

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

IN THE MATTER OF APPLICATIONS)
51045, 51051, 51052, 51058, 51060,))
51228, 51234, 51376, 51600, 51604,))
51606, 51608, 51733, 51734, 51736,))
51957, AND 52542.)

RULING ON REMAND

5047

GENERAL INTRODUCTION

I.

FILING OF APPLICATIONS AND PROTESTS

Applications 51045, 51051, 51052, 51058, 51060, 51228, 51234, 51376, 51600, 51604, 51606, 51608, 51733, 51734, 51736, 51957 and 52542¹ were filed to change the place of use of water decreed under the Truckee and Carson River Decrees, the decrees which adjudicated the waters of those rivers.² The 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").

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

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

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

* * *

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

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

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

II.

UNITED STATES INTERVENTION

Early in the transfer case proceedings, the United States Department of Interior, Bureau of Reclamation, petitioned the State Engineer to intervene as an unaligned party in interest.³ Intervention was granted on the grounds that there were federal interests in the proceedings that justified standing as a party.⁴

III.

PREVIOUS HEARINGS ON GROUPS 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 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

³ 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.

⁴ State Engineer's Ruling No. 3241, dated September 30, 1985. Transcript, p. 23, public administrative hearing before the State Engineer, October 15-18, 1996 (U.S. allowed full party status for protecting federal interests and limited to that protection), official records in the office of the State Engineer.

made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties.⁵ 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.⁶ While the transcripts from the February 16 and 22, 1989, administrative hearings on Group 6, and the April 9, 1991, administrative hearings on Group 7 do not have specific references to incorporating the previous administrative hearing records, by the fact that the protestant examined applicants' 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.⁷ On February 12, 1987, the State Engineer issued his ruling with regard to the Group 4 transfer

⁵ 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, official records in the office of the State Engineer.

⁶ 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, official records in the office of the State Engineer.

⁷ State Engineer's Ruling No. 3241, dated September 30, 1985, official records in the office of the State Engineer.

applications overruling the PLPT's protests and approving all the subject applications.⁸ 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.⁹ 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.¹⁰

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). 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 pertain to the issues of perfection, forfeiture and abandonment.¹¹ No new evidence was presented at the November 7, 1990, administrative hearing and the State Engineer proceeded to rule on remand from the evidence already contained in the record of the proceedings.¹² On January 30, 1992, the State Engineer

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

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

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

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

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

issued his ruling with regard to the transfer applications in Group 7 overruling the PLPT's protests and approving all the subject applications.¹³

The State Engineer's rulings approving those 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 those cases nor have those applications ever received an initial review by the Federal District Court.¹⁴

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.¹⁵ The Alpine II Court held that:

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

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

¹⁴ The State Engineer notes that appeals from the remand of some of those applications are now in progress.

¹⁵ U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217 (9th Cir. 1989) ("Alpine II").

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.¹⁶

¹⁶ U.S. v. Alpine Land and Reservoir Co., 983 F.2d 1487 (9th Cir. 1992) ("Alpine III").

VI.

ALPINE III

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

The Ninth Circuit Court of Appeals remanded the matter to the U.S. District Court to determine: (1) whether the water rights appurtenant to the transferor properties at issue had been perfected; (2) whether the holders of the water rights sought to be transferred had abandoned their water rights; and (3) whether the specific water rights sought to be transferred, if said water rights vested after March 22, 1913, had been forfeited. If said rights vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to March 22, 1913, then the water rights are not subject to forfeiture under the provision of NRS § 533.060.¹⁷

¹⁷ Alpine III, 983 F.2d at 1496.

VII.

ORDER OF REMAND TO STATE ENGINEER

On October 4, 1995, the U.S. District Court issued an order remanding the transfer application cases¹⁸ 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

By notice dated January 10, 1996, the State Engineer informed the Group 3 applicants of a status conference to be held on February 5, 1996.¹⁹ 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.²⁰ 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.

¹⁸ *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.

¹⁹ January 10, 1996, Notice of Status Conference, official records in the office of the State Engineer.

²⁰ Transcript, Status Conference, public administrative hearing before the State Engineer, February 5, 1996.

IX.

EXCHANGE OF INFORMATION AND LEGAL BRIEFS

After the status conference, by notices dated February 12, 1996,²¹ and March 6, 1996,²² the 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. 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, as to Group 3 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). The notices further established a date by which the applicants were to provide the PLPT with any rebuttal²³ 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

²¹ February 12, 1996, Notice of Group 3 discovery schedule, official records in the office of the State Engineer.

²² March 6, 1996, Notices of Groups 4-7 discovery schedule, official records in the office of the State Engineer.

²³ 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.

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.²⁴

As to Groups 4 through 7, the State Engineer followed the same process agreed upon with regard to Group 3 and ordered the protestant to provide the applicants by July 31, 1996, a more definitive statement in which the protestant was to identify parcel by parcel whether it was ultimately pursuing a claim of lack of perfection, forfeiture or abandonment as to each parcel, and to provide its documentary evidence to support said claim(s). In response, by November 29, 1996, the applicants were ordered to supply the protestant with any evidence they had to refute the protestant's claims. While the parties agreed upon this process, all appeared in some way to disregard said agreement.

The protestant argues it can allege alternative theories as to means by which an applicant can lose their water rights and repeatedly argued that the State Engineer had put the protestant under an onerous burden for producing the evidence in its more definitive statement. The State Engineer finds that the protestant did not comply with the spirit of the order for a more definitive statement and further finds that the protestant's cries of onerous burden are disingenuous. These protest claims were first part of the proceedings held in 1985, 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 has been given another opportunity to present its case, but now, more than a decade

²⁴ 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.

later, the protestant claims it was under an onerous burden to produce the evidence or any additional evidence to support its claims. The State Engineer does not agree. It was reasonable at this juncture, particularly since it is impossible to sustain all three claims of lack of perfection, forfeiture and abandonment, to require the protestant to refine its generalized/alternating theory claims making these claims specific based on evidence that can sustain them. A water right that is not perfected is not subject to the doctrines of loss through forfeiture or abandonment.

As to the petitions to declare certain transfer applications as intrafarm transfers under consideration in this ruling, the State Engineer by notice dated February 2, 2001, ordered the protestant PLPT to serve on the applicants' legal counsel and file with the State Engineer by March 9, 2001, its evidence regarding the protest issues remanded to the State Engineer, those being lack of perfection, forfeiture and abandonment. These transfer applications are being ruled upon based on the documentary evidence attached to the applicants' petitions and that evidence filed by the protestant in compliance with the February 2, 2001, notice.

X.

STATE ENGINEER'S INTERIM RULING NO. 4411

On August 30, 1996, the State Engineer issued Interim Ruling No. 4411²⁵ regarding some of the issues of law that had been addressed in the pre-hearing legal briefs and which pertained to matters the State Engineer determined could be ruled on as a matter of law at that time. Those issues included the following:

1. Is the PLPT through its protests to the transfer applications attempting to modify, relitigate or collaterally attack the Orr Ditch Decree and the Alpine

²⁵ State Engineer's Interim Ruling No. 4411, dated August 30, 1996, official records in the office of the State Engineer.

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 Engineer²⁶, 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.

XII.

1996-1998 HEARINGS

After all parties of interest were duly noticed by certified mail, the public administrative hearings regarding certain of the

²⁶ Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948 (1992).

Groups 3 through 7 transfer applications were re-opened and hearings were continued on October 15-18, 1996,²⁷ November 12-15, 1996,²⁸ January 23-24, 1997,²⁹ March 4, 1997,³⁰ April 14-16, 1997,³¹ August 25-26, 1997,³² September 22-24, 1997,³³ October 7-8, 1997,³⁴ October 20-23, 1997,³⁵ November 17, 1997,³⁶ February 2-3, 1998,³⁷ March 2-6, 1998,³⁸ March 30 - April 3, 1998,³⁹ April 27 - May 1,

²⁷ Transcript, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer.

