting Application 51737 is hereby affirmed.

**APPLICATION 52335**

Application 52335 was filed on July 18, 1988, by Bernard and Barbara Ponte to change the place of use of 17.12 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Serial Number 537-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>661</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 0.97 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.& M.

**Parcel 2** - 0.68 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.& M.

**Parcel 1** - 0.34 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.& M.

**Parcel 4** - 0.21 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.& M.

**Parcel 5** - 0.19 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.& M.

**Parcel 6** - 2.50 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 25, T.19N., R.28E., M.D.B.& M.

The proposed place of use is described as 4.89 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.19N., R.28E., M.D.B.&M.

**II.**

Application 52335 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>662</sup> and more specifically on the grounds as follows:<sup>663</sup>

**Parcel 1** - Abandonment

**Parcel 2** - Lack of perfection, abandonment

**Parcel 3** - Lack of perfection, abandonment

**Parcel 4** - Lack of perfection, abandonment

**Parcel 5** - Abandonment

**Parcel 6** - Abandonment.

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<sup>661</sup> Exhibit No. 1123, public administrative hearing before the State Engineer, March 7, 2000.

<sup>662</sup> Exhibit No. 1124, public administrative hearing before the State Engineer, March 7, 2000.

<sup>663</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 52335**

Exhibit XXX from the 1991 administrative hearing contain contracts or evidence as to contracts covering the existing places of use under Application 52335.<sup>664</sup>

**Parcel 1** - Exhibit XXX contains an "Agreement" dated December 31, 1907, covering this existing place of use and which evidences the water right is based on a pre-Project vested water right. The State Engineer finds the contract date is December 31, 1902.

**Parcels 2, 3 and 4** - Exhibit XXX contains two documents covering these existing places of use. The first is an "Agreement" dated December 6, 1907, and which evidences the water rights are based on pre-Project vested water rights. The second is a "Certificate of Filing Water Right Application" dated January 25, 1908, which indicates that in 1908 Warren Williams applied for water rights to cover 760 acres of land of which 600 acres were covered by pre-Project vested water rights. The State Engineer finds the documents are close enough in time to warrant application of the doctrine of relation back, and finds the contract dates are December 6, 1907.

**II.**

**PERFECTION**

**Parcel 2 and 3** - The contract dates are December 6, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>665</sup> which indicates from aerial photographs that in 1948 the land uses on these parcels were described as residential. At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land was under

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<sup>664</sup> Exhibit Nos. 1125 and 1127, public administrative hearing before the State Engineer, March 7, 2000.

<sup>665</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

cultivation.<sup>666</sup> At the 2000 administrative hearing, the applicant testified in his recollection the area was all farmed.<sup>667</sup> The protestant did not provide any evidence other than a 1948 photograph as its evidence that water rights were not perfected on these parcels between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water rights were never perfected on these parcels between 1907 and 1948, therefore, the protestant did not prove its claims of lack of perfection on these parcels. If the water rights are part of the pre-Project vested water rights, the State Engineer specifically adopts and incorporates General Finding of Fact IX, which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law. If the water rights are part of the applied for rights under the 1908 contract, the State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water rights under these contracts were perfected at some point in time prior to the contract dates.

**Parcel 4** - The contract date is December 6, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>668</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. At the 1991 administrative hearing, the applicant provided evidence that in 1948 the land use was a feedlot.<sup>669</sup> The protestant did not

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<sup>666</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>667</sup> Transcript, p. 5510, public administrative hearing before the State Engineer, March 7, 2000.

<sup>668</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

<sup>669</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. If the water right is part of the pre-Project vested water rights, the State Engineer specifically adopts and incorporates General Finding of Fact IX, which held that pre-Project vested water rights exchanged for Project water rights were perfected as a matter of fact and law. If the water right is part of the applied for rights under the 1908 contract, the State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

### 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.<sup>670</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>671</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>672</sup> however, abandonment will not be presumed, but rather must be clearly and

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<sup>670</sup> 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).

<sup>671</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>672</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>673</sup> which indicates from aerial photographs that from 1948 through 1980 the land use on this parcel was described as irrigated. In 1984, 1985, 1986, 1987 and 1988 the land use was described as residential. The applicant testified that at the time he purchased the property around 1980 it was irrigated, but that it now has townhouses and apartments on it.<sup>674</sup>

The applicant testified that in the 1970's he went to TCID to inquire about transferring water rights he owned and was told they were not permitting transfers of water rights,<sup>675</sup> but when transfers were permitted again he filed this change application to move water rights to his home ranch. The State Engineer finds no water was placed to beneficial use on Parcel 1 from 1984 through the filing of the change application in 1988, however, the State

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<sup>673</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

<sup>674</sup> Transcript, p. 5514, public administrative hearing before the State Engineer, March 7, 2000.

<sup>675</sup> Transcript, pp. 5504-5506, public administrative hearing before the State Engineer, March 7, 2000.

Engineer finds this is not a substantial period of non-use before the filing of the change application. The State Engineer finds the applicant demonstrated that he attempted to exercise dominion and control over the water rights when he tried to move them in the 1970's, but was told he could not, and that he took the opportunity when available to move the water right to his home ranch by the filing of this change application thereby demonstrating a lack of intent to abandon the water rights appurtenant to this parcel.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>676</sup> which indicates from aerial photographs that from 1948 through 1988 the land use on this parcel was described as residential. At the 1991 administrative hearing, the applicant provided evidence that the existing place of use was cultivated in 1948.<sup>677</sup> The applicant testified that when he bought the property around 1980 it was irrigated.<sup>678</sup>

This parcel demonstrates the difficulty in using the aerial photographs to make land use determinations as minute as the ones the protestant's witnesses are making here from these particular aerial photographs. The aerial photographs show an area that is being or was converted from a farm to residential areas over time. While the photographs generally show a residential area, they are not specific enough to pick out the very small parcels like those at issue here. Evidence in various hearings over the years, and testimony provided by the applicant in this hearing - in fact for this specific parcel, has indicated that within those residential

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<sup>676</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

<sup>677</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>678</sup> Transcript, pp. 5510-5511, public administrative hearing before the State Engineer, March 7, 2000.

areas there were still pieces of ground being farmed, and there still existed irrigation structures.<sup>679</sup> This points out that the protestant's witness' testimony as to the surrounding area being generally residential is in many instances an insufficient analysis to determine the land use on small parcels of land within those areas.

The applicant testified that in the late 1970's he went to TCID to inquire about transferring water rights he owned and was told they were not permitting transfers of water rights,<sup>680</sup> but when transfers were permitted again he filed this change application to move water rights to his home ranch.

The State Engineer finds no water was placed to beneficial use on Parcel 2 from 1980 through the filing of the change application in 1988, and the land use is inconsistent with irrigation. However, in light of the fact that transfers were not being permitted in the early 1980's, and that the applicant had earlier inquired as to transferring water to his home ranch demonstrating an attempt at dominion and control over use of the water rights, and filed this application when transfers were again permitted, the State Engineer finds the applicant demonstrated a lack of intent to abandon the water rights appurtenant to this parcel.

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>681</sup> which indicates from

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<sup>679</sup> Mr. Mahannah has testified to this in various transfer case water right applications under consideration over the years. Mr. Ponte testified that this parcel was irrigated at the time he purchased it in 1980 and when he developed the property he had to put in a culvert in order for irrigation water to pass. Transcript, p. 5511, public administrative hearing before the State Engineer, March 7, 2000.

<sup>680</sup> Transcript, pp. 5504-5506, public administrative hearing before the State Engineer, March 7, 2000.

<sup>681</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

aerial photographs that from 1948 through 1988 the land use on this parcel was described as residential. At the 1991 administrative hearing, the applicant provided evidence that the existing place of use was cultivated in 1948.<sup>682</sup> The applicant's evidence as to this parcel is difficult and confusing to follow in the record. The applicant testified this land was purchased before 1964,<sup>683</sup> but then later testified that all the lands within the Section 36 existing places of use were purchased in the late 1970's.<sup>684</sup>

The applicant testified that the land on the northern edge in this existing place of use was where he built the first house in the neighborhood, but that it was a vacant lot at the time he purchased it.<sup>685</sup> No evidence was provided by the applicant as to the other parcel in this existing place of use; therefore, the only evidence the State Engineer has on this record is that from the 1991 hearing that this parcel was cultivated in 1948<sup>686</sup> as opposed to the protestant's evidence that it was a residential area in 1948. The State Engineer specifically adopts and incorporates General Finding of Fact VI and finds that in 1948 the land use was irrigation.

The State Engineer finds as to the parcel on the northern edge of this  $\frac{1}{4}$   $\frac{1}{4}$  section of land that no water has been placed to beneficial use from 1977 through 1988. The State Engineer finds

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<sup>682</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>683</sup> Transcript, p. 5516, public administrative hearing before the State Engineer, March 7, 2000.

<sup>684</sup> Transcript, p. 5517, public administrative hearing before the State Engineer, March 7, 2000.

<sup>685</sup> Transcript, pp. 5516-5517, public administrative hearing before the State Engineer, March 7, 2000.

<sup>686</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

since the applicant testified that the other parcel was a vacant lot when he purchased it and did not provide any evidence that he irrigated the parcel, there is clear and convincing evidence that no water was placed to beneficial use from 1977 through 1988, but since there is no evidence as to when a house was built, there is no evidence to support any finding of how long the lot has been covered by a use inconsistent with irrigation. Evidence was provided that as of the 2000 administrative hearing the lot is covered by a house,<sup>687</sup> but there is no evidence as to when the structure was constructed.

However, in light of the fact that transfers were not being permitted at the time, and that the applicant had earlier inquired as to transferring the water to his home ranch and filed this application when transfers were again permitted, the State Engineer finds the applicant demonstrated a lack of intent to abandon the water rights appurtenant to this parcel.

**Parcel 4** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>688</sup> which indicates from aerial photographs that in 1948, 1962 and 1972 the land use on this parcel was described as bare land. From 1973 through 1988 the land use was described as residential. The applicant testified that 40 years ago he built a house for this father-in-law on this parcel.<sup>689</sup> However, that once he bought his home ranch in 1969 he went to TCID to inquire about transferring the water rights and was told they were not permitting transfers of water

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<sup>687</sup> Exhibit No. 1131, public administrative hearing before the State Engineer, March 7, 2000.

<sup>688</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

<sup>689</sup> Transcript, pp. 5518-5519, public administrative hearing before the State Engineer, March 7, 2000.

rights,<sup>690</sup> but when transfers were permitted again he filed this change application to move water rights to his home ranch. The State Engineer finds no water was placed to beneficial use on Parcel 3 from 1973 through the filing of the change application in 1988.

However, in light of the fact that transfers were not being permitted at the time, and that the applicant had earlier inquired as to transferring the water to his home ranch and filed this application when transfers were again permitted, the State Engineer finds the applicant demonstrated a lack of intent to abandon the water rights appurtenant to this parcel.

**Parcel 5** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>691</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as irrigated. In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use was described as residential. The applicant's evidence as to this parcel is difficult and confusing to follow in the record. The applicant testified this land was purchased before 1964<sup>692</sup>, but then later testified that all the lands within the Section 36 existing places of use were purchased in the late 1970's.<sup>693</sup> The applicant did not provide any evidence as to the land development, if any, on this

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<sup>690</sup> Transcript, pp. 5504-5506, public administrative hearing before the State Engineer, March 7, 2000.

<sup>691</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

<sup>692</sup> Transcript, p. 5516, public administrative hearing before the State Engineer, March 7, 2000.

<sup>693</sup> Transcript, p. 5517, public administrative hearing before the State Engineer, March 7, 2000.

parcel, but that it was a vacant lot at the time he purchased it.<sup>694</sup>

The State Engineer finds since the applicant testified that the parcel was a vacant lot when he purchased it and did not provide any evidence that he irrigated the parcel, there is clear and convincing evidence that no water was placed to beneficial use from 1977 through 1988, but since there is no evidence as to when a house was built, there is no evidence to support any finding of how long the lot has been covered by a use inconsistent with irrigation. Evidence was provided that as of the 2000 administrative hearing the lot is covered by a house,<sup>695</sup> but there is no evidence as to when the structure was constructed.

However, in light of the fact that transfers were not being permitted at the time, and that the applicant had earlier inquired as to transferring the water to his home ranch and filed this application when transfers were again permitted, the State Engineer finds the applicant demonstrated a lack of intent to abandon the water right appurtenant to this parcel.

**Parcel 6** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>696</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as residential and portion irrigated. In 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use was described as residential. The applicant testified that he bought the property in 1964, and that after he bought the home ranch in 1969 in the 1970's he went to TCID to inquire about transferring water rights he owned and was told they

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<sup>694</sup> Transcript, pp. 5516-5517, public administrative hearing before the State Engineer, March 7, 2000.

<sup>695</sup> Exhibit No. 1131, public administrative hearing before the State Engineer, March 7, 2000.

<sup>696</sup> Exhibit No. 1128, public administrative hearing before the State Engineer, March 7, 2000.

were not permitting transfers of water rights,<sup>697</sup> but when transfers were permitted again he filed this change application to move water rights to his home ranch. The applicant testified that he specifically reserved the water rights off these parcels when the houses were sold for the purpose of transferring them to the home ranch.<sup>698</sup>

The State Engineer finds the applicant did not provide any evidence as to when the houses were built or that he applied any water on the parcels making up this existing place of use after he purchased the land in 1964, therefore, the only evidence the State Engineer has is that provided by the protestant. The State Engineer finds that no water was placed to beneficial use on the parcels comprising Parcel 6 from 1964 through 1988 and the land use is inconsistent with irrigation.

However, in light of the fact that transfers were not being permitted at the time, that the applicant had reserved the water rights out of the deeds on those parcels, and that the applicant had earlier inquired as to transferring the water to his home ranch and filed this application when transfers were again permitted, the State Engineer finds the applicant demonstrated a lack of intent to abandon the water rights appurtenant to this parcel.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>699</sup>

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<sup>697</sup> Transcript, pp. 5504-5506, public administrative hearing before the State Engineer, March 7, 2000.

<sup>698</sup> Transcript, pp. 5508, 5513, public administrative hearing before the State Engineer, March 7, 2000.

<sup>699</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 2, 3 and 4.

**III.**

**ABANDONMENT**

The State Engineer concludes the protestant did not prove its claims of abandonment as to Parcels 1, 2, 3, 4, 5 and 6.