²⁸ Transcript, public administrative hearing before the State Engineer, November 12-15, 1996, official records in the office of the State Engineer.

²⁹ Transcript, public administrative hearing before the State Engineer, January 23-24, 1997, official records in the office of the State Engineer.

³⁰ Transcript, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

³¹ Transcript, public administrative hearing before the State Engineer, April 14-16, 1997, official records in the office of the State Engineer.

³² Transcript, public administrative hearing before the State Engineer, August 25-26, 1997, official records in the office of the State Engineer.

³³ Transcript, public administrative hearing before the State Engineer, September 22-24, 1997, official records in the office of the State Engineer.

³⁴ Transcript, public administrative hearing before the State Engineer, October 7-8, 1997, official records in the office of the State Engineer.

³⁵ Transcript, public administrative hearing before the State Engineer, October 20-23, 1997, official records in the office of the State Engineer.

³⁶ Transcript, public administrative hearing before the State Engineer, November 7, 1997, official records in the office of the State Engineer.

³⁷ Transcript, public administrative hearing before the State Engineer, February 2-3, 1998, official records in the office of the State Engineer.

³⁸ Transcript, public administrative hearing before the State Engineer, March 2-6, 1998, official records in the office of the State Engineer.

³⁹ Transcript, public administrative hearing before the State Engineer, March 30 - April 3, 1998, official records in the office of the State Engineer.

1998,⁴⁰ November 2-6, 1998,⁴¹ January 11-22, 1999,⁴² January 25-28, 2000,⁴³ March 7-10, 2000,⁴⁴ April 11-14, 2000,⁴⁵ and October 17, 2000,⁴⁶ at Carson City, Nevada, before representatives of the office of the State Engineer. At the pre-hearing status conference, the parties agreed that a "clean record" would be easier to follow. 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 remarked for this record. While certain applicants argued this was a brand new hearing the State Engineer does not agree. It is a hearing on remand which means it is a continuation of the previous hearing, and the State Engineer cannot and will not ignore all that has taken place to date. Therefore, the State Engineer also took administrative notice of the records in the office of the State

⁴⁰ Transcript, public administrative hearing before the State Engineer, April 27 - May 1, 1998, official records in the office of the State Engineer.

⁴¹ Transcript, public administrative hearing before the State Engineer, November 2-6, 1998, official records in the office of the State Engineer.

⁴² Transcript, public administrative hearing before the State Engineer, January 11-22, 1999, official records in the office of the State Engineer.

⁴³ Transcript, public administrative hearing before the State Engineer, January 25-28, 2000, official records in the office of the State Engineer.

⁴⁴ Transcript, public administrative hearing before the State Engineer, March 7-10, 2000, official records in the office of the State Engineer.

⁴⁵ Transcript, public administrative hearing before the State Engineer, April 11-14, 2000, official records in the office of the State Engineer.

⁴⁶ Transcript, public administrative hearing before the State Engineer, October 17, 2000, official records in the office of the State Engineer.

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.⁴⁷

**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, and State Engineer's Ruling No. 4591, was issued pursuant to the Federal District order of remand issued in October 1995.⁴⁸ 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 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 observed that it

⁴⁷ Transcript p. 7, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer.

⁴⁸ *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.

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 which derives from the Project was initiated by 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.

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, the Court stated 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 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 payment of taxes or assessments, the Court concluded the PLPT failed to provide clear and convincing evidence of abandonment.

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. This part of Judge McKibben's order is what prompted the petitions under consideration in this ruling.

In November 1998, the State Engineer re-opened the evidentiary hearing to address those matters remanded to the State Engineer pursuant to the September 3, 1998, order from the Federal District Court. In January 1999, the State Engineer re-opened the evidentiary hearings of other remanded transfer applications already re-heard by the State Engineer prior to the date of September 3, 1998, order to provide those applicants the same chance to address the issues raised by Judge McKibben in his order of September 3, 1998. On July 21, 1999, the State Engineer issued Supplemental Ruling on Remand No. 4750, which addressed those matters remanded by the Federal District Court in September 1998. Ruling No. 4750 presented the State Engineer's first decision on intrafarm matters. Since then intrafarm transfers have been addressed in State Engineer Ruling Nos. 4825, 4798 and 5005, which are all ruling on portions of the matters remanded in these transfer cases.

XIV.

INTRAFARM PETITIONS

The State Engineer has before him in this ruling sixteen (16) petitions alleging that the relevant transfer applications are intrafarm transfers and requests for the State Engineer to so determine and then to 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 applicants alleged that their transfer applications could 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, they believe the facts proving an intrafarm transfer can be proven by 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. Therefore, by Notice dated February 2, 2001, a schedule was established for the protestant to serve on the applicants' legal counsel and to file with the State Engineer its evidence regarding the protest issues remanded by the Federal District Court to the State Engineer. These transfer applications will be ruled upon

based on the documentary evidence attached to the petitions and that evidence filed by the protestant in compliance with the February 2, 2001, notice.

**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."⁴⁹ It is the policy of the Division of Water Resources, affirmed by the Nevada Supreme Court's decision in the Town of Eureka case, that whenever a private person files a protest claim or a petition alleging forfeiture or abandonment of a water right it is the protestant's or petitioner's burden to produce the evidence and prove said claims. It is not the applicant's job to disprove the protestant's claims. The State Engineer finds that the burden of producing evidence and proving the protest claims of abandonment and forfeiture lie squarely on the protestant 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.

⁴⁹ Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948, 952 (1992).

II.

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.⁵⁰ Certain applicants argue that the water right is appurtenant to the entire parcel of land described in a contract.⁵¹

Some of the "Agreements" submitted into evidence were grants by private persons of their pre-Project vested water rights to the United States in exchange for Project water for lands then presently under cultivation and irrigation.⁵² Other "Agreements" described obtaining a water right for the **total irrigable** area of the entire ownership susceptible of being served water.⁵³

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

⁵⁰ 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.

⁵¹ 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.

⁵² Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997, official records in the office of the State Engineer.

⁵³ Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997, official records in the office of the State Engineer.

beneficially used on said **irrigable** land.⁵⁴ 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 a certain portion were then classed as **irrigable**.⁵⁵ In a "Water-Right Application - Homesteads Under The Reclamation Act" and in a "Water-Right Application For Lands in Private Ownership And Lands Other Than Homesteads Under The Reclamation Act" the applicant applied for a permanent water right for the irrigation of and to be appurtenant to a certain number of **irrigable** acres as shown on plats approved by the Secretary of the Interior within the tract of land described. The description of the land identified a total number of acres of which a certain portion were then classed as **irrigable**.⁵⁶

Testimony provided at the 1985 hearings and the evidence provided in the contracts indicate that just by reference to the contracts a person cannot identify the location of either the **irrigable** or **non-irrigable** acres within any particular section of land. Rather, other information available in the TCID engineering department would further locate those lands, i.e., the TCID water right maps would generally reveal areas designated as not having

⁵⁴ Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997, official records in the office of the State Engineer.

⁵⁵ Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997, official records in the office of the State Engineer.

⁵⁶ Exhibit Nos. 45 and 59, public administrative hearing before the State Engineer, October 1996 through March 1997, official records in the office of the State Engineer.

water rights.⁵⁷ 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.⁵⁸ These maps were produced around 1913, 1925⁵⁹, 1960⁶⁰ 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

⁵⁷ 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, official records in the office of the State Engineer.

⁵⁸ Transcript, pp. 1797-1817, 1845-1847, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

⁵⁹ Transcript, pp. 1804-1806, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

⁶⁰ "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 acreage 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, official records in the office of the State Engineer. 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) of said section.

district's water right is not appurtenant to **irrigated** acreage, but rather the **irrigable** acreage.⁶¹ The State Engineer finds that the water rights contracted for use in the Project are not appurtenant to the entire parcel of land described in any particular contract.