**RULING**

The protest to Application 52335 is hereby overruled and the State Engineer's decision granting Application 52335 is hereby affirmed.

APPLICATION 52545

GENERAL

I.

Application 52545 was filed on September 23, 1988, by John Juelson<sup>700</sup> to change the place of use of 87.50 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 192-2 and 4-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>701</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 9.55 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 04, T.18N., R.29E., M.D.B.&M.

Parcel 2 - 3.45 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 04, T.18N., R.29E., M.D.B.&M.

Parcel 3 - 0.95 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 01, T.17N., R.28E., M.D.B.&M.

Parcel 4 - 5.05 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 01, T.17N., R.28E., M.D.B.&M.

Parcel 5 - 0.85 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 02, T.17N., R.28E., M.D.B.&M.

Parcel 6 - 5.15 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 02, T.17N., R.28E., M.D.B.&M.

The proposed places of use are described as 5.50 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  and 2.70 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , both in Section 1, T.17N., R.28E., M.D.B.&M., 9.95 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 6.85 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , both in Section 2, T.17N., R.28E., M.D.B.&M. By letter dated March 13, 1998, the applicant withdrew 0.06 of an acre from the Parcel 1 request for transfer, withdrew 0.22 of an acre from the Parcel 2 request for transfer, withdrew 0.65 of an acre from the Parcel 4 request for transfer, withdrew 0.21 of an acre from the Parcel 5 request for transfer, and withdrew 0.07 of an acre from the Parcel 6 request for transfer.<sup>702</sup>

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<sup>700</sup> There is a request pending in the office of the State Engineer requesting assignment of Application 52545 to Barbara Juelson.

<sup>701</sup> Exhibit No. 1321, public administrative hearing before the State Engineer, April 13, 2000.

<sup>702</sup> Exhibit No. 1322, public administrative hearing before the State Engineer, April 13, 2000.

**II.**

Application 52545 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>703</sup> and more specifically on the grounds as follows:<sup>704</sup>

- Parcel 1** - Partial lack of perfection, forfeiture, abandonment
- Parcel 2** - Partial lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, forfeiture; abandonment
- Parcel 4** - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 5** - Lack of perfection, forfeiture, abandonment
- Parcel 6** - Partial lack of perfection, partial forfeiture, partial abandonment.

By letter dated March 25, 1998, the United States Bureau of Reclamation requested that the protestant withdraw its protest to this transfer on the grounds that after review of the lands withdrawn from the application all of the remaining places of use appeared on the "composite map" and were eligible for transfer, however, the protestant declined to withdraw its protest.<sup>705</sup>

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 52545**

Exhibit XXX from the April 1991 administrative hearing contains contracts covering the existing places of use under Application 52545.<sup>706</sup>

**Parcels 1 and 2** - Exhibit XXX contains a "Certificate of Filing

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<sup>703</sup> Exhibit No. 1323, public administrative hearing before the State Engineer, April 13, 2000.

<sup>704</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

<sup>705</sup> File No. 52545, official records in the office of the State Engineer.

<sup>706</sup> Exhibit No. 1324, public administrative hearing before the State Engineer, April 13, 2000.

Water Right Application" dated December 24, 1907, which provides for water rights for 56 acres of irrigable land in the S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 4, T.18., R.29E., M.D.B.&M. The State Engineer finds the contract dates are December 24, 1907.

**Parcel 3** - Exhibit XXX contains two documents covering this existing place of use. The first is an "Application for Permanent Water Right" dated July 14, 1943, which provides for 12 irrigable acres within Lot 4, Section 1, T.17N., R.28E., M.D.B.&M. The second document is an "Application for Permanent Water Right" dated June 16, 1948, which provides for water rights for 32 acres of irrigable land in Lot 4 of Section 1, T.17., R.28E., M.D.B.&M., and indicates that in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land that there were 12 acres of previous water rights and that 20 acres were added under the 1948 application. The State Engineer finds the contract dates are July 14, 1943 and June 16, 1948.

**Parcel 4** - Exhibit XXX contains two documents covering this existing place of use. The first is an "Application for Permanent Water Right" dated November 5, 1929, pursuant to which 27 acres of water rights were applied for in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land. The second document is an "Application for Permanent Water Right" dated June 16, 1948, which provides for water rights for the 30 acres of irrigable land in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 1, T.17N., R.28E., M.D.B.&M., and indicates that in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land that there were 27 acres of previous water rights and that 3 acres were added under the 1948 application. The State Engineer finds the contract dates are November 5, 1929, and June 16, 1948.

**Parcel 5** - Exhibit XXX contains two documents covering this existing place of use. The first is an "Application for Permanent Water Right" dated November 14, 1929, which provides for 3 acres of irrigable land within 10 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, T.17N., R.28E., M.D.B.&M. with a specific description of the location, that being, "beginning at the northeast corner of the Northeast quarter of the Northeast quarter (NE $\frac{1}{4}$  NE $\frac{1}{4}$ ) of Section 2,

running thence South 726 feet, thence East 600 feet, thence North 726 feet, thence West 600 feet to the place of beginning." The second document is an "Application for Permanent Water Right" dated June 16, 1948, which provides for water rights for the 11 acres of irrigable land in the E $\frac{1}{2}$  and the SW $\frac{1}{4}$  Lot 1 of Section 2, T.17., R.28E., M.D.B.&M., and indicates that in this section of land that there were 10 acres of previous water rights and that 11 acres were added under the 1948 application. The State Engineer finds the contract dates are November 14, 1929, and June 16, 1948.

**Parcel 6** - Exhibit XXX contains two documents covering this existing place of use. The first is an "Application for Permanent Water Right" dated November 5, 1929, pursuant to which 14 acres of water rights were applied for in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land. The second document is an "Application for Permanent Water Right" dated June 16, 1948, which provides for water rights for the 17 acres of irrigable land in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 2, T.17., R.28E., M.D.B.&M., and indicates that in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land that there were 14 acres of previous water rights and that 3 acres were added under the 1948 application. The State Engineer finds the contract dates are November 5, 1929, and June 16, 1948.

## II.

### PERFECTION

**Parcel 1** - The contract date is December 24, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>707</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drainage ditch and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The applicant withdrew 0.06 of an acre from the southern portion of this existing place of use (that portion shown in white on the

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<sup>707</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

southern portion of the protestant's Exhibit No. 1329). The protestant provided evidence that from 1948 through 1980 9.0 acres of this parcel had been irrigated.<sup>708</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the rest of this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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 2** - The contract date is December 24, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>709</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drainage ditch and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The applicant withdrew 0.22 of an acre from the southern portion of this existing place of use (that portion shown in white on the southern portion of the protestant's Exhibit No. 1329). The protestant provided evidence that from 1948 through 1980 3.05 acres of this parcel had been irrigated.<sup>710</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the rest of this parcel between 1907 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State

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<sup>708</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

<sup>709</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>710</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

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 3** - The contract dates are July 14, 1943, and June 16, 1948. It is not clear from the evidence which contract - the 1943 or the 1948 - applies to which land in this parcel and that it important information which is lacking. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>711</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and portion irrigated. The protestant did not provide any evidence other than a 1948 and 1962 photograph as its evidence that a water right was not perfected on this parcel between 1943/1948 and 1948/1962. The protestant provided evidence that from 1948 through 1980 0.60 of an acre of this 0.95 of an acre parcel had been irrigated.<sup>712</sup> The State Engineer finds that 1948 and 1962 photographs showing bare land and a portion irrigated are not sufficient evidence to prove that a water right was never perfected on this parcel between 1943/1948 and 1948/1962. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel, and in fact, the protestant proved that part of its claim of lack of perfection is without merit.

**Parcel 4** - The contract dates are November 5, 1929, and June 16, 1948. It is not clear from the evidence which contract - the 1943 or the 1948 - applies to which land in this parcel and that is important information which is lacking. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

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<sup>711</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>712</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

of Use"<sup>713</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a road and portion irrigated. The protestant did not provide any evidence other than 1948 and 1962 photographs as its evidence that a water right was not perfected on this parcel between 1929/1948 and 1948/1962. The protestant provided evidence that from 1948 through 1988 4.40 acres of the 4.40 acres remaining after the withdrawal had been irrigated.<sup>714</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1929/1948 and 1948. The State Engineer finds the protestant did not prove its claim of partial lack of perfection on this parcel, and in fact, the protestant proved that its claim of lack of perfection (as well as its claims of forfeiture and abandonment) is without merit as its own evidence shows the areas remaining after withdrawal as irrigated throughout the entire time frame of its evidence.

**Parcel 5** - The contract dates are November 14, 1929, and June 16, 1948. It is not clear from the evidence which contract - the 1929 or the 1948 - applies to which land in this parcel and that is important information, which is lacking. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>715</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. In 1962 the land use was described as a drainage ditch and natural vegetation. The protestant did not provide any evidence other than 1948 and 1962 photographs as its evidence that a water right was not perfected on this parcel between 1929/1948 and 1948/1962.

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<sup>713</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>714</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

<sup>715</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

The protestant provided evidence that from 1986 through 1988 0.24 of an acre of the 0.64 of an acre parcel remaining after the withdrawal had been irrigated.<sup>716</sup> The State Engineer finds that a 1948 and 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1929/1948 and 1948/1962, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

**Parcel 6** - The contract dates are November 5, 1929, and June 16, 1948. It is not clear from the evidence which contract - the 1929 or the 1948 - applies to which land in this parcel and that is important information, which is lacking. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>717</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and portion irrigated. In 1962 the land use was described as bare land, natural vegetation and a portion irrigated. The protestant did not provide any evidence other than a 1948 and 1962 photograph as its evidence that a water right was not perfected on this parcel between 1929/1948 and 1948/1962. The protestant provided evidence that from 1948 through 1988 4.99 acres of the 4.99 acres remaining after the withdrawal had been irrigated.<sup>718</sup> The State Engineer finds that a 1948 and 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1929/1948 and 1948/1962, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel.

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<sup>716</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

<sup>717</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>718</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

III.

**FORFEITURE**

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The State Engineer finds that since the contract date is December 24, 1907, the water right was initiated in accordance with the law in effect prior to March 22, 1913, and therefore, is not subject to the forfeiture provision of NRS § 533.060.

**Parcel 2** - The State Engineer finds that since the contract date is December 24, 1907, the water right was initiated in accordance with the law in effect prior to March 22, 1913, and therefore, is not subject to the forfeiture provision of NRS § 533.060.

**Parcel 3** - The contract dates are July 14, 1943, and June 16, 1948, therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>719</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and portion irrigated. In 1962, 1972, 1973, 1974, 1975, 1977 and 1980 the land use on this parcel was described as a drainage ditch and portion irrigated. In 1984, 1985, 1986, 1987 and 1988 the land use was described as a drainage ditch and road. The protestant provided evidence that from 1948 through 1980 0.60 of an acre of the 0.95 of an acre in this parcel had been irrigated.<sup>720</sup> The protestant's witness testified that when he did his field inspection in 2000 that what

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<sup>719</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>720</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

he had described as a road was found to be an on-farm supply ditch which he believes was added after 1988,<sup>721</sup> and testimony was provided that the drain ditch does not start until about ½ way across the ¼ ¼ section.<sup>722</sup> The State Engineer finds there is not clear and convincing evidence as to the land use described as a road, because based on the protestant's own evidence it appears that it could have been an on-farm supply ditch which the State Engineer has held demonstrates beneficial use of the water.<sup>723</sup> The State Engineer is not convinced the on-farm supply ditch appeared after 1988 as the agent for the applicant testified that he believed the application was moving water off an on-farm supply ditch.<sup>724</sup> As to the 0.35 of an acre covered by the drain ditch, the State Engineer finds that no water was placed to beneficial use for the 26 year period from 1962 through 1988.

**Parcel 4** - The contract dates are November 5, 1929, and June 16, 1948, therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>725</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use was described as a road and portion irrigated. The protestant provided evidence that from 1948 through 1988 4.40 acres of the

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<sup>721</sup> Transcript, p. 6008; Exhibit No. 1330, photograph 13-32, public administrative hearing before the State Engineer, April 13, 2000.

<sup>722</sup> Transcript, p. 6041, public administrative hearing before the State Engineer, April 13, 2000.

<sup>723</sup> See, General Finding of Fact X.

<sup>724</sup> Transcript, p. 6040, public administrative hearing before the State Engineer, April 13, 2000.

<sup>725</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

4.40 acres remaining after the withdrawal had been irrigated.<sup>726</sup> The State Engineer finds that the protestant's own evidence shows beneficial use of the water throughout the time frame of its evidence, therefore, its claim of forfeiture is without merit.

**Parcel 5** - The contract dates are November 14, 1929, and June 16, 1948, therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>727</sup> which indicates from aerial photographs that in 1948 the land use was described as natural vegetation. In 1962, 1972, 1973, 1974, 1975, 1977 and 1980 the land use was described as a drainage ditch and natural vegetation. In 1984 and 1985 the land use was described as a drainage ditch and bare land. In 1986, 1987 and 1988 the land use was described as a drainage ditch, bare land and portion irrigated. The protestant provided evidence that from 1986 through 1988 0.24 of an acre of the 0.64 of an acre remaining after the withdrawal had been irrigated.<sup>728</sup> The State Engineer finds no water was placed to beneficial use on 0.40 of an acre along the northern edge of the  $\frac{1}{4}$   $\frac{1}{4}$  for the 40-year period from 1948 through 1988.

**Parcel 6** - The contract dates are November 5, 1929, and June 16, 1948, therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>729</sup> which indicates from aerial photographs that in 1948 the land use was

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<sup>726</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

<sup>727</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>728</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

<sup>729</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

described as natural vegetation and portion irrigated. In 1962, 1972, 1973, 1974, 1975, 1977 and 1980 the land use was described as bare land, natural vegetation and portion irrigated. In 1984 the land use was described as a road, natural vegetation and portion irrigated. In 1985, 1986, 1987 and 1988 the land use was described as a road, natural vegetation, portion irrigated and drainage ditch. The protestant provided evidence that from 1948 through 1988 4.99 acres had been irrigated.<sup>730</sup> The protestant witness admitted as to this existing place of use that it was a very fine line whether the entire parcel was irrigated or not. The State Engineer finds that after the withdrawal only 4.99 acres remained in this existing place of use. The State Engineer finds there is not clear and convincing evidence of non-use and finds the protestant proved 4.99 acres were irrigated from 1948 through 1988.

#### IV.

##### 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.<sup>731</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>732</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>733</sup> however,

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<sup>730</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

<sup>731</sup> 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).

<sup>732</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>733</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>734</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977 and 1980 the land use on this parcel was described as a drainage ditch and portion irrigated. In 1984, 1985, 1986, 1987 and 1988 the land use was described as a drainage ditch and bare land. The protestant provided evidence that from 1948 through 1980 9.00 acres of the 9.49 acres remaining in this parcel after the withdrawal had been irrigated.<sup>735</sup> A witness for the applicant indicated that after he bought the land in 1980 he did not apply any irrigation water to it because he was prevented from irrigating it as TCID would not honor a easement to bring water through a different delivery system than the historical one, that TCID told him to use the original take out which was not on property he owned and was on the property of a person he did not get along with, that he attempted 3 times to get the water to the

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<sup>734</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>735</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

property through a different ditch, finally selling the water to the applicant in 1987.<sup>736</sup> The State Engineer finds that the drainage ditch only takes up 0.49 of an acre of this existing place of use and that use is incompatible with irrigation. The State Engineer finds as to the 9.00 acres described as bare land from 1980 through 1988, that use is not incompatible with irrigation. The State Engineer finds the applicant provided evidence of a lack of intent to abandon the water right. While no water was placed to beneficial use on this parcel from 1980 through the filing of the change application in 1988 it was not for lack of trying.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>737</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977 and 1980 the land use on this parcel was described as a drainage ditch and portion irrigated. In 1984, 1985, 1986, 1987 and 1988 the land use was described as a drainage ditch and bare land. The protestant provided evidence that from 1948 through 1980 3.05 acres of the 3.23 acres remaining in this parcel after the withdrawal had been irrigated.<sup>738</sup> A witness for the applicant indicated that after he bought the land in 1980 he did not apply any irrigation water to it because he was prevented from irrigating it as TCID would not honor a easement to bring water through a different delivery system than the historical one, that TCID told him to use the original take out which was not on property he owned and was on the property of a person he did not get along with, that he attempted 3 times to get the water to the

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<sup>736</sup> Transcript, pp. 6018-6022, Exhibit No. 1337, public administrative hearing before the State Engineer, April 13, 2000.

<sup>737</sup> Exhibit No. 1327, public administrative hearing before the State Engineer, April 13, 2000.

<sup>738</sup> Exhibit No. 1329, public administrative hearing before the State Engineer, April 13, 2000.

property through a different ditch, finally selling the water to the applicant in 1987.<sup>739</sup> The State Engineer finds that the drainage ditch only takes up 0.18 of an acre of this existing place of use and that use is incompatible with irrigation. The State Engineer finds as to the 3.05 acres described as bare land from 1980 through 1988, that use is not incompatible with irrigation. The State Engineer finds the applicant provided evidence of a lack of intent to abandon the water right. While no water was placed to beneficial use on this parcel from 1980 through the filing of the change application in 1988 it was not for lack of trying.

**Parcel 3** - The State Engineer has already found that there is not clear and convincing evidence as to the land use described as a road, because based on the protestant's own evidence it appears that could have been an on-farm supply ditch which the State Engineer has held demonstrates beneficial use of the water.<sup>740</sup> As to the 0.35 of an acre covered by the drain ditch, the State Engineer has already found that no water was placed to beneficial use for the 26 year period from 1962 through 1988 and finds the use is incompatible with irrigation.

**Parcel 4** - The State Engineer has already found that the protestant's own evidence shows beneficial use of the water throughout the time frame of its evidence, therefore, its claim of partial abandonment is without merit.

**Parcel 5** - The State Engineer has already found that no water was placed to beneficial use on 0.40 of an acre along the northern edge of the  $\frac{1}{4}$   $\frac{1}{4}$  for the 40-year period from 1948 through 1988.

**Parcel 6** - The State Engineer has already found that there is not clear and convincing evidence of non-use and finds the protestant

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<sup>739</sup> Transcript, pp. 6018-6022, Exhibit No. 1337, public administrative hearing before the State Engineer, April 13, 2000.

<sup>740</sup> See, General Finding of Fact X.

proved the existing place of use was irrigated from 1948 through 1988.

The applicant alleges that the water rights requested for transfer from Parcels 3, 4, 5 and 6 are intrafarm transfers and as to these parcels provided deeds to support its claim that the transfers are intrafarm transfers.<sup>741</sup> The State Engineer finds as to Parcel 3, 4, 5 and 6 that both the existing and proposed places of use are within the applicants farm and are therefore intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>742</sup>

##### **II.**

#### **PERFECTION**

The State Engineer concludes the protestant did not prove its claims of partial lack of perfection as to Parcels 1, 2, 4 and 6 or its claims of lack of perfection as to Parcels 3 and 5.

##### **III.**

#### **FORFEITURE**

The State Engineer concludes as to Parcels 1 and 2 that the contracts alone demonstrate that the water rights were initiated prior to March 22, 1913, and therefore, are not subject to the forfeiture provision of NRS § 533.060. The State Engineer concludes as to Parcels 4 and 6 that the protest claims are without merit as beneficial use of the water throughout the time frame was proved by the protestant's own witness and there is not clear and convincing evidence of non-use of the water on these

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<sup>741</sup> Exhibit Nos. 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349 and 1350, public administrative hearing before the State Engineer, April 13, 2000.

<sup>742</sup> NRS chapter 533 and Order of Remand from Federal District Court.

parcels. The State Engineer concludes as to Parcel 3 that the protestant proved non-use on 0.35 of an acre and as to Parcel 5 proved non-use on 0.40 of an acre for the statutory period, but that the transfers are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

**IV.**

**ABANDONMENT**

The State Engineer concludes as to Parcels 1 and 2 that the protestant did not prove its claim of abandonment. The State Engineer concludes as to Parcels 4 and 6 that the protest claims are without merit as beneficial use of the water throughout the time frame was proved by the protestant's own witness and there is not clear and convincing evidence of non-use of the water on these parcels. The State Engineer concludes as to Parcel 3 that the protestant proved non-use on 0.35 of an acre and as to Parcel 5 proved non-use on 0.40 of an acre for the substantial period of time, and proved a land use inconsistent with irrigation, but the transfers are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the protestant did not prove its claims of abandonment.

**RULING**

The protest to Application 52545 is hereby overruled and the State Engineer's decision granting Application 52545 is hereby affirmed.

**APPLICATION 52549**

**GENERAL**

**I.**

Application 52549 was filed on September 23, 1988, by Maie and Myrl Nygren to change the place of use of 28.00 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 550-3 and 37, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>743</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 3.84 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 35, T.19N., R.28E., M.D.B.&M.

**Parcel 2** - 4.16 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 35, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 8.00 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 8, T.17N., R.29E., M.D.B.&M.

Application 52549 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>744</sup> and more specifically on the grounds as follows:<sup>745</sup>

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

**Parcel 2** - Lack of perfection, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 52549**

Exhibit RRR from the April 1991 administrative hearing contains contracts covering these existing places of use.<sup>746</sup>

**Parcel 1** - Exhibit RRR contains a "Water-right Application" dated

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<sup>743</sup> Exhibit No. 1275, public administrative hearing before the State Engineer, April 12, 2000.

<sup>744</sup> Exhibit No. 1276, public administrative hearing before the State Engineer, April 12, 2000.

<sup>745</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

<sup>746</sup> Exhibit No. 1277, public administrative hearing before the State Engineer, April 12, 2000.

October 28, 1914, covering the existing place of use. The State Engineer finds the contract date is October 28, 1914.

**Parcel 2** - Exhibit RRR contains a "Certificate of Filing Water-right Application" dated April 12, 1912, covering the existing place of use. The State Engineer finds the contract date is April 12, 1912.

## II.

### PERFECTION

**Parcel 1** - The contract date is October 28, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>747</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is April 12, 1912. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>748</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not

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<sup>747</sup> Exhibit No. 1280, public administrative hearing before the State Engineer, April 12, 2000.

<sup>748</sup> Exhibit No. 1280, public administrative hearing before the State Engineer, April 12, 2000.

perfected on this parcel between 1912 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1912 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

**Parcel 1** - The contract dates is October 28, 1914, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>749</sup> which indicates from aerial photographs that from 1948 through 1988 the land use on this parcel was described as a drain ditch and natural vegetation.

The State Engineer finds there is clear and convincing evidence that no water was placed to beneficial use on the existing place of use for the 40-year period from 1948 through 1988.

### IV.

#### 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.<sup>750</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

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<sup>749</sup> Exhibit No. 1280, public administrative hearing before the State Engineer, April 12, 2000.

<sup>750</sup> 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).

surrounding circumstances."<sup>751</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>752</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already held that no water was placed to beneficial use on this parcel for the 40-year period from 1948 through 1988. The State Engineer finds the land covered by the drain is a land use inconsistent with irrigation, however, there is no proof the remaining land use is inconsistent with irrigation. The State Engineer finds no evidence was provided to demonstrate a lack of intent to abandon the water rights.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>753</sup> which indicates from aerial photographs that from 1948 through 1988 the land use on this parcel was described as a drain ditch and natural vegetation. The State Engineer finds there is clear and convincing evidence

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<sup>751</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>752</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>753</sup> Exhibit No. 1280, public administrative hearing before the State Engineer, April 12, 2000.

that no water was placed to beneficial use on the existing place of use for the 40-year period from 1948 through 1988. The State Engineer finds the land covered the drain is a land use inconsistent with irrigation, however, there is no proof the remaining land use is inconsistent with irrigation. The State Engineer finds no evidence was provided to demonstrate a lack of intent to abandon the water rights.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>754</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1 and 2.

**III.**

**FORFEITURE**

**Parcel 1** - The State Engineer concludes that the protestant proved the statutory period of non-use, the water right on Parcel 1 is subject to the forfeiture provision of NRS § 533.060, and the water right appurtenant to Parcel 1 is subject to forfeiture.

**IV.**

**ABANDONMENT**

**Parcel 1** - The water right appurtenant to this parcel is below declared forfeited, therefore, the State Engineer concludes the PLPT's claim of abandonment is moot.

**Parcel 2** - The State Engineer concludes there is clear and convincing evidence of non-use of the water right appurtenant to Parcel 2 for a substantial period of time, there is evidence that a portion of the land is covered by a use inconsistent with irrigation and that the applicant did not provide evidence to

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<sup>754</sup> NRS chapter 533 and Order of Remand from Federal District Court.

demonstrate a lack of intent to abandon the water right.

**RULING**

The protest to Application 52549 is hereby upheld. The water right appurtenant to Parcel 1 is hereby declared forfeited, and the water right appurtenant to Parcel 2 is declared abandoned. The State Engineer's decision granting the transfer of water rights under Application 52549 is hereby rescinded and no water rights are available to be transferred under Application 52549; therefore, Application 52549 is denied.

**APPLICATION 52550**

**GENERAL**

**I.**

Application 52550 was filed on September 23, 1988, by Albert A. Mussi<sup>755</sup> to change the place of use of 124.43 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 622-3, 624 and 3057, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>756</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 7.20 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 4, T.19N., R.29E., M.D.B.&M.

**Parcel 2** - 5.40 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 4, T.19N., R.29E., M.D.B.&M.

**Parcel 3** - 6.65 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 4, T.19N., R.29E., M.D.B.&M.

**Parcel 4** - 9.00 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 4, T.19N., R.29E., M.D.B.&M.

**Parcel 5** - 3.65 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 5, T.19N., R.29E., M.D.B.&M.

**Parcel 6** - 0.95 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 33, T.20N., R.29E., M.D.B.&M.

**Parcel 7** - 2.55 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 33, T.20N., R.29E., M.D.B.&M.

**Parcel 8** - 0.15 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 25, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 3.40 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , 7.20 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 10.90 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 5.95 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , 0.10 of an acre in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 0.20 of an acre in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , all in Section 4, T.19N., R.29E., M.D.B.&M., 3.50 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  in Section 5, T.19N., R.29E., M.D.B.&M., 1.55 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  and 2.75 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , both in Section 33, T.20N., R.29E., M.D.B.&M.

By letter dated January 16, 1996, the applicant withdrew the Parcels 1, 2, 3 and 5 requests for transfer, and withdrew 5.20

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<sup>755</sup> The records of the State Engineer indicate a request for conveyance is on file requesting assignment of Application 52550 to the Albert A. and Delores B. Mussi Family Trust.

<sup>756</sup> Exhibit No. 1406, public administrative hearing before the State Engineer, April 13, 2000.

acres from the Parcel 4 request for transfer.<sup>757</sup> By letter dated February 17, 2000, the applicant withdrew another 0.17 of an acre from the Parcel 4 request for transfer, and withdrew the Parcel 8 request for transfer.<sup>758</sup>

**II.**

Application 52550 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>759</sup> and more specifically on the grounds as follows:<sup>760</sup>

- Parcel 1 - None
- Parcel 2 - None
- Parcel 3 - None
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - None
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Lack of perfection, forfeiture, abandonment
- Parcel 8 - Lack of perfection, abandonment.

**FINDINGS OF FACT**

**I.**

**PROTEST CLAIMS**

The State Engineer finds that since the applicant withdrew the entire request for transfer from Parcel 8 there is no pending transfer from that parcel to support any protest claims.

**II.**

**CONTRACT DATES 52550**

Exhibit XXX from the April 1991 administrative hearing

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<sup>757</sup> Exhibit No. 1407, public administrative hearing before the State Engineer, April 13, 2000.

<sup>758</sup> Exhibit No. 1408, public administrative hearing before the State Engineer, April 13, 2000.

<sup>759</sup> Exhibit No. 1409, public administrative hearing before the State Engineer, April 13, 2000.