III. 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.⁶² 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.⁶³ Yet, farmers (with apparent acquiescence by the United States) continued to transfer water within a farm unit or contract area as farm technology changed and they leveled fields and filled in sloughs.

⁶¹ In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin; State of Washington, Dept. of Ecology v. Acquavella, et al., 1997 WL 197268 (Wash.). The Court further held that although an irrigation district's water right is legally appurtenant to the land on which the water is applied, the right can be shifted to any land in the district on which the water can be beneficially used, on any irrigable acreage.

⁶² 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, official records in the office of the State Engineer.

⁶³ Transcript, pp. 1789-1795, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

After the Alpine Decree in 1980, and after the United States Supreme Court's 1983 decision in Nevada v. U.S.,⁶⁴ 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 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 II⁶⁵ 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. 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.

IV.

LOCATION OF LANDS COVERED BY WATER RIGHTS

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

⁶⁴ Nevada v. U.S., 463 U.S.110, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983).

⁶⁵ Alpine II, 878 F.2d at 1229.

the Reclamation Service, the Bureau of Reclamation or the TCID the specific location of the areas with water rights within an identified section of land. Testimony was provided in the 1984-1985 hearings that the water righted area of an existing place of use can be found on the water rights maps found in the TCID offices, and that the State⁶⁶ and the Bureau of Reclamation also have copies of those maps.⁶⁷ 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.⁶⁸

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

⁶⁶ The State Engineer assumes the witness was referring to the State Engineer's office.

⁶⁷ 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, official records in the office of the State Engineer.

⁶⁸ 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, official records in the office of the State Engineer.

water right documents made available by the TCID.⁶⁹ In September 1984, Intermountain Professional Services, Inc. entered into a contract with the Bureau of Reclamation for a review of the Criddle Report.⁷⁰ 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.⁷¹ 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.⁷²

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.⁷³ Intermountain concluded its review by proposing suggestions for further research, including further research for all water-right contracts and applications and updating maps.⁷⁴

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-

⁶⁹ "Criddle Report" Review, prepared by Intermountain Professional Services, Inc., dated January 31, 1985, p. 2, official records in the office of the State Engineer.

⁷⁰ Id. at 3.

⁷¹ Ibid.

⁷² Ibid.

⁷³ "Criddle Report" Review at 21.

⁷⁴ "Criddle Report" Review at 25-30.

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.⁷⁵ However, subsequently, in recognition of the difficulty of responding to that request, the Bureau of Reclamation contracted with Chilton Engineering, Chartered ("Chilton") to perform a water-rights investigation.⁷⁶

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 acreage, ownerships, and locations within the Newlands Project.⁷⁷ In Milestone 1, Chilton was to tabulate by ¼ ¼ sections the water-righted acreage according to the TCID colored water-right maps⁷⁸ 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.⁷⁹ In Milestone 2, Chilton resolved all but 110.4 acres of the

⁷⁵ Official records in the office of the State Engineer.

⁷⁶ 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.

⁷⁷ 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, official records in the office of the State Engineer.

⁷⁸ Id. at 1-2.

⁷⁹ Report on Milestone 2 at 3.

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.⁸⁰

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.⁸¹ Milestone 4 would have produced a map showing the physical location of water rights within the ¼ ¼ sections⁸² 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.⁸³

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.⁸⁴

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

⁸⁰ Report on Milestone 2 at 5.

⁸¹ Report on Milestone 2 at 6.

⁸² 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.

⁸³ Report on Milestone 2 at 28-29.

⁸⁴ 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.

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 the cumulative work prepared from the records of the TCID which were found to be substantially accurate.

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

Another issue as to the location of land covered by water right contracts arises in the context of the aerial photography used by the protestant's witnesses for making land use determinations on the existing places of use from 1948 through the 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 and 1987⁸⁵ (no photographs were introduced into evidence) at various scales as summarized below:

1948 March	- black and white, approximate scale 1" = 400'
1962 Sept.	- black and white, approximate scale 1:20,000
1972 June	- color infrared, approximate scale 1:34,000
1973 August	- color infrared, approximate scale 1:12,000
1974 May, June	- color infrared, approximate scale 1:12,000
1975 May	- color infrared, approximate scale 1:12,000

⁸⁵ There is no evidence in the record as to the scale of the 1985, 1986 and 1987 aerial photographs.

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 1:24,000⁸⁶

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 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 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 of an acre square. Taking that 0.15 of an acre and multiplying it by the 43,560 ft²

⁸⁶ Exhibit No. 15, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer.

found in an acre equals 6,534 ft² or 80.83 feet on a single side of the 0.15 of an 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.

V.

EXISTENCE OF UNDERLYING CONTRACT

The issues remanded to the State Engineer were lack of perfection, forfeiture or abandonment and those remanded issues did not include whether or not an underlying contract existed. In

fact, in many of the hearings at issue here a process was gone through whereby the legal counsel for the United States Bureau of Reclamation, Mr. Turner, in each instance informed the applicants when he was not convinced that title to the water rights requested for transfer had been supplied. Upon such notification, the applicants performed further research until Mr. Turner had been satisfied that the title was documented to each of the water rights at issue. The State Engineer finds it interesting that during the remand hearings Mr. Macfarlane, present legal counsel for the United States, presented new documents regarding title to the underlying water rights being requested for transfer, but now took the position that he could not certify whether the appropriate title documents had been found. The State Engineer finds that the issue of whether or not an underlying contract exists is barred as it was not an issue raised on appeal to the Federal District Court and was not included as an issue remanded to the State Engineer by the Federal District Court, particularly since part of the role the United States played in these proceedings was to assure that an underlying water right contract existed for each parcel of land sought to be transferred. Furthermore, even if a contract was not specifically introduced into evidence, the TCID contract file is readily identifiable from serial numbers found on either the transfer application or its accompanying map, and the TCID certification as to each transfer application provides the contract serial number for the relevant contract.⁸⁷

⁸⁷ There have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by owner's names. They also used serial numbers issued to the contract owner's Homestead Entries. Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, p. 40. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996, official records in the office of the State Engineer.

VI.

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.⁸⁸ A review of Exhibit CC from the 1985 administrative hearings, during the 1996-98 hearings, revealed that the contract document exhibits did not in fact 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. In recognition that perhaps some of the early contract exhibits appear to be incomplete, if the original exhibit does not contain a contract for a particular parcel, the supplemental contracts provided by the Bureau of Reclamation will be taken as the best evidence of a particular contract date unless evidence convinces him to use another contract date. If a conflict arises between a date provided in the exhibit at the original administrative

⁸⁸ 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, official records in the office of the State Engineer. 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, official records in the office of the State Engineer.

hearing and a contract provided by the Bureau of Reclamation during the 1996-98 hearings, the State Engineer will accept the contract date in the exhibit at the original administrative hearing as the appropriate contract date, as that was the contract provided by the TCID at those hearings, unless evidence is provided otherwise by any party proving a different and apparently correct contract date. While the United States provided the additional contract documents at some of the hearings on remand it took no position as to which document would be the correct underlying contract.

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

VII.

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 images⁸⁹ that in some cases 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. The State Engineer finds this finding is in complete agreement with Judge McKibben's decision regarding intrafarm transfers.

VIII.

PERFECTION OF PRE-STATUTORY VESTED WATER RIGHTS

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

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

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

⁹¹ Ibid.

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

The Alpine Decree, in a tabulation of vested rights acquired by contract, identifies 30,482 "former **irrigated**" acres with priority dates ranging from 1865 to 1902.⁹⁵ Testimony was provided that at the time the Project was turned over to the TCID in 1926⁹⁶ for operation and maintenance there were 20,145 acres of vested water rights on land within the Project and those lands had been **put to use and irrigated** back in the 1800's.⁹⁷ Based on the fact that the Alpine Decree identifies and tabulates vested water right

⁹² 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, official records in the office of the State Engineer.