<sup>760</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

contains contracts covering the existing places of use as listed under Application 52550.<sup>761</sup>

**Parcel 4** - Exhibit XXX contains an "Application for Permanent Water Right" filed by Albert Mussi dated December 29, 1955, covering this existing place of use. This application notes that in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land that no other water rights existed. The applicant provided evidence of an "Agreement" dated June 19, 1903, whereby George Ernst exchanged pre-Project vested water rights for Project water rights. This 1903 Agreement indicates that Ernst had 550 acres of land under irrigation within 6 sections of land, specifically within Sections 13, 34 and 35, T.20N., R.29E., M.D.B.&M., Sections 3 and 4, T.19N., R.29E., M.D.B.&M., and Section 19, T.21R., R.30E., M.D.B.&M.<sup>762</sup> However, those water rights were exchanged under the 1903 Agreement for 160 acres of water rights located within Townships 19 and 20 North, Range 29 East, M.D.B.&M. In order to determine the location of any vested water rights, as opposed to those water rights applied for under the 1955 application, the State Engineer reviewed the TCID maps.<sup>763</sup> The TCID maps do not show any vested water rights as being located in Section 4, T.19N., R.29E., M.D.B.&M., and the 1955 application notes that in this  $\frac{1}{4}$   $\frac{1}{4}$  section of land that no other water rights existed. It appears that upon entering the 1903 contract that any pre-Project vested water rights that may have existed in Section 4, T.19N., R.29E., M.D.B.&M. were extinguished in the exchange since there is no evidence of any pre-Project vested water rights being in Section 4.

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<sup>761</sup> Exhibit No. 1410, public administrative hearing before the State Engineer, April 13, 2000.

<sup>762</sup> Exhibit No. 1419, Attachment B, public administrative hearing before the State Engineer, April 21, 2000.

<sup>763</sup> See, General Finding of Fact V.

While the evidence indicates that this land was part of the Ernst farm since before 1903, the evidence does not show that a water right existed on this existing place of use until December 29, 1955, and there is insufficient evidence to apply the doctrine of relation back. The State Engineer finds the contract date is December 29, 1955.

**Parcels 6 and 7** - Exhibit XXX contains an "Application for Permanent Water Right" filed by Mary Mussi dated March 14, 1961, covering these existing places of use. This application notes that in these  $\frac{1}{4}$   $\frac{1}{4}$  sections of land that no other water rights existed. The applicant provided evidence that this land was not patented until November 17, 1953,<sup>764</sup> and no evidence was provided as to a water right contract that existed prior to the patent. The State Engineer finds the contract dates are March 14, 1961.

## II.

### PERFECTION

**Parcel 4** - The contract date is December 29, 1955. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>765</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as natural vegetation. The protestant provided evidence, which shows that this  $\frac{1}{4}$   $\frac{1}{4}$  section of land is along a river channel with a concentration of irrigated lands on either side of the river changing to what appears to be native vegetation on either side of the irrigated lands.<sup>766</sup> While the protestant's aerial photographic evidence just referenced goes to photographs taken in the mid-

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<sup>764</sup> Exhibit No. 1419, Attachment F, public administrative hearing before the State Engineer, April 21, 2000.

<sup>765</sup> Exhibit No. 1413, public administrative hearing before the State Engineer, April 13, 2000.

<sup>766</sup> Exhibit No. 1414, public administrative hearing before the State Engineer, April 13, 2000.

1980's, the State Engineer believes it is probably an accurate reflection of how the land along the river has been used for decades, that is, irrigation along the sides of the river.

The applicant's only evidence as to perfection of a water right on this particular parcel is the 1903 Agreement that water rights existed within Section 4 and a 1905 patent which covers the SW $\frac{1}{4}$  NE $\frac{1}{4}$  and the S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 4, T.19N., R.29E., M.D.B.&M.<sup>767</sup> The 1903 Agreement and 1905 patent show that the  $\frac{1}{4}$   $\frac{1}{4}$  section of land containing Parcel 4 became part of a farm prior to the inception of the Project, but does not provide sufficient evidence to show that a water right was perfected on this parcel prior to or after the 1955 contract. The State Engineer finds there is insufficient evidence to prove perfection of a water right on this parcel and there is sufficient evidence to prove that a water right was never perfected on this parcel. The State Engineer finds that no water right was ever perfected on this parcel; there was no evidence provided going to due diligence and the water is not available to be transferred.

**Parcel 6** - The contract date is March 14, 1961. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>768</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as natural vegetation. The applicant's only evidence as to perfection of a water right on this parcel is a 1953 patent which covers the S $\frac{1}{2}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  and the S $\frac{1}{2}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 33, T.20N., R.29E., M.D.B.&M.<sup>769</sup> The State Engineer finds there is insufficient

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<sup>767</sup> Exhibit No. 1419, Attachments B and E, public administrative hearing before the State Engineer, April 13, 2000.

<sup>768</sup> Exhibit No. 1413, public administrative hearing before the State Engineer, April 13, 2000.

<sup>769</sup> Exhibit No. 1419, Attachment F, public administrative hearing before the State Engineer, April 13, 2000.

evidence to prove perfection of a water right on this parcel and there is sufficient evidence to prove that a water right was never perfected on this parcel. The State Engineer finds that no water right was ever perfected on this parcel; there was no evidence provided going to due diligence and the water is not available to be transferred.

**Parcel 7** - The contract date is March 14, 1961. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>770</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as natural vegetation, portion irrigated and on-farm supply ditch. The protestant provided evidence that 0.17 of an acre was irrigated from 1948 through 1988,<sup>771</sup> and that 0.28 of an acre was covered by an on-farm supply ditch.<sup>772</sup> The applicant's only evidence as to perfection of a water right on this parcel is a 1953 patent which covers the S $\frac{1}{2}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  and the S $\frac{1}{2}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 33, T.20N., R.29E., M.D.B.&M.<sup>773</sup> The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that water was beneficially used on the land covered by the on-farm supply ditch and that the protestant proved beneficial use of the water until the filing of the change application on the 0.17 of an acre that was irrigated. As to the remaining portion of the parcel, the State Engineer finds there is insufficient evidence to prove perfection of a water right and there is sufficient evidence to

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<sup>770</sup> Exhibit No. 1413, public administrative hearing before the State Engineer, April 13, 2000.

<sup>771</sup> Exhibit No. 1415, public administrative hearing before the State Engineer, April 13, 2000.

<sup>772</sup> Exhibit No. 1416, public administrative hearing before the State Engineer, April 13, 2000.

<sup>773</sup> Exhibit No. 1419, Attachment F, public administrative hearing before the State Engineer, April 13, 2000.

prove that a water right was never perfected on that portion of this parcel. The State Engineer finds that no water right was ever perfected on 2.10 acres of this parcel; there was no evidence provided going to due diligence and the water is not available to be transferred.

As to Parcels 4, 6 and 7, the State Engineer notes that the protestant's evidence shows that at least by 1985<sup>774</sup> the proposed places of use were being irrigated, therefore, showing beneficial use of water within the Massi farm of the water rights held in the Massi name since the mid-1950's and early 1960's. However, on the evidence presented to the State Engineer, there is no showing of perfection of a water right on the parcels from which the applicants are requesting to transfer water.

### III.

#### PERFECTION, FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture. In that Order, the Court also held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

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<sup>774</sup> Exhibit No. 1414, public administrative hearing before the State Engineer, April 13, 2000.

The applicant provided evidence that Parcels 4, 6 and 7 were all held in his name by 1949<sup>775</sup> (Parcel 4) and 1960<sup>776</sup> (Parcels 6 and 7) showing that this is an intrafarm transfer.

This application presents troubling questions because there is evidence that the water rights were not perfected on the places from which the applicants are seeking to move them from, but there is also evidence that water was used within the family farm on the proposed places of use at least several years before the filing of the change application. The evidence indicates a substantial period of non-use of the water on the existing places of use, but the land use at the existing places of use are not covered by improvements inconsistent with irrigation. The applicant did not provide any evidence as to the payment of taxes or assessments, but the TCID certified the water right is available for transfer<sup>777</sup> which one must assume means there are no assessments or taxes past due.

The State Engineer finds by the very fact that the water was used on the proposed places of use by the applicant who owns that water and was being used within the farm he owns demonstrates beneficial use of the water and a lack of intent to abandon the water right, but under the law of this case it appears that the State Engineer's only choice is to declare that the water rights were never perfected on the existing places of use, and therefore, not available to be transferred. Because of the lack of perfection, there is no need to address the forfeiture or abandonment claims or the fact that this is an intrafarm transfer.

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<sup>775</sup> Exhibit No. 1419, attachment P, public administrative hearing before the State Engineer, April 13, 2000.

<sup>776</sup> Exhibit No. 1419, attachment S, public administrative hearing before the State Engineer, April 13, 2000.

<sup>777</sup> Exhibit No. 1419, attachment V, public administrative hearing before the State Engineer, April 13, 2000.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>778</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant proved its claims of lack of perfection as to Parcels 4, 6 and as to 2.10 acres in Parcel 7, therefore, the State Engineer cannot allow the transfer of water rights from these parcels.

**III.**

**FORFEITURE AND ABANDONMENT**

As to Parcels 4, 6 and 2.10 acres of Parcel 7, the State Engineer concludes that since the water rights were not perfected on the existing places of use the protestant's claims of forfeiture and abandonment are moot.

**RULING**

The protest to Application 52550 is hereby upheld in part and overruled in part. The State Engineer's decision granting Application 52550 as to Parcels 4, 6 and 2.10 acres of Parcel 7 is hereby rescinded and no water rights are available to be transferred. The State Engineer's decision as to 0.45 of an acre in Parcel 7 is hereby affirmed. Therefore, the permit granted under Application 52550 is amended to allow the transfer of water rights appurtenant to 0.45 of an acre of land totaling 1.575 acre-feet of water to be perfected at the proposed place of use. There are issues regarding bench-land and bottom-land designations which could require adjustments as to duty or acreage. The applicant may want to consult regarding these numbers before filing the map that is ordered below. The applicant is hereby ordered to file with the State Engineer within 90 days a map,

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<sup>778</sup> NRS chapter 533 and Order of Remand from Federal District Court.

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which designates which portion of the proposed place of use is excluded as to the water rights that were declared as never perfected.

**APPLICATION 52552**

**GENERAL**

**I.**

Application 52552 was filed on September 23, 1988, by Hendrix Ranch to change the place of use of 81.45 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 698, 2155, 541-24-C-2-A, 541-24-C-2-B, 541-24-C-2-C, 504 and 541-24-C-2, Claim No. 3 Orr Ditch Decree and Alpine Decree.<sup>779</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 2.00 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 26, T.19N., R.29E., M.D.B.&M.

**Parcel 2** - 1.75 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 27, T.19N., R.29E., M.D.B.&M.

**Parcel 3** - 18.75 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 18, T.19N., R.28E., M.D.B.&M.

**Parcel 4** - 0.77 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 5.20 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  and 13.97 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , both in Section 22, T.19N., R.29E., M.D.B.&M., 2.00 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$  in Section 26, T.19N., R.29E., M.D.B.&M., 0.60 of an acre in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 1.50 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , both in Section 27, T.19N., R.29E., M.D.B.&M.

By letter dated May 25, 1994 the applicant withdrew 1.15 acres from the Parcel 2 request for transfer.<sup>780</sup>

**II.**

Application 52552 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>781</sup> and more

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<sup>779</sup> Exhibit No. 1351, public administrative hearing before the State Engineer, April 13, 2000.

<sup>780</sup> Exhibit No. 1352, public administrative hearing before the State Engineer, April 13, 2000.

<sup>781</sup> Exhibit No. 1353, public administrative hearing before the State Engineer, April 13, 2000.

specifically on the grounds as follows:<sup>782</sup>

- Parcel 1** - Lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, forfeiture, abandonment
- Parcel 4** - Lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 52552**

Exhibit RRR from the April 1991 administrative hearing contains contracts covering the existing places of use as listed under Application 52552,<sup>783</sup> but note the problem with Parcel 4 below.

**Parcel 1** - Exhibit RRR contains a "Water-right Application" filed by Mrs. J.C. Shepard dated August 27, 1919, covering this existing place of use. This application notes that a E. B. Cornell was selling and assigning to Mrs. Shepard all interest under an earlier water right application number 436. No evidence was provided as to the earlier water right application. The State Engineer finds the contract date is August 27, 1919.

**Parcel 2** - Exhibit RRR contains a "Water-right Application" filed by M. Genevieve Williams dated October 23, 1919, covering this existing place of use. This application indicates that it somehow ties to a George H. Knight in June 1907 and was assigned through a Mary E. Moore. The applicant provided a "Certificate of Filing Water-Right Application" filed by Fred Waidely dated March 20, 1912, which indicates that in the NE $\frac{1}{4}$  of Section 27, T.19N., R.29E., M.D.B.&M. George Knight had assigned a homestead entry to Waidely. The applicant also provided a "Certificate of Filing Water-Right Application" filed by Mary E. Moore dated October 18,

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<sup>782</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

<sup>783</sup> Exhibit No. 1354, public administrative hearing before the State Engineer, April 13, 2000.

1912, which also refers back to the George Knight homestead entry. Finally, the applicant also provided a "Certificate of Filing Water Right Application" filed by George H. Knight dated April 9, 1908. The State Engineer finds the contract date is April 9, 1908 as there is adequate evidence to tie the homestead entry and water rights together and back to George H. Knight.

**Parcel 3** - Exhibit RRR contains a "Water-right Application" filed by Robert L. Combs dated September 23, 1918, covering this existing place of use and more specifically identified as the E $\frac{1}{2}$  NW $\frac{1}{4}$  (Farm Unit "J" as amended) of Section 18, T.19N., R.28E., M.D.B.&M. The State Engineer finds the contract date is September 23, 1918.

**Parcel 4** - During the course of the administrative hearing, it was discovered that the application incorrectly identified the  $\frac{1}{4}$   $\frac{1}{4}$  section for this existing place of use. The applicant does not own this existing place of use as identified, but rather owns land and water rights in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 36, T.19N., R.28E., M.D.B.&M. and not the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 36 as identified in the application.<sup>784</sup> The State Engineer finds that he cannot allow the transfer of a water right from land the applicant does not own, therefore, this portion of Application 52552 cannot be allowed to be transferred nor will he rule on the protest issues.

## II.

### PERFECTION

**Parcel 1** - The contract date is August 27, 1919, but is perhaps tied to an earlier water right application no. 436. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>785</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch

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<sup>784</sup> Transcript, pp. 6109-6110, public administrative hearing before the State Engineer, April 13, 2000.

<sup>785</sup> Exhibit No. 1357, public administrative hearing before the State Engineer, April 13, 2000.

(Harmon Deep Drain). The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is April 9, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>786</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 3** - The contract date is September 23, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>787</sup> which indicates from aerial photographs that in

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<sup>786</sup> Exhibit No. 1357, public administrative hearing before the State Engineer, April 13, 2000.

<sup>787</sup> Exhibit No. 1357, public administrative hearing before the State Engineer, April 13, 2000.

1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1918 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is August 27, 1919, therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>788</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as a drain ditch (Harmon Deep Drain). At the 1991 administrative hearing, the applicant described the land use in 1948 and 1991 as a ditch.<sup>789</sup> The State Engineer finds that no

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<sup>788</sup> Exhibit No. 1357, public administrative hearing before the State Engineer, April 13, 2000.

<sup>789</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

water was placed to beneficial use on Parcel 1 for the 40-year period from 1948 to 1988.

**Parcel 2** - The State Engineer finds that since the contract date is April 9, 1908, the water right was initiated in accordance with the law in effect prior to March 22, 1913, and therefore, is not subject to the forfeiture provision of NRS § 533.060.

**Parcel 3** - The contract date is September 23, 1918, therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>790</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as bare land and natural vegetation. At the 1991 administrative hearing, the applicant described the land use in 1948 and 1991 as low land and cleared land.<sup>791</sup>

At the 2000 administrative hearing, testimony was provided that TCID had become the owner of 1,500 acres of water rights through foreclosure probably in the mid-1930's, and these water rights were part of those 1,500 acres.<sup>792</sup> TCID in the late 1970's began allowing temporary use of these foreclosed waters by farmers pursuant to contracts and in the mid-1980's sold these foreclosed water rights to farmers through a lottery.<sup>793</sup> The testimony provided indicated that the TCID's motivation was to keep the water beneficially used on the Project, and conditions of these leases were that the water user had to pay irrigation district

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<sup>790</sup> Exhibit No. 1357, public administrative hearing before the State Engineer, April 13, 2000.

<sup>791</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>792</sup> Transcript, pp. 6077-6082, public administrative hearing before the State Engineer, April 13, 2000.

<sup>793</sup> Transcript, pp. 6079-6081, public administrative hearing before the State Engineer, April 13, 2000.

assessment charges and the land where the water was to be used had to already be developed. The Section 18 water at issue in this particular parcel could not be specifically traced to that water used on the applicant's property,<sup>794</sup> since the 1,500 acres of water rights was bundled together and parts or all of it was leased to users in the late 1970's and a portion sold to Hendrix Ranch in 1985.<sup>795</sup> The argument is that all of the 1,500 acres of water rights that had come into TCID's hands pursuant to foreclosures was used pursuant to these temporary contracts during the 1970's, therefore, the water rights are not forfeited or abandoned.

The State Engineer finds these kinds of informal interfarm transfers for value are the types of transfers the Ninth Circuit has indicated that the State Engineer should scrutinize more closely. The State Engineer finds that no water was placed to beneficial use on Parcel 3 for the 40-year period from 1948 to 1988, however, the water was used within other parts of the Project.

The applicant provided evidence that the Parcel 1 lands came into the Hendrix name in 1955,<sup>796</sup> that the Parcel 2 lands and the proposed places of use in Section 27, T.19N., R.29E., M.D.B.&M. came into the Hendrix name in 1947,<sup>797</sup> and the proposed places of use in Section 22, T.19N., R.29E., M.D.B.&M. by patent in 1970.<sup>798</sup>

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<sup>794</sup> Transcript, pp. 6081-6088, public administrative hearing before the State Engineer, April 13, 2000.

<sup>795</sup> Exhibit No. 1393, public administrative hearing before the State Engineer, April 13, 2000.

<sup>796</sup> Exhibit Nos. 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, public administrative hearing before the State Engineer, April 13, 2000.

<sup>797</sup> Exhibit Nos. 1372, 1374, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, public administrative hearing before the State Engineer, April 13, 2000.

<sup>798</sup> Exhibit No. 1386, public administrative hearing before the State Engineer, April 13, 2000.

No claim was made that the lands in Section 18, T.19N., R.28E., M.D.B.&M. are part of the Hendrix Ranches. The State Engineer finds that the transfers from Parcels 1 and 2 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

IV.

**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.<sup>799</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>800</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>801</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove

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<sup>799</sup> 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).

<sup>800</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>801</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandonment by clear and convincing evidence.

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on Parcel 1 for the 40 year period from 1948 to 1988, and finds the land use is inconsistent with irrigation.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>802</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as a road. At the 1991 administrative hearing, the applicant described the land use in 1948 and 1991 as a ditch and road.<sup>803</sup> The State Engineer finds that no water was placed to beneficial use on Parcel 2 for the 40 year period from 1948 to 1988, and finds the land use is inconsistent with irrigation.

**Parcel 3** - The State Engineer finds the water rights is subject to forfeiture and is below declared forfeited, therefore, the protestant's claim of abandonment is moot.

The applicant provided evidence that the Parcel 1 lands came into the Hendrix name in 1955,<sup>804</sup> that the Parcel 2 lands and the proposed places of use in Section 27, T.19N., R.29E., M.D.B.&M. came into the Hendrix name in 1947,<sup>805</sup> and the proposed places of use in Section 22, T.19N., R.29E., M.D.B.&M. by patent in 1970.<sup>806</sup>

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<sup>802</sup> Exhibit No. 1357, public administrative hearing before the State Engineer, April 13, 2000.

<sup>803</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>804</sup> Exhibit Nos. 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, public administrative hearing before the State Engineer, April 13, 2000.

<sup>805</sup> Exhibit Nos. 1372, 1374, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, public administrative hearing before the State Engineer, April 13, 2000.

<sup>806</sup> Exhibit No. 1386, public administrative hearing before the State Engineer, April 13, 2000.

No claim was made that the lands in Section 18, T.19N., R.28E., M.D.B.&M. are part of the Hendrix Ranches. The State Engineer finds that the transfers from Parcels 1 and 2 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>807</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2 and 3. The State Engineer concludes the evidence showed the Parcel 4 transfer was incorrectly marked as to land the applicant does not own, therefore, the State Engineer will not rule on the protest claims nor allow the transfer of water rights from this parcel.

**III.**

**FORFEITURE**

The State Engineer concludes that the transfer from Parcels 1 and 2 are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes the protestant proved the statutory period of non-use as to Parcel 3.

**IV.**

**ABANDONMENT**

The State Engineer concludes that the transfers from Parcels 1 and 2 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcel 3 the protestant's claim of abandonment is moot.

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<sup>807</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**RULING**

The protest to Application 52552 is hereby upheld in part and overruled in part and is not ruled on as to that portion of the application which the applicant does not own. The State Engineer's decision granting Application 52552 as to Parcels 1 and 2 is hereby affirmed. The State Engineer's decision as to Parcel 4 is rescinded, however, the water right is not declared forfeited or abandoned. The State Engineer's decision as to Parcel 3 is rescinded and the water rights appurtenant to Parcel 3 are declared forfeited. Therefore, the permit granted under Application 52552 is amended to allow the transfer of water rights appurtenant to 2.60 acres of land totaling 9.1 acre-feet of water to be perfected at the proposed place of use. The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the 0.77 of an acre of water rights which the State Engineer cannot rule upon since Parcel 4 as identified in the application is not owned by the applicants and as to the 18.75 acres of water rights forfeited from Parcel 3.

**APPLICATION 52554**

**GENERAL**

**I.**

Application 52554 was filed on September 23, 1988, by Kent and Carmae Whitaker to change the place of use of 78.05 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 154, 156 and 160, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>808</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 4.40 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 23, T.18N., R.28E., M.D.B.&M.

**Parcel 2** - 2.00 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 23, T.18N., R.28E., M.D.B.&M.

**Parcel 3** - 3.60 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 23, T.18N., R.28E., M.D.B.&M.

**Parcel 4** - 5.25 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 23, T.18N., R.28E., M.D.B.&M.

**Parcel 5** - 4.45 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.

**Parcel 6** - 1.80 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 25, T.18N., R.28E., M.D.B.&M.

**Parcel 7** - 0.80 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 25, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.40 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 4.20 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 2.70 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , 2.10 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 1.75 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , 0.70 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , all within Section 23, T.18N., R.28E., M.D.B.&M., 4.95 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 24, T.18N., R.28E., M.D.B.&M., 4.60 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 0.90 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , both within Section 25, T.18N., R.28E., M.D.B.&M.<sup>809</sup>

**II.**

Application 52554 was protested by the PLPT on the grounds

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<sup>808</sup> The records of the State Engineer indicate that Application 52554 has been assigned to show the owners of record as Kent and Carmae Whitaker, Jeffrey and Diane Whitaker, and Gregory and Linda Whitaker. Exhibit No. 975, public administrative hearing before the State Engineer, January 25, 2000.

<sup>809</sup> Exhibit Nos. 974 and 978, public administrative hearing before the State Engineer, January 25, 2000.

described in the General Introduction I of this ruling,<sup>810</sup> and more specifically on the grounds as follows:<sup>811</sup>

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Lack of perfection, forfeiture, abandonment
- Parcel 3 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Lack of perfection, forfeiture, abandonment.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 52554**

**Parcel 1** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated February 11, 1918, covering the existing place of use in Parcel 1.<sup>812</sup> The State Engineer finds the contract date is February 11, 1918.

**Parcels 2 and 3** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated May 7, 1921, covering the existing place of uses in Parcels 2 and 3.<sup>813</sup> The State Engineer finds the contract dates are May 7, 1921.

**Parcel 4** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated April 10, 1922, covering the existing place of

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<sup>810</sup> Exhibit No. 976, public administrative hearing before the State Engineer, January 25, 2000.

<sup>811</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

<sup>812</sup> Exhibit No. 977, public administrative hearing before the State Engineer, January 25, 2000.

<sup>813</sup> Exhibit No. 977, public administrative hearing before the State Engineer, January 25, 2000.

use in Parcel 4.<sup>814</sup> The State Engineer finds the contract date is April 10, 1922.

**Parcel 5** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated April 20, 1921, covering the existing place of use in Parcel 5.<sup>815</sup> The State Engineer finds the contract date is April 20, 1921.

**Parcels 6 and 7** - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated March 20, 1920, covering the  $\frac{1}{4}$   $\frac{1}{4}$  sections of land in which the Parcels 6 and 7 existing places of use are located.<sup>816</sup> The PLPT asserted this March 20, 1920, date as the correct contract date<sup>817</sup> without dispute raised by the applicants. However, upon the State Engineer's analysis of the Exhibit RRR documents, it was noted that the March 20, 1920, contract indicates that it is for lands all south of the AA canal right of way in the N $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 25, T.18N., R.28E., M.D.B. & M. The existing places of use in Parcels 5 and 6 are found along the very northern border of the N $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 25, T.18N., R.28E., M.D.B. & M., therefore, the March 20, 1920, document does not make sense as being the appropriate contract since it describes land south of the AA canal. Another document found in Exhibit RRR is a "Water-right Application for Lands in Private Ownership" dated April 20, 1921, which indicates that it covers all that portion of the N $\frac{1}{2}$  NE $\frac{1}{4}$  of said Section 25 lying north of the right of way of

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<sup>814</sup> Exhibit No. 977, public administrative hearing before the State Engineer, January 25, 2000.

<sup>815</sup> Exhibit No. 977, public administrative hearing before the State Engineer, January 25, 2000.

<sup>816</sup> Exhibit No. 977, public administrative hearing before the State Engineer, January 25, 2000.

<sup>817</sup> Exhibit No. 979, public administrative hearing before the State Engineer, January 25, 2000.

the "AA" line canal at its location at that time. The State Engineer finds the contract dates are April 20, 1921.

II.

**PERFECTION**

**Parcel 1** - The contract date is February 11, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>818</sup> which indicates from aerial photographs that in 1948 the land use was described as a farmyard, farm structures and drain ditch. At the 1991 administrative hearing, the applicant indicated that in 1948 the land use on the Parcel 1 existing place of use was barren land.<sup>819</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is May 7, 1921. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>820</sup> which indicates from aerial photographs that in 1948 the land use was described as natural vegetation and a canal. At the 1991 administrative hearing, the applicant indicated that in 1948 the land use on the Parcel 2 existing place of use was a ditch and

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<sup>818</sup> Exhibit No. 980, public administrative hearing before the State Engineer, January 25, 2000.

<sup>819</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>820</sup> Exhibit No. 980, public administrative hearing before the State Engineer, January 25, 2000.

barren land.<sup>821</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1921 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 3** - The contract date is May 7, 1921. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>822</sup> which indicates from aerial photographs that in 1948 the land use was described as natural vegetation and a portion irrigated. At the 1991 administrative hearing, the applicant indicated that in 1948 the land use on the Parcel 3 existing place of use was a ditch.<sup>823</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1921 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact, the protestant conceded that a portion of the water right was perfected. 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 4** - The contract date is April 10, 1922. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

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<sup>821</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>822</sup> Exhibit No. 980, public administrative hearing before the State Engineer, January 25, 2000.

<sup>823</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

of Use"<sup>824</sup> which indicates from aerial photographs that in 1948 the land use was described as a road, canal, delivery ditch, drain ditch, farm yard and portion irrigated. At the 1991 administrative hearing, the applicant indicated that in 1948 the land use on the Parcel 4 existing place of use was a ditch and road.<sup>825</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1922 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact the protestant conceded that a portion of the water right was perfected. 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 5** - The contract date is April 20, 1921. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>826</sup> which indicates from aerial photographs that in 1948 the land use was described as a road, farmyard and portion irrigated. At the 1991 administrative hearing, the applicant indicated that in 1948 the land use on the Parcel 5 existing place of use was a ditch, road and farmstead.<sup>827</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1921 and 1948, therefore, the protestant did not prove its claim of lack of

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<sup>824</sup> Exhibit No. 980, public administrative hearing before the State Engineer, January 25, 2000.

<sup>825</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

<sup>826</sup> Exhibit No. 980, public administrative hearing before the State Engineer, January 25, 2000.

<sup>827</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

perfection on this parcel, and in fact the protestant conceded that a portion of the water right was perfected. 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.

**Parcels 6 and 7** - The contract dates are April 20, 1921. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>828</sup> which indicates from aerial photographs that in 1948 the land use was described as a drain ditch. At the 1991 administrative hearing, the applicant indicated that in 1948 the land use on the Parcels 6 and 7 existing places of use was a ditch.<sup>829</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water rights were never perfected on these parcels between 1921 and 1948; therefore, the protestant did not prove its claim of lack of perfection on these parcels. 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 rights were perfected.