⁹³ Alpine, 503 F.Supp. at 881.

⁹⁴ Ibid.

⁹⁵ Alpine Decree at 151-152.

⁹⁶ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer. 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, official records in the office of the State Engineer.

⁹⁷ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer. Transcript, p. 69, public administrative hearing before the State Engineer, February 4, 1985, official records in the office of the State Engineer.

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.

IX.

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

⁹⁸ Transcript, pp. 69-70, public administrative hearing before the State Engineer, February 4, 1985, official records in the office of the State Engineer. See TCID Exhibit Y in Vol. II, previous Record on Review filed with the Court in November 1985.

⁹⁹ Exhibit No. 203, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

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

**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 NEULANDS PROJECT
IN THE ORR DITCH DECREE**

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

as to what was actually accomplished by the Orr Ditch Decree. While the Orr Ditch Decree itself appears to have determined that the water right was perfected as a matter of law, later court decisions have brought that determination into question.

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

The Special Master noted that the United States was not constrained by the doctrine of due diligence in placing the water to beneficial use, but also noted that the Government proceeded with due diligence to construct the Derby Dam, Truckee Canal and Lahontan Reservoir, and that if the enterprise had been a private one the right to the water diverted for storage and irrigation would have been complete,¹⁰² i.e., the water right was perfected. Under these conditions the State Engineer would find that the water right for the entire Project was perfected as a matter of law pursuant to the decree even though the decree only established an agreed upon maximum aggregate amount of water to which the United States (now Project farmers) was entitled for the development of the Project.¹⁰³

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

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

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

¹⁰³ Alpine II, 878 F.2d at 1224.

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 tracts of land.¹⁰⁴ This decision of the Ninth Circuit Court of Appeals is internally inconsistent and illogical as the decision also indicates there is no appropriation of water until water is actually put to beneficial use, but fails to consider how the United States could have perfected water rights under Nevada law absent the United States itself having a place to put that water to beneficial use. All water rights associated with the Project had to either be established under Nevada law or they are the implied reserved water rights noted by the Special Master.¹⁰⁵ However, even though the Special Master treated the United States' water right for the Project as a federal reserved right, the Reclamation Act itself provides that water for reclamation projects is appropriated pursuant to state law.

In Prosole v. Steamboat Canal Co.,¹⁰⁶ the Nevada Supreme Court considered the issue of who was the appropriator and owner of the water as between a diverter and a conveyor of the water and the owner of the reclaimed lands upon which the water was applied to beneficial use. The Court held that no water right was created by the mere diversion of water from a public watercourse. An appropriation was only accomplished by the act of diversion coupled with the act of application to a beneficial use.¹⁰⁷ It

¹⁰⁴ Alpine III, 983 F.2d at 1495.

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

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

¹⁰⁷ Id. at 159-60.

necessarily follows from the principle established by Prosole that no water right was created by the mere diversion and storage of water by the United States and that under Nevada law the appropriation is not accomplished until the water is put to beneficial use. Since the United States Supreme Court in Nevada v. U.S. has now said that the water rights belong to the farmers and not the United States, nearly 40 years after the fact the Court changed the rules of the same 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.¹⁰⁸ 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.¹⁰⁹ However, if a right being determined

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

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

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**.

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 1902.¹¹⁰ 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,"¹¹¹ 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

¹¹⁰ Alpine III, at 1495-96.

¹¹¹ Id. at 1496.

constituting Bureau approval of the irrigation of the water-righted land.¹¹² Based on the Bureau of Reclamation regulations, which the State Engineer must assume the Bureau followed while it operated the Project through 1926, the Bureau required that in order to obtain a water right a person was to perfect the water right before the Bureau determined irrigability and productivity. Therefore, the State Engineer concludes the evidence supports the conclusion that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

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

In the pre-hearing legal briefs, the State Engineer was presented with the argument that after the Ninth Circuit Court of Appeals' decision in Alpine II¹¹³ (that the State Engineer may not grant an application to transfer a water right that has not been put to beneficial use) the Nevada Legislature re-affirmed that Nevada law does allow for the transfer of a water right before perfection on the transferor place of use, indicating that the Ninth Circuit was mistaken in its interpretation of Nevada law.¹¹⁴ After the Court's decision in Alpine II, the Nevada Legislature

¹¹² Transcript Vol. III, pp. 458-459, public administrative hearing before the State Engineer, November 28, 1984, official records in the office of the State Engineer. Transcript, pp. 133-135, public administrative hearing before the State Engineer, April 9, 1991, official records in the office of the State Engineer. Transcript, p. 1857, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

¹¹³ Alpine II, 878 F.2d at 1226.

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

added NRS § 533.324 to clarify that as used in NRS § 533.325¹¹⁵ "water already appropriated" **includes** water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended beneficial use before an application to change the point of diversion, place or manner of use is made. In other words, 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

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

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".¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Yet, the law was enacted.

¹¹⁶ Assembly Committee on Government Affairs, March 24, 1993.

¹¹⁷ Briefing paper submitted by R. Michael Turnipseed, P.E., State Engineer to the 1993 Nevada State Legislature, dated March 16, 1993.

¹¹⁸ Assembly Committee on Government Affairs, March 24, 1993.

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.

In any analysis of a change in place of use of a pre-statutory (pre-1905) surface-water right the issue does arise as to 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...¹¹⁹

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

¹¹⁹ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the work a *bona fide* intention to complete it within a reasonable time.¹²⁰

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.¹²¹ 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.¹²²

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 not all unperfected water rights within the Newlands Project are available to be transferred. If

¹²⁰ Id. at 546.

¹²¹ 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).

¹²² NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

the protestant proves a water right was not perfected prior to the filing of one of the transfer applications, the issue becomes whether that particular water right is still within the diligence phase of development. If it is within the diligence phase, the unperfected water right can be moved. If it is not within the diligence phase, the unperfected water right is not available for transfer as it does not comport with the common law concepts of due diligence and relation back. The State Engineer further finds this is an area where equity perhaps should act. Everyone had operated for years under the belief, as set forth by the Special Master, that the concept of due diligence was not applicable to the "United States" water right for the Project. If there was no requirement of diligence placed on the United States, 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 51045

GENERAL

I.

Application 51045 was filed on June 18, 1987, by Larry Z. and Ynez Kyte¹²³ to change the place of use of 117.14¹²⁴ acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 424 and 427, 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** - 0.82 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, T.19N., R.27E., M.D.B.&M.
- Parcel 2** - 6.11 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, T.19N., R.27E., M.D.B.&M
- Parcel 3** - 0.83 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 19, T.19N., R.27E., M.D.B.&M
- Parcel 4** - 3.06 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 19, T.19N., R.27E., M.D.B.&M.
- Parcel 5** - 6.26 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 19, T.19N., R.27E., M.D.B.&M
- Parcel 6** - 3.97 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M
- Parcel 7** - 1.83 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M
- Parcel 8** - 3.15 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M

The proposed places of use are described as being 0.86 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 3.94 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 1.36 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.65 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, all within Section 19, T.19N., R.27E., M.D.B.&M., 2.91 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, 6.21 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 10.10 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, all within Section 20, T.19N., R.27E., M.D.B.&M

¹²³ File No. 51045, official records in the office of the State Engineer. There is an assignment pending for the transfer of this permit to the Kyte Family Trust.

¹²⁴ The State Engineer notes that while the application was actually filed for 117.14 acre-feet of water, when the original permit was issued the State Engineer corrected the number to more closely reflect the actual amount applied for in relation to the land in question and issued the permit for 106.99 acre-feet.