### III.

#### FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrines of forfeiture and abandonment.

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<sup>828</sup> Exhibit No. 980, public administrative hearing before the State Engineer, January 25, 2000.

<sup>829</sup> Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

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.<sup>830</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>831</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>832</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcels 1, 2, 3, 4, 5, 6 and 7** - Testimony and evidence were presented at the administrative hearing that showed that all lands comprising the existing and proposed places of use are owned by the applicants.<sup>833</sup> Testimony was also provided that prior to the

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<sup>830</sup> 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).

<sup>831</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>832</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>833</sup> Exhibit Nos. 989, 993 and 1004; Transcript, pp. 5057-5063, 5065-5076, public administrative hearing before the State Engineer, January 25, 2000.

time of the filing of the transfer application the applicants had been using the water to irrigate lands within their farm and they were told they needed to file the transfer applications in order to get the records in order to reflect the lands actually being irrigated.<sup>834</sup> The State Engineer finds the transfer requests from Parcels 1, 2, 3, 4, 5, 6 and 7 are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998, nor was an intent to abandon proven.

### **CONCLUSIONS OF LAW**

#### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>835</sup>

#### **II.**

##### **PERFECTION**

As to Parcels 1, 2, 3, 4, 5, 6 and 7, the State Engineer concludes the protestant did not prove its claims of lack of perfection and in fact proved perfection on portions of Parcels 3, 4 and 5.

#### **III.**

##### **FORFEITURE AND ABANDONMENT**

The State Engineer concludes that the transfers from Parcels 1, 2, 3, 4, 5, 6 and 7 are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes much, if not all, of the water was already being used on other parts of the farm precluding an intent to abandon the water rights.

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<sup>834</sup> Transcript, pp. 5077-5087, public administrative hearing before the State Engineer, January 25, 2000.

<sup>835</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**RULING**

The protest to Application 52554 is overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1, 2, 3, 4, 5, 6 and 7 is hereby affirmed.

**APPLICATION 52843**

**GENERAL**

**I.**

Application 52843 was filed on January 3, 1989, by Alfred Inglis to change the place of use of 104.94 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 116, 603.2, 389, 353, 541-28-E-3-A6, 541-28-E-3-B, 188-7, 568-5-A and 529, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>836</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 14.95 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 11, T.19N., R.27E., M.D.B.&M.

**Parcel 2** - 0.70 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 34, T.19N., R.28E., M.D.B.&M.

**Parcel 3** - 1.50 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 34, T.19N., R.29E., M.D.B.&M.

**Parcel 4** - 0.97 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 36, T.19N., R.28E., M.D.B.&M.

**Parcel 5** - 1.40 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 10, T.18N., R.28E., M.D.B.&M.<sup>837</sup>

**Parcel 6** - 2.36 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 23, T.19N., R.28E., M.D.B.&M.<sup>838</sup>

**Parcel 7** - 1.44 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 30, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 10.30 acres in the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 5.50 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , 1.99 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 0.75 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , and 4.78 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , all in Section 35, T.19N., R.26E., M.D.B.&M.

**II.**

Application 52843 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>839</sup> and more

<sup>836</sup> Exhibit No. 1074, public administrative hearing before the State Engineer, January 27, 2000.

<sup>837</sup> This is the 1.40 acres that were withdrawn from Application 49689.

<sup>838</sup> This is the 2.36 acres that were withdrawn from Application 49880.

<sup>839</sup> Exhibit No. 1075, public administrative hearing before the State Engineer, January 27, 2000.

specifically on the grounds as follows:<sup>840</sup>

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 52843**

Exhibit XXX from the 1991 administrative hearing contains contracts covering the existing places of use.<sup>841</sup>

**Parcel 1** - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated August 19, 1919, covering the existing place of use under Parcel 1. The State Engineer finds the contract date is August 19, 1919.

**Parcel 3** - Exhibit XXX from the 1991 administrative hearing contains an "Agreement" dated December 27, 1907, covering the existing place of use under Parcel 3 and which evidences the water rights are based on pre-Project vested water rights. The State Engineer finds the contract date is December 27, 1907.

**Parcel 5** - Exhibit XXX from the 1991 administrative hearing contains an "Application for Permanent Water Right" dated December 30, 1954, covering the existing place of use under Parcel 5. The State Engineer finds the contract date is December 30, 1954.

**Parcel 6** - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application" dated August 18, 1919,

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<sup>840</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

<sup>841</sup> Exhibit No. 1076 and 1078, public administrative hearing before the State Engineer, January 27, 2000.

covering the existing place of use under Parcel 6. The State Engineer finds the contract date is August 18, 1919.

**Parcel 7** - Exhibit XXX from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated June 13, 1907, covering the existing place of use under Parcel 7. The State Engineer finds the contract date is June 30, 1907.<sup>842</sup>

## II.

### PERFECTION

**Parcel 1** - The contract date is August 19, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>843</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 3** - The contract date is December 27, 1907, and the water rights are based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>844</sup> which indicates from aerial photographs that in

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<sup>842</sup> To avoid confusion one must note the handwritten entry in the upper right hand corner of this document.

<sup>843</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

<sup>844</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

1948 the land use on this parcel was described as natural vegetation and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948, and in fact admitted a portion was irrigated. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact IX and finds that pre-Project vested water rights were perfected as a matter of fact and law.

**Parcel 5** - The contract date is December 30, 1954. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>845</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a road and natural vegetation. The 1.40 acres at issue here are those acres that were withdrawn from Application 49689, which adjoins the property discussed under that application.

Under Application 49689, the State Engineer found that he did not believe the protestant's witnesses description of natural vegetation was an accurate description of the land use, and that the applicant's witness testified that the area is pasture grass and not natural vegetation,<sup>846</sup> a point with which the State Engineer agreed. The State Engineer found that photograph E-6 demonstrated that this land was mostly likely used as pastureland, and that the ditch remnant indicated that irrigation was attempted in the area. The State Engineer found that no water was placed to beneficial use on the road, but no evidence was provided

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<sup>845</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

<sup>846</sup> Transcript, p. 5271, public administrative hearing before the State Engineer, January 27, 2000.

indicating the portion of the existing place of use taken up by the road. The State Engineer found the photograph and evidence provided by the protestant did not prove that a water right was never perfected on that portion of the existing place of use taken up by what appears to be pasture land, and that the protestant did not provide any evidence other than the series of photographs as its evidence that a water right was not perfected on this parcel between 1954 and 1986. The State Engineer found under Application 49689 the photographs were not sufficient evidence to prove that a water right was never perfected on the portion adjacent to this existing place of use not covered by the road, and that the evidence of a ditch leaned more towards a finding that water was applied to the adjacent parcel. The State Engineer further found that the protestant did not provide adequate evidence as to how much of the existing place of use was taken up by the road, therefore, the protestant did not prove its claim of lack of perfection on any specifically identifiable ground.

As to this parcel, which appears to have been part of the same area farmed as that found under Application 49689, the applicant provided evidence that a building permit was issued to build the house on October 15, 1986, which is only 26 months before transfer Application 52843 was filed. The State Engineer finds the same analysis that was made for the attached existing place of use under Application 49689 should apply to this parcel; therefore, the protestant did not prove its claim of lack of perfection on any specifically identifiable ground.

**Parcel 6** - The contract date is August 18, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>847</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. As previously noted, this 2.36 acres is the land that

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<sup>847</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

was withdrawn from Application 49880, and was along the northern edge of the existing place of use under Application 49880. Having reviewed the aerial photographs under Application 49880 and those presented in this hearing as Exhibit No. 1082, the State Engineer finds the same analysis should apply to this application as that under Application 49880.

At the 1988 administrative hearing, the applicants indicated in 1948 the land use on this parcel was described as barren ground.<sup>848</sup> At the 1991 administrative hearing, the applicants described basically the exact same land as described under Application 49880, which under Application 49880 described as barren ground, as being a ditch and a road.<sup>849</sup> The State Engineer finds the land use description presented in 1991 appears to be partially in error as it is clear by the photographs there is no road in the area; however, the ditch the applicant may have been referring to could be the large ditch the applicant's witness showed in photographs E-1 and E-2 in Exhibit No. 1064.

At the January 2000 administrative hearing, the applicant's witness provided photographs purportedly covering portions of the existing place of use.<sup>850</sup> Pursuant to questions raised at the administrative hearing, by letter dated February 18, 2000, conveyed to the State Engineer by the applicant's legal counsel on April 7, 2000, the witness came to the conclusion that photographs E-3 and E-4 were erroneously admitted. Therefore, the State Engineer will ignore any testimony provided as to those photographs.

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<sup>848</sup> Exhibit No. 449, public administrative hearing before the State Engineer, September 24, 1997.

<sup>849</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>850</sup> Exhibit No. 1064, photographs E-3 and E-4, public administrative hearing before the State Engineer, January 27, 2000.

Testimony and evidence were provided that remnants of a significantly large ditch are located upgradient approximately 1/8th mile of the existing place of use.<sup>851</sup> The protestant's witness did not believe the ditch was there for the purpose of carrying water to the existing place of use, but believed it was to capture surface runoff to keep it out of a low spot located below the ditch. The applicant's witness believes the structure was used to carry water and not capture runoff as there are berms on either side of the ditch as seen in photographs E-1 and E-2 in Exhibit No. 1064, and that the ditch was an irrigation canal built many years ago to take water to that part of the Newlands Project.

The State Engineer finds the applicant's evidence of an irrigation ditch to be more credible than that of the protestant's witness that it was a structure to capture runoff, thereby evidencing irrigation activity in the area. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948, therefore, the protestant did not prove its claim of lack of 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 7** - The contract date is June 13, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>852</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. In 1962, the land use was described as a road, on-farm supply ditch

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<sup>851</sup> Transcript, pp. 5287, 5297-5298, 5309; Exhibit No. 1064, photographs E-1 and E-2, public administrative hearing before the State Engineer, January 27, 2000.

<sup>852</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

and portion irrigated. The protestant also provided evidence that of this 1.44 acre parcel, 1.29 acres were irrigated from 1962 through 1988, and that another 0.06 of an acre was covered by an on-farm supply ditch, thereby leaving 0.09 in dispute. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on the 0.09 of an acre in dispute on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on the 0.09 of an acre portion of this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

**Parcel 1** - The contract date is August 18, 1919, and thereby the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>853</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1980 and 1984 the land use on this parcel was described as natural vegetation. At the 1991 administrative hearing, the applicant described the 1948 and 1991 land use as brush ground.<sup>854</sup> The land use as demonstrated by photographs presented through the

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<sup>853</sup> Exhibit No. 1071, public administrative hearing before the State Engineer, January 27, 2000.

<sup>854</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

applicant's witness<sup>855</sup> was covered by mature native vegetation such as sagebrush and trees that had obviously been there for a long period of time. At the 2000 administrative hearing, the applicant provided evidence which indicated that in 1943<sup>856</sup> the lands encompassing the existing place of use were sold to the TCID after they had been foreclosed upon by Churchill for taxes owed and argues since the TCID leased these waters to others during the time it held the water rights from 1943 through the sale to the applicant in 1985<sup>857</sup> they cannot be subject to the doctrines of forfeiture or abandonment. The applicant's evidence suggests that the land went out of production in the mid-1940's.

The State Engineer finds no water was placed to beneficial use on Parcel 1 for the 36-year period from 1948 through 1984, and as addressed in the ruling as to Application 52552, these are the types of informal transfers, which the court has indicated should be scrutinized more closely.

**Parcel 5** - The contract date is December 30, 1954, and thereby the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>858</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land use on this parcel was described as a road and natural vegetation. In 1987 and 1988 the land use was described as a road, natural vegetation and farm structures.

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<sup>855</sup> Exhibit No. 1064, photographs E-11, E-12, E-13, E-14, public administrative hearing before the State Engineer, January 27, 2000.

<sup>856</sup> Exhibit No. 1085, public administrative hearing before the State Engineer, January 27, 2000.

<sup>857</sup> Exhibit No. 1086, public administrative hearing before the State Engineer, January 27, 2000.

<sup>858</sup> Exhibit No. 1060, public administrative hearing before the State Engineer, January 27, 2000.

As to this parcel, which appears to have been part of the same area farmed as that found under Application 49689, the applicant provided evidence that a building permit was issued to build the house on October 15, 1986, which is only 26 months before transfer Application 52843 was filed. The State Engineer finds the same analysis that was made for the attached existing place of use under Application 49689 should apply to this parcel, and as previously discussed, the photographs provided by both the protestant and the applicant appear to show this parcel was pasture land before the house was built in 1986 and 1987, but for that portion the protestant's witness said was taken up by a road. The applicant's witness testified that he believed the last time the parcel was probably irrigated was in the early 1980's.<sup>859</sup> The State Engineer finds since this application was not filed until January 1989, and based on the applicant's evidence that the parcel was probably last irrigated in the early 1980's (the State Engineer must assume that means 1980, 1981 or 1982) that more than 5 years have passed between the date of last irrigation and the filing of transfer Application 52843. The State Engineer finds no water was placed to beneficial use on Parcel 5 for the 7-year period from 1982 through 1989.

**Parcel 6** - The contract date is August 18, 1919, and thereby the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>860</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as natural vegetation.

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<sup>859</sup> Transcript, p. 5278, public administrative hearing before the State Engineer, January 27, 2000.

<sup>860</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

The State Engineer notes this 2.36 acres were those acres that were withdrawn from the northern edge of the parcel requested for transfer under Application 49880 and finds that the same analysis applies here as applied under that application. The land use as demonstrated by a 1985 aerial photograph<sup>861</sup> was covered by mature native vegetation such as sagebrush that had obviously been there for a long period of time. The State Engineer finds no water was placed to beneficial use on Parcel 6 for the 40-year period from 1948 through 1988.

#### 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.<sup>862</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>863</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>864</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a

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<sup>861</sup> Exhibit No. 1082, public administrative hearing before the State Engineer, January 27, 2000.

<sup>862</sup> 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).

<sup>863</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>864</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcel 1** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>865</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1980 and 1984 the land use on this parcel was described as natural vegetation. At the 1991 administrative hearing, the applicant described the 1948 and 1991 land use as brush ground.<sup>866</sup> The land use as demonstrated by photographs presented through the applicant's witness<sup>867</sup> was covered by mature native vegetation such as sagebrush and trees that had obviously been there for a long period of time. At the 2000 administrative hearing, the applicant provided evidence which indicated that in 1943<sup>868</sup> the lands encompassing the existing place of use were sold to the TCID after they had been foreclosed upon by Churchill County for taxes owed, and argues as the TCID leased these waters to others during the time it held the water rights from 1943 through the sale to the applicant in 1985<sup>869</sup> they cannot be subject to the doctrines of forfeiture or abandonment. This suggests that the land went out

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<sup>865</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

<sup>866</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>867</sup> Exhibit No. 1064, photographs E-11, E-12, E-13, E-14, public administrative hearing before the State Engineer, January 27, 2000.

<sup>868</sup> Exhibit No. 1085, public administrative hearing before the State Engineer, January 27, 2000.

<sup>869</sup> Exhibit No. 1086, public administrative hearing before the State Engineer, January 27, 2000.

of production in the mid-1940's.

The State Engineer finds no water was placed to beneficial use on Parcel 1 for the 36 year period from 1948 through 1984, and as addressed in the ruling as to Application 52552, these are the types of informal transfers which the court has indicated should be scrutinized more closely. The State Engineer finds that while the land is not physically covered by a structure, the land use is inconsistent with irrigated agriculture in that it is covered with mature native brush. No evidence was presented regarding the payment of taxes or assessment as to these particular water rights. The State Engineer finds that no evidence was provided to rebut an intent to abandon the water right.

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>870</sup> which indicates from aerial photographs that in 1962, 1972, 1973, 1974, 1975, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as a canal and drain ditch. At the 1991 administrative hearing, the applicant described the 1948 and 1991 land use as a ditch and road.<sup>871</sup> At the 2000 administrative hearing, the applicant's witness described the existing place of use as an irrigation ditch, drain ditch and adjacent land, and further described these as on-farm ditches.<sup>872</sup> The State Engineer has previously found that on-farm, dirt-lined, supply ditches were historically required to be water righted,<sup>873</sup> therefore, the evidence demonstrated beneficial use of water throughout the time

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<sup>870</sup> Exhibit No. 1071, public administrative hearing before the State Engineer, January 27, 2000.

<sup>871</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>872</sup> Transcript, pp. 5352-5254, public administrative hearing before the State Engineer, January 27, 2000.

<sup>873</sup> See, General Finding of Fact X.

frame of the photographs which demonstrate the existence of these ditches.

However, that analysis was never applied to a drain, and no evidence was presented to the State Engineer that drains were historically water-righted areas. No evidence was presented in this case which sufficiently convinces the State Engineer as to whether the road is part of the existing place of use, or whether the existing place of use includes the drain ditch, or as to the size of the alleged on-farm, dirt-lined, supply ditch in order to make any ruling as to the same. Photograph E-20 found in Exhibit No. 1064 appears to show a small, on-farm, dirt-lined, supply ditch rather than the canal described by the protestant's witness, and this corresponds with the applicant's 1991 description of ditch and road. The State Engineer questions whether the drain described by the protestant's witness is really part of the existing place of use.

The State Engineer finds that no water was placed to beneficial use on the existing place of use for the 22-year period from 1962 through 1984, taken up by the road. However, the State Engineer finds there is not clear and convincing evidence of non-use of the water right in that portion of the existing place of use taken up by the on-farm supply ditch, and no evidence was introduced as to how much land was taken up by either the road or the ditch. Therefore, the protestant did not prove its case of non-use as to any specifically identifiable portion of the existing place of use by clear and convincing evidence.

**Parcel 4** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>874</sup> which indicates from aerial photographs that in 1977 the land use on this parcel was described as irrigated. In 1980, 1984, 1985, 1986, 1987 and 1988, the land use was described as residential. At the 1991

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<sup>874</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

administrative hearing, the applicant described the 1948 land use as cultivated and 1991 land use as urban development.<sup>875</sup>

At the 2000 administrative hearing, the applicant testified that he bought the parcel in October 1974, that when he bought the land in 1974 it had alfalfa growing on it, that he first applied to move the water off the property under Application 47902 which was filed on March 15, 1984, and later withdrawn and a new filing made under Application 52843.<sup>876</sup> Since the protestant admits the property was irrigated in 1977, and does not have any other evidence until 1980 to show the land use as residential, and the applicant admits the apartments were built in 1980 and 1981, and Application 47902 was first filed in 1984, then withdrawn and followed by Application 52843, the State Engineer finds there is not a substantial period of non-use, and there is evidence of a lack of intent to abandon the water right.

**Parcel 5** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>877</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land use on this parcel was described as a road and natural vegetation. In 1987 and 1988 the land use was described as a road, natural vegetation and farm structures.

As to this parcel, which appears to have been part of the same area farmed as that found under Application 49689, the applicant provided evidence that a building permit was issued to build the house on October 15, 1986, which is only 26 months

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<sup>875</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>876</sup> Transcript, pp. 5357-5360, public administrative hearing before the State Engineer, January 27, 2000; File No. 47902 official records in the office of the State Engineer.

<sup>877</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

before transfer Application 52843 was filed. The State Engineer finds the same analysis that was made for the attached existing place of use under Application 49689 should apply to this parcel, and as previously discussed, the photographs provided by both the protestant and the applicant appear to show this parcel was pasture land before the house was built in 1986 and 1987, but for that portion the protestant's witness said was taken up by a road. The applicant's witness testified that he believed the last time the parcel was probably irrigated was in the early 1980's and the protestant did not adequately rebut this testimony.<sup>878</sup> The State Engineer finds the applicant first applied to move this water right in 1986 under Application 49689, but then withdrew the request for transfer and refiled in 1989 under Application 52843. The State Engineer finds there is not a substantial period of non-use, and there is evidence of a lack of intent to abandon the water right as demonstrated by the applicant's attempt to first move the water right immediately after the house was built.

**Parcel 6** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>879</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986, 1987 and 1988 the land use on this parcel was described as natural vegetation.

The State Engineer notes this 2.36 acres were those acres that were withdrawn from the northern edge of the parcel requested for transfer under Application 49880 and finds that the same analysis applies here as applied under that application. The land use as demonstrated by a 1985 aerial photograph<sup>880</sup> was covered by

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<sup>878</sup> Transcript, p. 5278, public administrative hearing before the State Engineer, January 27, 2000.

<sup>879</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

<sup>880</sup> Exhibit No. 1082, public administrative hearing before the State Engineer, January 27, 2000.

mature native vegetation such as sagebrush that had obviously been there for a long period of time. The State Engineer finds no water was placed to beneficial use on Parcel 6 for the 40 year period from 1948 through 1988. The State Engineer finds that while the land is not physically covered by a structure, the land use is inconsistent with irrigated agriculture in that it is covered with mature native brush. The State Engineer finds that no evidence was provided to show a lack of intent to abandon the water right nor was any evidence provided as to the payment of taxes or assessments.

**Parcel 7** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>881</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980 and 1984, the land use was described as a road, on-farm supply ditch and portion irrigated. In 1985, the land use was described as a road, on-farm supply ditch, portion irrigated and bare land cleared for housing. In 1988, the land use was described as a road, on-farm supply ditch, portion irrigated and residential. The protestant provided evidence that of this 1.44 acre parcel, 1.29 acres were irrigated from 1962 through 1988,<sup>882</sup> and that another 0.06 of an acre was covered by an on-farm supply ditch, thereby leaving 0.09 alleged as being under a road for a substantial period of time. The State Engineer finds protestant provided evidence that on-farm, dirt-lined, supply ditch takes up 0.06 of an acre of the existing place of use,<sup>883</sup> and since those

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<sup>881</sup> Exhibit No. 1079, public administrative hearing before the State Engineer, January 27, 2000.

<sup>882</sup> Exhibit No. 1080, public administrative hearing before the State Engineer, January 27, 2000.

<sup>883</sup> Exhibit No. 1081, public administrative hearing before the State Engineer, January 27, 2000.

ditches were historically required to be water righted<sup>884</sup> the evidence demonstrates beneficial use of that water throughout the time frame of the photographs. The State Engineer finds the protestant proved non-use on 0.09 of an acre of land by clear and convincing evidence for a substantial period of time, a use inconsistent with irrigation, and the applicant did not make a sufficient showing of a lack of intent to abandon the water right or provide any evidence as to the payment of taxes or assessments.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>885</sup>

##### **II.**

#### **PERFECTION**

The State Engineer concludes that the protestant did not prove its claims of lack of perfection on Parcels 1, 3, 5, 6 or 7.

##### **III.**

#### **FORFEITURE**

The State Engineer concludes that the protestant proved the statutory period of non-use, the water rights are subject to the forfeiture provision of NRS § 533.060, and the water rights appurtenant to Parcels 1, 5 and 6 are subject to forfeiture.

##### **IV.**

#### **ABANDONMENT**

The State Engineer concludes as to Parcels 1, 6 and 0.09 of an acre in Parcel 7 that the protestant provided clear and convincing evidence of non-use of the water and a land use inconsistent with irrigated agriculture. The applicant did not prove payments of taxes or assessments or a lack of intent to abandon the water rights. Therefore, the State Engineer concludes

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<sup>884</sup> See, General Finding of Fact XI.

<sup>885</sup> NRS chapter 533 and Order of Remand from Federal District Court.

the water rights requested for transfer from Parcels 1, 6 and 0.09 of an acre in Parcel 7 are subject to abandonment. The State Engineer concludes that the protestant did not prove its claims of abandonment as to Parcels 3, 4 and 5 by clear and convincing evidence.

**RULING**

The protest to Application 52843 is hereby upheld in part and overruled in part. The water rights requested for transfer from Parcels 1, 5 and 6 are hereby declared forfeited. The water rights requested for transfer from Parcels 1, 6 and 0.09 of an acre in Parcel 7 are hereby declared abandoned. Therefore, the permit granted under Application 52843 is amended to allow the transfer of water rights appurtenant to 4.52 acres of land totaling 20.34 acre-feet to be perfected at the proposed place of use. There are issues regarding bench-land and bottom-land designations which could require adjustment of these numbers. The applicant may want to consult regarding these numbers before filing the map that is ordered below. The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were declared forfeited and/or abandoned.

**APPLICATION 53662**

**GENERAL**

**I.**

Application 53662 was filed on June 30, 1989, by Thomas W. Cook<sup>886</sup> to change the place of use of 76.73 acre-feet annually, a portion of the decreed waters of the Truckee River previously appropriated under the Serial Numbers 1043, 1044, 1046, 1046-1 and 1046-2, Claim No. 3 Orr Ditch Decree.<sup>887</sup> The proposed point of diversion is described as being located at Derby Dam. The existing places of use are described as:

**Parcel 1** - 1.40 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.20N., R.24E., M.D.B.&M.

**Parcel 2** - 13.70 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.20N., R.24E., M.D.B.&M.

**Parcel 3** - 1.95 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 24, T.20N., R.24E., M.D.B.&M.

The proposed places of use are described as 12.70 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 1.50 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 1.35 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , and 1.50 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , all in Section 24, T.20N., R.24E., M.D.B.&M. By letter dated March 28, 2000, the applicant withdrew 1.50 acres from the Parcel 2 request for transfer.<sup>888</sup>

**II.**

Application 53662 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>889</sup> and more

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<sup>886</sup> The Hearing Officer noted at the time of the administrative hearing that it had come to her attention that the property at issue here had been sold to many different parties; however, to the date of the hearing not one person or entity had filed to have the water rights assigned into their individual name(s). The trustee for the Thomas Cook Family Trust indicated that the property had been sold to a Cal-Neva Builders, Inc., which was notified of the hearing dates. Cal-Neva Builders has since been assigned a portion of the application.

<sup>887</sup> Exhibit No. 1295, public administrative hearing before the State Engineer, April 12, 2000.

<sup>888</sup> Exhibit No. 1296, public administrative hearing before the State Engineer, April 12, 2000.

<sup>889</sup> Exhibit No. 1297, public administrative hearing before the State Engineer, April 12, 2000.

specifically on the grounds as follows:<sup>890</sup>

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

**Parcel 2** - Partial lack of perfection, partial forfeiture, partial  
abandonment

**Parcel 3** - Lack of perfection, forfeiture, abandonment.

#### **FINDINGS OF FACT**

##### **I.**

#### **CONTRACT DATE 53662**

Exhibit XXX from the April 1991 administrative hearing contains contracts covering the existing places of use under Application 53662.<sup>891</sup>

**Parcel 1** - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application" dated August 3, 1917, covering the existing place of use. The State Engineer finds the contract date is August 3, 1917.

**Parcel 2** - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application" dated December 26, 1914, covering the existing place of use. The State Engineer finds the contract date is December 26, 1914.

**Parcel 3** - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application" dated October 28, 1914, covering the existing place of use. The State Engineer finds the contract date is October 28, 1914.

##### **II.**

#### **PERFECTION**

**Parcel 1** - The contract date is August 3, 1917. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

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<sup>890</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

<sup>891</sup> Exhibit No. 1298, public administrative hearing before the State Engineer, April 12, 2000.

of Use"<sup>892</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1917 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1917 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is December 26, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>893</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch, farmyard, farm structures and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. In fact, the protestant's witness proved perfection of the water right on 10.12 acres of this 12.20-acre parcel.<sup>894</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and

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<sup>892</sup> Exhibit No. 1301, public administrative hearing before the State Engineer, April 12, 2000.

<sup>893</sup> Exhibit No. 1301, public administrative hearing before the State Engineer, April 12, 2000.

<sup>894</sup> Exhibit No. 1303, public administrative hearing before the State Engineer, April 12, 2000.

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 3** - The contract date is October 28, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>895</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948; therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

**Parcel 1** - The contract date is August 3, 1917, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use

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<sup>895</sup> Exhibit No. 1301, public administrative hearing before the State Engineer, April 12, 2000.

Descriptions for Existing Place(s) of Use"<sup>896</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1988 and 1989 the land use on this parcel was described as a drain ditch. At the 1991 administrative hearing, the applicant described the land use as a ditch in both 1948 and 1991.<sup>897</sup> The State Engineer finds that no water was placed to beneficial use on Parcel 1 from 1948 through 1989.