By letter dated February 25, 1994 and revised March 23, 1994, the applicant withdrew 1.7 acres from the Parcel 4 request for transfer and 2.0 acres from the Parcel 6 request for transfer.¹²⁵

II.

Application 51045 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹²⁶ and more specifically on the grounds as follows:¹²⁷

- Parcel 1** - Lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, abandonment
- Parcel 4** - Lack of perfection, abandonment
- Parcel 5** - Lack of perfection, abandonment
- Parcel 6** - Lack of perfection, abandonment
- Parcel 7** - Lack of perfection, abandonment
- Parcel 8** - Partial lack of perfection, partial abandonment.

Pursuant to the filing of the PLPT's evidence in this matter on March 8, 2001, which post-dates the filing of the applicant's evidence, the Tribe attempted to amend its contentions to the following:

- Parcel 1** - Lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, abandonment
- Parcel 4** - Lack of perfection, abandonment
- Parcel 5** - Lack of perfection, abandonment
- Parcel 6** - Lack of perfection, abandonment
- Parcel 7** - Partial lack of perfection, abandonment
- Parcel 8** - Partial lack of perfection, abandonment.

¹²⁵ File No. 51045, official records in the office of the State Engineer.

¹²⁶ File No. 51045, official records in the office of the State Engineer.

¹²⁷ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will remain those pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATES 51045

Parcels 1 and 2 - Exhibit LLL from the 1989 administrative hearing contains a "Water-right Application for Land in Private Ownership" dated August 17, 1918,¹²⁸ which covers the land identified as Parcels 1 and 2. The applicants also refer to this document as the relevant water rights contract.¹²⁹ The State Engineer finds the contract date is August 17, 1918.

Parcels 3 and 4 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated January 8, 1907,¹³⁰ which indicates that parts of the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 19, T.19N., R.27E., M.D.B.&M area covered by pre-Project vested water rights exchanged for Project water rights. A second document, a "Certificate for Filing Water Right Application"¹³¹ dated December 31, 1907, indicates that in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 19 31 acres of vested water rights existed and 3 acres of new water rights were added under the December 31, 1907, certificate. The PLPT indicates in its Table 1 that the December 31, 1907, certificate

¹²⁸ Official records in the office of the State Engineer.

¹²⁹ Applicants' Petition for Certification as Intrafarm Transfer, filed September 29, 2000, official records in the office of the State Engineer.

¹³⁰ See also, Applicants' Petition for Certification as Intrafarm Transfer, Attachment B, filed September 29, 2000, official records in the office of the State Engineer.

¹³¹ See also, Applicants' Petition for Certification as Intrafarm Transfer, Attachment C, filed September 29, 2000, official records in the office of the State Engineer.

also covers Parcel 4, but the applicants do not so indicate and neither does the State Engineer see it from the certificate presented. The State Engineer finds he cannot identify which lands were specifically added under the December 31, 1907, Certificate for Parcel 3; therefore, the contract dates for Parcel 3 are January 8, 1907, and December 31, 1907, and for Parcel 4 is January 8, 1907.

Parcel 5 - Exhibit LLL from the 1989 administrative hearing contains a "Certificate for Filing Water Right Application"¹³² dated December 31, 1907. The State Engineer finds the contract date is December 31, 1907.

Parcels 6, 7 and 8 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement"¹³³ dated May 13 1907, which indicates the lands are covered by pre-Project vested water rights. The State Engineer finds the contract date is May 13, 1907.

II.

PERFECTION

Parcel 1 - The contract date is August 17, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹³⁴ 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 natural vegetation. The State Engineer notes that color copies of the post-1984 aerial photographs provided by the PLPT in its

¹³² See also, Applicants' Petition for Certification as Intrafarm Transfer, Attachment C, filed September 29, 2000, official records in the office of the State Engineer.

¹³³ See also, Applicants' Petition for Certification as Intrafarm Transfer, Attachment D, filed September 29, 2000, official records in the office of the State Engineer.

¹³⁴ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

evidentiary package appear to show on photographs #006, # 010 and #011 what appears to be the remnants of old fields for Parcel 2 and perhaps Parcel 1. A careful review of the photographs, particularly photographs #006 and #010, shows what looks like the outlines of three separate fields in the area of Parcel 2, and photograph #011 looks like perhaps those old fields could extend up into the area where Parcel 1 is located. This makes sense in light of the applicants' description of the land use on this parcel in their 1989 administrative hearing as barren land, perhaps indicating that at some time someone tried to farm it.¹³⁵ It is interesting to note that in the early history of the Project inadequate drainage was a serious problem which became more so over time.

In the O & M [Operation and Maintenance] Report for 1915 (p.10) there was evidence that these 100 miles of drains were not enough

..."the crying need of adequate drainage is more and more evidence as time goes on. Land that produced on 25% crops during 1914 produced none during the past year. This condition is observed in every district of the Project. At the taking of the annual crop census, farmers were asked 'Have you had any land rendered unfit for cultivation by seepage?' and resulted in a report of 2213 acres so affected. As practically all of this area has been under cultivation and reported in previous crop reports, it will in a measure account for the absence of the usual yearly increase in area irrigated."

By the year 1921 the drainage problem had reached a critical phase which required avuncular assistance.¹³⁶

¹³⁵ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

¹³⁶ Dangberg, Grace, Conflict on the Carson, Carson Valley Historical Society, p. 146 (1975) citing to Project Operation and Maintenance Reports.

By looking at the PLPT's post-1984 aerial photographs,¹³⁷ it is very easy to see that perhaps this area is just one of those areas that someone attempted to farm, but it soon became barren due to lack of adequate drainage. Those photographs show an area that has remnants of old fields, but now appears alkali.

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 August 17, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹³⁸ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as bare land. The State Engineer notes that color copies of the post-1984 aerial photographs provided by the PLPT in its evidentiary package appear to show on photographs #006, # 010 and #011 the remnants of old fields on this parcel. A careful review of the photographs, particularly photographs #006 and #010, shows what looks like the outlines of three separate fields. These fields look much like those described above in Parcel 1, and could again be an area that

¹³⁷ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹³⁸ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

became alkali in a short amount of time due to lack of drainage. At the 1989 administrative hearing the applicants described the land use in 1948 and 1988 as corrals and feedyard.¹³⁹

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.

Parcels 3 and 4 - The contract dates are January 8, 1907, and December 31, 1907, for Parcel 3 and January 8, 1907, for Parcel 4. The water rights under the January 8, 1907, contract for Parcel 4 are pre-Project vested water rights, and the water rights being transferred from Parcel 3 could be pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁴⁰ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land uses on these parcels were described as a road. At the 1989 administrative hearing, the applicants described the land use on these parcels in 1948 and 1988 as a road for Parcel 3 and a road and ditch for Parcel 4.¹⁴¹ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on these parcels between 1907 and 1948; therefore, the protestant did not prove its claims of lack of perfection on these parcels. The

¹³⁹ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁴⁰ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁴¹ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested 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 5 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁴² 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. The State Engineer notes that color copies of the post-1984 aerial photographs provided by the PLPT in its evidentiary package appear to show on photographs #006, # 010 and #011 a creek or natural drainage. At the 1989 administrative hearing, the applicants described the land use on this parcel in 1948 and 1988 as a river edge.¹⁴³ The State Engineer finds that the December 31, 1907, contract indicates that it was not the creek that was considered the water righted land, but rather, land north of the Carson River in this ¼ ¼ section. Therefore, one must assume the description of the river edge is more accurate or that perhaps the river has changed course since the water right was established on this parcel in 1907. It is again interesting to note that the Project History of 1919 indicates that due to the scarcity of grazing land due to the desert conditions, the raising of stock other than dairy cattle was confined to such animals that

¹⁴² PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁴³ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

could be pastured in the limited waste areas of farm units when pasturage was developed by seepage waters along natural river and drainage canals.¹⁴⁴

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 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 6 - The contract date is May 13, 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"¹⁴⁵ 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 road, farm structure, farm yard, drain ditch and natural vegetation. At the 1989 administrative hearing, the applicants' described the land use on this parcel in 1948 and 1988 as a farmstead and stackyard.¹⁴⁶

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 VIII that pre-Project vested water rights were perfected as a matter of fact and law.