**Parcel 2** - The contract date is December 26, 1914, therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>898</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1988 and 1989 the land use on this parcel was described as a drain ditch, farm yard, farm structures and portion irrigated. The protestant's witness proved perfection of the water right on 10.12 acres of this 12.20-acre parcel.<sup>899</sup> At the 1991 administrative hearing, the applicant described the land use in 1948 as a farmstead, road and cultivated land and in 1991 as a farmstead, road and urban development.<sup>900</sup> The State Engineer finds that no water was placed to beneficial use on 2.08 acres in Parcel 2 from 1948 through 1989.

**Parcel 3** - The contract date is October 28, 1914, therefore, the water right is subject to the forfeiture provision of NRS §

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<sup>896</sup> Exhibit No. 1301, public administrative hearing before the State Engineer, April 12, 2000.

<sup>897</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>898</sup> Exhibit No. 1301, public administrative hearing before the State Engineer, April 12, 2000.

<sup>899</sup> Exhibit No. 1303, public administrative hearing before the State Engineer, April 12, 2000.

<sup>900</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>901</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1988 and 1989 the land use on this parcel was described as a drain ditch. At the 1991 administrative hearing, the applicant described the land use in both 1948 and 1991 as a ditch.<sup>902</sup> The State Engineer finds that no water was placed to beneficial use on Parcel 3 from 1948 through 1989.

The applicant provided evidence that the proposed and existing places of use were held by the Viaene family since prior to 1920<sup>903</sup> and that the Viaene family obtained patents to the farms in 1922 (Farm Unit "F" which is the S½ NE¼ of Section 24, T.20N., R.24E., M.D.B.&M.)<sup>904</sup> and in 1923 (Farm Unit "D" which is the NE¼ NE¼ of Section 24, T.20N., R.24E., M.D.B.&M.).<sup>905</sup> The Viaene family became joint tenants of all the existing and proposed places of use with Thomas Cook in 1959<sup>906</sup>, except for Parcel 3, which was obtained by Cook in 1976.<sup>907</sup> The State Engineer finds that all the existing and proposed places of use were within a farm owned by the applicant at the time Application 53662 was

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<sup>901</sup> Exhibit No. 1301, public administrative hearing before the State Engineer, April 12, 2000.

<sup>902</sup> Exhibit No. 258, public administrative hearing before the State Engineer, April 15, 1997.

<sup>903</sup> Exhibit No. 1298, public administrative hearing before the State Engineer, April 12, 2000.

<sup>904</sup> Exhibit No. 1306, public administrative hearing before the State Engineer, April 12, 2000.

<sup>905</sup> Exhibit No. 1307, public administrative hearing before the State Engineer, April 12, 2000.

<sup>906</sup> Exhibit No. 1315, public administrative hearing before the State Engineer, April 12, 2000.

<sup>907</sup> Exhibit No. 1317, public administrative hearing before the State Engineer, April 12, 2000.

filed, therefore, the transfers from Parcels 1, 2 and 3 are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

**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.<sup>908</sup> "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."<sup>909</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>910</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

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<sup>908</sup> 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).

<sup>909</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>910</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

**Parcel 1** - The State Engineer has already found that no water was placed to beneficial use on Parcel 1 from 1948 through 1989. The State Engineer finds the land use is inconsistent with irrigation. The State Engineer finds that no evidence was presented demonstrating a lack of intent to abandon the water right.

**Parcel 2** - The State Engineer has already found that no water was placed to beneficial use on 2.08 acres in Parcel 2 from 1948 through 1989. The State Engineer finds as to those 2.08 acres that the land use is inconsistent with irrigation. The State Engineer finds that no evidence was presented demonstrating a lack of intent to abandon the water right.

**Parcel 3** - The State Engineer has already found that no water was placed to beneficial use on Parcel 3 from 1948 through 1989. The State Engineer finds the land use is inconsistent with irrigation. The State Engineer finds that no evidence was presented demonstrating a lack of intent to abandon the water right.

The applicant provided evidence that the proposed and existing places of use were held by the Viaene family since prior to 1920<sup>911</sup> and that the Viaene family obtained patents to the farms in 1922 (Farm Unit "F" which is the S $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 24, T.20N., R.24E., M.D.B.&M.)<sup>912</sup> and in 1923 (Farm Unit "D" which is the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T.20N., R.24E., M.D.B.&M.).<sup>913</sup> The Viaene family became joint tenants of all the existing and proposed places of use with Thomas Cook in 1959<sup>914</sup>, except for Parcel 3

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<sup>911</sup> Exhibit No. 1298, public administrative hearing before the State Engineer, April 12, 2000.

<sup>912</sup> Exhibit No. 1306, public administrative hearing before the State Engineer, April 12, 2000.

<sup>913</sup> Exhibit No. 1307, public administrative hearing before the State Engineer, April 12, 2000.

<sup>914</sup> Exhibit No. 1315, public administrative hearing before the State Engineer, April 12, 2000.

which was obtained by Cook in 1976.<sup>915</sup> The State Engineer finds that all the existing and proposed places of use were within a farm owned by the applicant at the time Application 53662 was filed, therefore, the transfers from Parcels 1, 2 and 3 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>916</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcel 2 or its claims of lack of perfection as to Parcels 1 and 3.

**III.**

**FORFEITURE AND ABANDONMENT**

The State Engineer concludes the water rights requested for transfer are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**RULING**

The protest to Application 53662 is hereby overruled and the State Engineer's decision granting Application 53662 is hereby affirmed.

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<sup>915</sup> Exhibit No. 1317, public administrative hearing before the State Engineer, April 12, 2000.

<sup>916</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 53910**

**GENERAL**

**I.**

Application 53910 was filed on October 2, 1989, by Darrell E. & Beverly J. Thomas to change the place of use of 198.45 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 854, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>917</sup> The proposed point of diversion is described as being located at Lahontan Dam.

The existing places of use are described as:

**Parcel 1** - 24.00 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 31, T.20N., R.28E., M.D.B.&M.

**Parcel 2** - 19.00 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 31, T.20N., R.28E., M.D.B.&M.<sup>918</sup>

**Parcel 3** - 1.10 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 31, T.20N., R.28E., M.D.B.&M.

The proposed places of use are described as 15.30 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  and 28.80 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , both in Section 31, T.20N., R.28E., M.D.B. & M.

**II.**

Application 53910 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>919</sup> and more specifically on the grounds as follows:<sup>920</sup>

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

**Parcel 2** - Lack of perfection, forfeiture, abandonment

**Parcel 3** - Lack of perfection, forfeiture, abandonment.

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<sup>917</sup> Exhibit No. 1485, public administrative hearing before the State Engineer, October 17, 2000.

<sup>918</sup> The State Engineer notes that the book record entered as Exhibit No. 1485 indicates that the existing place of use in Parcel 2 is the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, T.20N., R.28E., M.D.B.&M. However, upon review of the original application, it is clear that the existing place of use for Parcel 2 was identified as the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, T.20N., R.28E., M.D.B.&M.

<sup>919</sup> Exhibit No. 1486, public administrative hearing before the State Engineer, October 17, 2000.

<sup>920</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 53910**

Exhibit XXX from the 1991 administrative hearing contains contracts covering the existing place of uses under Application 53910.<sup>921</sup>

**Parcel 1** - Exhibit XXX contains a "Water-right Application for Lands in Private Ownership" under the name of E.R. Stuver and her husband dated September 10, 1919, covering the existing place of use. The State Engineer finds the contract date is September 10, 1919.

**Parcel 2** - Exhibit XXX contains a "Water-right Application for Lands in Private Ownership" under the name of G.F. and Ruth Engle dated October 21, 1919, covering the existing place of use. The State Engineer finds the contract date is October 21, 1919.

**Parcel 3** - Exhibit XXX contains a "Water-right Application for Lands in Private Ownership" under the name of C.B. and Millie Austin dated October 21, 1919, covering the existing place of use. The State Engineer finds the contract date is October 21, 1919.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is September 10, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>922</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and a portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948, and in fact provided evidence that a water right was

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<sup>921</sup> Exhibit No. 1487, public administrative hearing before the State Engineer, October 17, 2000.

<sup>922</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

perfected on 7.06 acres of the 24.00 acres comprising Parcel 1.<sup>923</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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 2** - The contract date is October 21, 1919, and provided that within the E $\frac{1}{2}$  SW $\frac{1}{4}$  of said Section 31 there were 80 acres of irrigable land in 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>924</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was natural vegetation and a portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948, and in fact provided evidence that a water right was perfected on 6.95 acres of the 19.00 acres comprising Parcel 2.<sup>925</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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

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<sup>923</sup> Exhibit No. 1492, public administrative hearing before the State Engineer, October 17, 2000.

<sup>924</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>925</sup> Exhibit No. 1492, public administrative hearing before the State Engineer, October 17, 2000.

was perfected.

**Parcel 3** - The contract date is October 21, 1919, and provided that within the W½ SE¼ of said Section 31 there were 80 acres of irrigable land in 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>926</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948, and in fact provided evidence that a water right was perfected on 0.60 of an acre of the 1.10 acres comprising Parcel 3.<sup>927</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. 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.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

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<sup>926</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>927</sup> Exhibit No. 1492, public administrative hearing before the State Engineer, October 17, 2000.

**Parcels 1 and 2** - The contract date for Parcel 1 is September 10, 1919, and for Parcel 2 is October 21, 1919; therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>928</sup> which indicates from aerial photographs that in 1948 the land use for both parcels was described as natural vegetation and a portion irrigated. In 1962, 1973, 1974, 1975, 1977, 1980, 1984 and 1989 the land uses were described as natural vegetation and bare land.

A witness for the applicant, a former owner of the farm, was brought forth to testify as to previous irrigation practices, but the testimony was very difficult to follow and understand. The witness described that the S½ of the SW¼ of said Section 31 had 44 acres of water rights used each year during the 1950's to grow melons and alfalfa.<sup>929</sup> The witness indicated that he purchased the farm in the early 1960's, leveled the S½ SW¼ of said Section 31 and fenced the N½ SW¼, which is that area which encompasses Parcels 1 and 2, and that tail water was allowed to run off the S½ into the N½ SW¼ of said Section 31.<sup>930</sup> The witness indicated that the N½ SW¼ of said Section 31 was used as a pasture for cattle from 1965 through 1982. The witness further indicated that the water came off the field in the S½ SW¼ of said Section 31 and flowed between Parcels 1 and 2 until ultimately finding its way to a low point where it ponded.<sup>931</sup>

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<sup>928</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>929</sup> Transcript, pp. 6204-6205, public administrative hearing before the State Engineer, October 17, 2000.

<sup>930</sup> Transcript, pp. 6204-6207, public administrative hearing before the State Engineer, October 17, 2000.

<sup>931</sup> Transcript, pp. 6204-6211, public administrative hearing before the State Engineer, October 17, 2000.

The State Engineer finds there is not clear and convincing evidence of non-use of the water rights on Parcels 1 and 2.

**Parcel 3** - The contract date for Parcel 3 is October 21, 1919; therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>932</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, and 1980 the land use on this parcel was described as a road and natural vegetation. In 1984, 1985, 1988 and 1989 the land use was described as a road, on-farm supply ditch and a portion irrigated. During the course of testimony, it became clear that the applicant believes the area from which water rights were requested to be stripped on the east side of Parcel 3 is not even his property, and that the road which he believed he was requesting to move water off of may not be part of the applicants' land.<sup>933</sup> The State Engineer finds there is sufficient evidence to draw into doubt whether the applicant owns the existing place of use from which he is requesting to transfer water; therefore, the State Engineer cannot allow the transfer of water from Parcel 3.

#### IV.

##### 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.<sup>934</sup> "Abandonment, requiring a union of acts

<sup>932</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>933</sup> Transcript, pp. 6216-6219, 6225-6235, public administrative hearing before the State Engineer, October 17, 2000.

<sup>934</sup> 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).

and intent is a question of fact to be determined from all the surrounding circumstances."<sup>935</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>936</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcels 1 and 2** - The State Engineer has already found that there is not clear and convincing evidence of non-use of the water rights on Parcels 1 and 2.

**Parcel 3** - The State Engineer has already found there is sufficient evidence to draw into doubt whether the applicant owns the existing place of use from which he is requesting to transfer water; therefore, the State Engineer cannot allow the transfer of water from Parcel 3.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>937</sup>

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<sup>935</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>936</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>937</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2 or 3.

**III.**

**FORFEITURE**

The State Engineer concludes as to Parcels 1 and 2 since there is not clear and convincing evidence of non-use of the water rights the protestant's forfeiture claim is not supported. The State Engineer concludes as to Parcel 3 that without sufficient proof that the applicants are requesting a transfer of water from land they own and there is no proof of ownership of the water right they are requesting to transfer, the transfer cannot be allowed.

**IV.**

**ABANDONMENT**

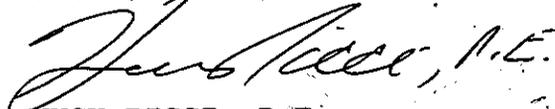
The State Engineer concludes as to Parcels 1 and 2 since there is not clear and convincing evidence of non-use of the water rights the protestant's abandonment claim is not supported. The State Engineer concludes as to Parcel 3 that without sufficient proof that the applicants are requesting a transfer of water from land they own and there is no proof of ownership of the water right they are requesting to transfer, the transfer cannot be allowed.

**RULING**

The protest to Application 53910 is hereby overruled. The State Engineer's decision granting Application 53910 as to Parcels 1 and 2 is hereby affirmed; however, the State Engineer's decision as to Parcel 3 is reversed and no transfer of water rights will be allowed from Parcel 3 due to the ownership issue. Therefore the permit granted under Application 53910 is amended to allow the transfer of water rights appurtenant to 43 acres of land totaling 193.50 acre-feet to be perfected at the proposed place of use.

The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were not allowed to be changed off Parcel 3.

Respectfully submitted as to  
Applications 49395, 49396, 49569,  
49689, 49880, 49999, 51039, 51041,  
51054, 51057, 51231, 51235, 51368,  
51369, 51371, 51374, 51377, 51599,  
51605, 51735, 51737, 52335, 52545,  
52549, 52550, 52552, 52554, 52843,  
53662, 53910,

  
HUGH RICCI, P.E.  
State Engineer

HR/SJT/hf  
Dated this 9 th day of  
March, 2001.