¹⁴⁴ Dangberg, Grace, Conflict on the Carson, Carson Valley Historical Society, pp. 156-157 (1975) citing to Project History of 1919.

¹⁴⁵ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁴⁶ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

Parcel 7 - The contract date is May 13, 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"¹⁴⁷ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975 and 1977 the land use on this parcel was described as a portion irrigated, road, on-farm supply ditch and natural vegetation. In 1980, 1984, 1985, 1986 and 1987 the land use was described as a road and canal. At the 1989 administrative hearing, the applicants described the land use on this parcel in 1948 and 1988 as a road and ditch.¹⁴⁸

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 VIII that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 8 - The contract date is May 13, 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"¹⁴⁹ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975 and 1977 the land use on this parcel was described as a portion irrigated, road and on-farm supply ditch. In 1980, 1984, 1985, 1986 and 1987 the land use was described as a

¹⁴⁷ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁴⁸ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁴⁹ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

road and canal. At the 1989 administrative hearing, the applicants described the land use on this parcel in 1948 and 1988 as a road and ditch.¹⁵⁰

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 VIII that pre-Project vested water rights were perfected as a matter of fact and law.

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 or abandonment.

Parcels 1, 2, 3, 4, 5, 6, 7 and 8 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat them in this section.

The PLPT conceded in its Response to Intrafarm Transfer Petition for Application No. 51045¹⁵¹ that it agrees that the entire farm under consideration here was in the ownership of the applicants by 1968. A review of the documents attached to the applicants' petition indicates that all the lands in Section 19

¹⁵⁰ Exhibit 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁵¹ PLPT's package of evidence for Application 51045 filed on March 8, 2001, official records in the office of the State Engineer.

were in the ownership of the Mori family as early as 1919¹⁵², and that as early as 1919 the lands in Section 20 were also being farmed by members of what appears to be the same or related family, the Mori family. However, those documents do show that the lands in Section 20 belonged to these applicants by 1964 and the lands in Section 19 by 1968. Therefore, the applicants provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicants and which has been operated as a farm unit at least since 1968.

Using the applicants' land use descriptions found in their exhibit from the original hearings,¹⁵³ it could be assessed that no water was placed to beneficial use on the existing places of use identified as Parcels 1, 2, 3, 4, 6, 7 and 8 for the 39 year period from 1948 through 1987. The State Engineer finds the evidence is not clear and convincing as to non-use on Parcel 5.

The State Engineer finds the PLPT's post-1984 photographs show the proposed places of use appear to be well established fields by 1984. Furthermore, the PLPT provided evidence that from 1948 through 1977 Parcels 7 and 8 contained an on-farm supply ditch taking up 0.64 of an acre of land and another 2.25 acres were irrigated,¹⁵⁴ thereby showing beneficial use of water on 0.67 on an acre in Parcel 7 and 2.22 acres of Parcel 8 during that time frame.¹⁵⁵ However, the State Engineer finds that evidence was

¹⁵² Applicants' Petition for Certification as Intrafarm Transfer Application 51045 filed on September 29, 2000, official records in the office of the State Engineer.

¹⁵³ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁵⁴ See, Map On-Farm Supply Ditches and Map Irrigated Portions of Existing Place of Use, Pyramid Lake Paiute Tribe's package of evidence for Application 51045 filed on March 8, 2001, official records in the office of the State Engineer.

¹⁵⁵ PLPT's package of evidence for Application 51045 filed on March 8, 2001, official records in the office of the State Engineer.

provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrines of forfeiture or 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.¹⁵⁶

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6, 7 and 8.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this 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 51045 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1, 2, 3, 4, 5, 6, 7 and 8 is hereby re-affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustment of the permit.

¹⁵⁶ NRS chapter 533 and Order of Remand from Federal District Court.

APPLICATIONS 51051 and 51052

GENERAL

I.

Application 51051 was filed on June 18, 1987, by Earl E. & Virginia M. Harriman¹⁵⁷ to change the place of use of 203.45 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 428 and 445, 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 - 0.50 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M.
- Parcel 2 - 2.57 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M.
- Parcel 3 - 6.18 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M.
- Parcel 4 - 0.17 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 20, T.19N., R.27E., M.D.B.&M.
- Parcel 5 - 8.71 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 6 - 0.07 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 7 - 2.72 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 8 - 3.00 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 9 - 1.92 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 10 - 3.32 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 11 - 10.6 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 21, T.19N., R.27E., M.D.B.&M.
- Parcel 12 - 1.21 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.19N., R.27E., M.D.B.&M.
- Parcel 13 - 0.66 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 22, T.19N., R.27E., M.D.B.&M.
- Parcel 14 - 1.29 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 28, T.19N., R.27E., M.D.B.&M.
- Parcel 15 - 2.29 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 29, T.19N., R.27E., M.D.B.&M.

The proposed places of use are described as being 0.69 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, 0.37 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.33 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, 6.04 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, all within Section 20, T.19N., R.27E., M.D.B.&M., 1.20 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 1.56 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, 9.93 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 8.49 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, 1.00 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, 2.43 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, 2.62 acres

¹⁵⁷ File No. 51051, official records in the office of the State Engineer.

in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 0.15 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, 2.44 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, all within Section 21, T.19N., R.27E., M.D.B.&M., 1.43 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, 1.23 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, both within Section 22, T.19N., R.27E., 0.63 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 3.49 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, and 1.18 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, all within Section 28, T.19N., R.27E., M.D.B.&M.

II.

Application 51052 was filed on June 18, 1987, by Richard Harriman¹⁵⁸ to change the place of use of 11.52 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 445-1, 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 - 0.80 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 29, T.19N., R.27E., M.D.B.&M.

Parcel 2 - 1.76 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 29, T.19N., R.27E., M.D.B.&M.

The proposed places of use are described as being 1.22 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, and 1.34 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, both within Section 29, T.19N., R.27E., M.D.B.&M.

III.

Application 51051 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹⁵⁹ and more specifically on the grounds as follows:¹⁶⁰

Parcel 1 - Lack of perfection, abandonment

Parcel 2 - Partial lack of perfection, abandonment

Parcel 3 - Lack of perfection, abandonment

Parcel 4 - Lack of perfection, abandonment

¹⁵⁸ File No. 51052, official records in the office of the State Engineer.

¹⁵⁹ File No. 51051, official records in the office of the State Engineer.

¹⁶⁰ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

- Parcel 5 - Lack of perfection, abandonment
- Parcel 6 - Partial lack of perfection, partial abandonment
- Parcel 7 - Lack of perfection, abandonment
- Parcel 8 - Abandonment
- Parcel 9 - Abandonment
- Parcel 10 - Lack of perfection, abandonment
- Parcel 11 - Lack of perfection, abandonment
- Parcel 12 - None
- Parcel 13 - Lack of perfection, abandonment
- Parcel 14 - Lack of perfection, abandonment
- Parcel 15 - Lack of perfection, forfeiture, abandonment.

Pursuant to the PLPT's evidentiary filing in this matter of March 8, 2001, which post-dates the filing of the applicants' evidence, the PLPT attempted to amend its contentions to the following:

- Parcel 1 - Lack of perfection, abandonment
- Parcel 2 - Lack of perfection, abandonment
- Parcel 3 - Partial lack of perfection, partial abandonment
- Parcel 4 - Lack of perfection, abandonment
- Parcel 5 - Partial lack of perfection, partial abandonment
- Parcel 6 - Lack of perfection, abandonment
- Parcel 7 - Partial lack of perfection, abandonment
- Parcel 8 - Partial lack of perfection, partial abandonment
- Parcel 9 - Partial lack of perfection, partial abandonment
- Parcel 10 - Lack of perfection, abandonment
- Parcel 11 - Partial lack of perfection, partial abandonment
- Parcel 12 - None
- Parcel 13 - Partial lack of perfection, partial abandonment
- Parcel 14 - Lack of perfection, abandonment
- Parcel 15 - Lack of perfection, forfeiture, abandonment.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter;

therefore, the contentions as originally asserted in the list of contentions filed upon remand will remain those pursuant to which the State Engineer will rule.

Application 51052 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹⁶¹ and more specifically on the grounds as follows:¹⁶²

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

FINDINGS OF FACT

I.

CONTRACT DATES 51051 and 51052

APPLICATION 51051

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated May 13, 1907, in the name of Anton M. Trolson¹⁶³ which covers the land identified as Parcel 1, and indicates that the water rights are based on pre-Project vested water rights.¹⁶⁴ The applicants provided no evidence in their petition as to a contract date for this parcel.¹⁶⁵ The State Engineer finds the contract date is May 13, 1907.

Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 - Exhibit LLL from the 1989 administrative hearing¹⁶⁶ contains an "Agreement"

¹⁶¹ File No. 51052, official records in the office of the State Engineer.

¹⁶² Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

¹⁶³ Official records in the office of the State Engineer.

¹⁶⁴ Table 1, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁶⁵ Applicants' Petition for Certification as Intrafarm Transfer Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer.

¹⁶⁶ Official records in the office of the State Engineer.

dated May 7, 1903, under the name of E.S. Harriman, which covers the lands identified as Parcels 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14,¹⁶⁷ and indicates the water rights are based on pre-Project vested water rights. Exhibit LLL also contains a "Certificate of Filing Water Right Application, dated December 26, 1907, under the name of E.S. Harriman, which covers the same parcels. The State Engineer notes the PLPT's Table 1 evidence, entered for the purpose of demonstrating the dates water rights were obtained for the existing places of use, appears to contain multiple errors. First, for Parcels 2, 3, 4, 12, 13 and 14, the PLPT's witness indicated the date of December 16, 1907, instead of December 26, 1907, and left off the date of December 26, 1907, for Parcels 10 and 11 when in fact these parcels are covered under the certificate.

The applicants in Attachment B attached to their Petition¹⁶⁸ provided a copy of an "Agreement" dated December 10, 1906, under the names of Edwin S. Harriman and Georgie M. Harriman, which covers Parcels 2, 3, 4, 5, 6, 7, 11, 12 and 13; however, on the top of that document it is indicated that it is superseded. The Agreement has a handwritten number on it of 01069, as does the Certificate of Filing Water Right Application, which also has a handwritten note on it dated March 4, 1970, indicating "Change in irrig. acreage conforms to latest farm unit plats. Harriman filed amended W.R.A. July 6, 1909. See letter from Register, US Land Office of Jan. 14, 1901, file 154." While the Agreement filed by the applicants as Attachment B attached to their petition does appear to be a related document, the State Engineer specifically

¹⁶⁷ Table 1, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁶⁸ Applicants' Petition for Certification as Intrafarm Transfer Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer.

adopts and incorporates General Finding of Fact VI and finds that the contract date is May 7, 1903, and the water rights for these parcels are all based on pre-Project vested water rights.

Parcel 15 - Exhibit LLL from the 1989 administrative hearing¹⁶⁹ contains an "Application for Permanent Water Right" dated April 15, 1948, under the name of E.L. Harriman, which covers the land identified as Parcel 15.¹⁷⁰ The State Engineer finds the contract date is April 15, 1948.

APPLICATION 51052

Parcels 1 and 2 - Exhibit LLL from the 1989 administrative hearing¹⁷¹ contains an "Application for Permanent Water Right" dated April 15, 1948, under the name of E.L. Harriman, which covers the land identified as Parcels 1 and 2.¹⁷² The State Engineer finds the contract date is April 15, 1948.

II.

PERFECTION

Parcels 1, 2, 4 and 10 - The contract date for Parcel 1 is May 13, 1907, and for Parcels 2, 4 and 10 is May 7, 1903, and both contracts are based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁷³ which indicates from aerial photographs that in

¹⁶⁹ Official records in the office of the State Engineer.

¹⁷⁰ Applicants' Petition for Certification as Intrafarm Transfer Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer. Table 1, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁷¹ Official records in the office of the State Engineer.

¹⁷² Applicants' Petition for Certification as Intrafarm Transfer Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer. Table 1, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁷³ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land uses on these parcels were described as a creek or natural drainage. At the 1989 administrative hearing on this application, the applicants described the land use on Parcels 1, 2, 4 and 10 in 1948 and 1988 as being a river edge.¹⁷⁴

The State Engineer does not believe that the United States would have contracted for the exchange of pre-Project vested water rights for lands that were not considered irrigated, and as indicated in the Ruling on Application 51045 such areas were often considered to be pasture ground. The State Engineer finds a 1948 photograph is not sufficient evidence to prove that water rights were never perfected on these parcels between 1903 or 1907 and 1948, and that there is insufficient evidence in this record to resolve the discrepancy between the exchange of vested water rights and the PLPT's land use descriptions of creek or natural drainage. It appears that natural drainage was considered by the Reclamation Service in 1903 and 1907 as part of the irrigated land since a water right was exchanged for it, and that it may have considered a land use such as pasture. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claims of lack of perfection on these parcels.

Parcel 3 - The contract date is May 7, 1903, 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"¹⁷⁵ 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 portion irrigated,

¹⁷⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁷⁵ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

creek or natural drainage, road, drainage ditch and on-farm supply ditch. The PLPT provided evidence that 1.94 acres of the 6.18 acres proposed for transfer from this parcel were irrigated from 1948-1987, and that an on-farm supply ditch was located on another 0.41 of an acre.¹⁷⁶ At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 3 as being roads, ditches and river edge.¹⁷⁷

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, that there is insufficient evidence in this record to resolve the discrepancy between the exchange of vested water rights and the PLPT's land use descriptions of creek or natural drainage, and that on-farm supply ditches are considered water-righted lands. It appears that natural drainage was considered by the Reclamation Service in 1903 and 1907 as part of the irrigated land since a water right was exchanged for it, and that it may have been considered a land use such as pasture. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant proved perfection on a 2.35 acre portion of Parcel 3. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 5 - The contract date is May 7, 1903, 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"¹⁷⁸ which indicates from aerial photographs that in 1948,

¹⁷⁶ Map Irrigated Portions of Existing Place(s) of Use; Map On-farm Supply Ditches Within Existing Places of Use, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁷⁷ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁷⁸ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as an on-farm supply ditch, portion irrigated, road, farm structure and farm yard. The PLPT provided evidence that 0.54 of an acre of the 8.71 acres proposed for transfer from this parcel was covered by an on-farm supply ditch, and that 5.34 acres were irrigated from 1948-1987.¹⁷⁹ At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 5 in 1948 and 1988 as being cultivated land, ditch and farmstead.¹⁸⁰

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, that the protestant proved perfection on a significant portion of the parcel, and that on-farm supply ditches are considered water-righted lands. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 6 - The contract date is May 7, 1903, 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"¹⁸¹ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the

¹⁷⁹ Map Irrigated Portions of Existing Place(s) of Use, Map On-Farm Supply Ditches Within Existing Places of Use, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁸⁰ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁸¹ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

land use on this parcel was described as an on-farm supply ditch. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 6 as being a ditch.¹⁸²

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, and that on-farm supply ditches are considered water-righted lands. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 7 - The contract date is May 7, 1903, 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"¹⁸³ which indicates from aerial photographs that in 1948 the land use was described as a road, portion irrigated 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 road, farm yard and natural vegetation. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 7 as cultivated land in 1948 and a stackyard in 1988.¹⁸⁴

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. The State Engineer specifically adopts and incorporates General Finding of

¹⁸² Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁸³ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁸⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 11 - The contract date is May 7, 1903, 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"¹⁸⁵ 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 portion irrigated, road, on-farm supply ditch, creek or natural drainage. The PLPT provided evidence that 1.41 acres of the 10.60 acres proposed for transfer from this parcel were irrigated from 1948-1987, and 0.63 of an acre was covered by an on-farm supply ditch,¹⁸⁶ which is considered water-righted land. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 11 in 1948 and 1988 as a river edge, ditch and road.¹⁸⁷

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. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 13 - The contract date is May 7, 1903, 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)

¹⁸⁵ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁸⁶ Map Irrigated Portions of Existing Place(s) of Use, Map On-farm Supply Ditches Within Existing Places of Use, PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁸⁷ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

of Use"¹⁸⁸ 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 an on-farm supply ditch and portion irrigated. The PLPT provided evidence that 0.40 of an acre of the 0.66 of an acre requested for transfer is covered by an on-farm supply ditch, which is considered water-righted land. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 13 in 1948 and 1988 as a road and river edge.¹⁸⁹

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, and the protestant provided evidence that from 1948 through 1987 the entire parcel was covered by either irrigated land or the on-farm supply ditch, which is considered water-righted land. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 14 - The contract date is May 7, 1903, 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"¹⁹⁰ 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 natural vegetation. At

¹⁸⁸ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁸⁹ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁹⁰ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

the 1989 administrative hearing on this application, the applicants described the land use of Parcel 14 in 1948 and 1988 as barren land.¹⁹¹

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, that there is insufficient evidence in this record to resolve the discrepancy between the exchange of vested water rights and the PLPT's land use descriptions of natural vegetation, that "barren land" perhaps indicates an attempt was made to farm the land, it is entirely possible that natural vegetation was considered by the Reclamation Service in 1903 as part of the irrigated land since a water right was exchanged for it, and it may have been considered a land use such as pasture. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 15 - The contract date is April 15, 1948. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁹² 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 or natural vegetation. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 15 in 1948 and 1988 as barren land.¹⁹³

¹⁹¹ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

¹⁹² PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁹³ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

The State Engineer finds it completely inconsistent for the applicant to have been given a water right for this land if it had not been considered irrigable, that there is insufficient evidence in this record to resolve the discrepancy between the granting of water rights for this land and the PLPT's land use descriptions of creek or natural drainage and natural vegetation, that "barren land" perhaps indicates an attempt was made to farm the land, and it is entirely possible that natural vegetation was considered by the Reclamation Service in 1903 to be irrigable land since a water right was granted for it, and it may have been considered a land use such as pasture. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

APPLICATION 51052

Parcels 1 and 2 - The contract date is April 15, 1948. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁹⁴ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land uses on these parcels were described as natural vegetation. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 1 and 2 in 1948 and 1988 as barren land.¹⁹⁵ The State Engineer finds it completely inconsistent for the applicant to have been given a water right for this land if it had not been considered irrigable, that there is insufficient evidence in this record to resolve the discrepancy between the granting of water rights for this land and the PLPT's land use descriptions of natural vegetation; however, it is entirely possible that natural vegetation was considered to be irrigable land since a water right was granted for it and it

¹⁹⁴ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁹⁵ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

may have been considered a land use such as pasture. The State Engineer finds the protestant did not prove its claims of lack of perfection on these parcels.

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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

APPLICATIONS 51051 AND 51052

For all parcels, except Parcels 8, 9 and Parcel 12 (for which the PLPT alleges no claims), the evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat them in this section.

Parcel 8 - The contract date is May 7, 1903, 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"¹⁹⁶ which indicates from aerial photographs that in 1948 the land use was described as creek or natural drainage. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987, the land use on this parcel was described as a portion irrigated, creek or natural drainage. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 8 in 1948 and 1988 as a river edge.¹⁹⁷

Parcel 9 - The contract date is May 7, 1903, and the water rights are based on pre-Project vested water rights. The PLPT provided

¹⁹⁶ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁹⁷ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁹⁸ which indicates from aerial photographs that in 1948 the land use 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 portion irrigated. At the 1989 administrative hearing on this application, the applicants described the land use on Parcel 9 in 1948 and 1988 as barren land.¹⁹⁹

The applicants alleged in their Petition that all the parcels under consideration for transfer within the subject property have been farmed as a single family farming unit since 1907. In light of the State Engineer's review of the evidence, this statement is not completely accurate, but is substantially correct. The applicant alleges that the water rights for most of the farm originated from a December 10, 1906, vested water right agreement entered into by E.S. and Georgie M. Harriman with the U.S. Reclamation Service. The State Engineer has found that actually a vested water right agreement was entered into on May 7, 1903, and that the document referred to by the applicants was not the correct document. The 1903 water right Agreement entered into by E.S. Harriman²⁰⁰ covers Parcels 2 through 14 under Application 51051. Pursuant to a 1930 deed, E.S. and Georgie M. Harriman, his wife, conveyed Parcels 2 through 15 under Application 51051 and Parcels 1 and 2 under Application 51052 to Edwin L. Harriman.²⁰¹

¹⁹⁸ PLPT's package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

¹⁹⁹ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁰⁰ "Agreement" dated May 7, 1903, under the name of E.S. Harriman, Exhibit LLL from the 1989 administrative hearing, official records in the office of the State Engineer.

²⁰¹ Attachment D, Applicants' Petition for Certification as Intrafarm Transfer for Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer.

Parcel 1 was added to the farm in 1932²⁰², the proposed place of use in the SW¼ NE¼ of Section 21, T.19N., R.27E., M.D.B.&M. was added to the farm in 1948²⁰³, and the proposed places of use in the NE¼ NW¼ and the NW¼ NE¼ of Section 28, T.19N., R.27E., M.D.B.&M. were added to the farm in 1953 by patent.²⁰⁴

The State Engineer finds that a review of the documents attached to the applicants' petition indicates that all the lands in Parcels 2 through 14 were part of the Harriman family farm as early as 1903, with the remaining parcels added to the farm by 1930, 1932, 1948 and 1953. Therefore, the applicants provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicants' family and which has nearly all been operated as a farm unit since 1903, except for the few additions added in the 1930's, 1940's and 1950's, long before the filing of these water right applications. Furthermore, by reviewing the PLPT's post-1984 photographs, which show the proposed places of use, it is evident that the proposed places of use had been irrigated for some time,²⁰⁵ thereby showing beneficial use of water on those parcels during that time frame.

Using the applicants' and protestant's land use descriptions it can be assessed that no water was placed to beneficial use on the existing places of use identified as a portion of Parcel 3, a portion of Parcel 5, Parcel 7, Parcel 9, a portion of Parcel 11,

²⁰² Attachment R, Applicants' Petition for Certification as Intrafarm Transfer for Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer.

²⁰³ Attachment J and K, Applicants' Petition for Certification as Intrafarm Transfer for Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer.

²⁰⁴ Attachment L and M, Applicants' Petition for Certification as Intrafarm Transfer for Applications 51051 and 51052 filed on September 29, 2000, official records in the office of the State Engineer.

²⁰⁵ PLPT's package of evidence for Application 51051 and 51052, filed on March 8, 2001, official records in the office of the State Engineer.

Parcel 14 and Parcel 15 under Application 51051 for the most of the 39 year period from 1948 through 1987, and Parcels 1 and 2 under Application 51052. The State Engineer finds the evidence is not clear and convincing as to Parcels 1, 2, a portion of Parcel 3, Parcel 4, a portion of Parcel 5, Parcel 6, Parcel 8, Parcel 10, a portion of Parcel 11 and Parcel 13.

The State Engineer finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrines of forfeiture or 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.²⁰⁶

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to all parcels in Applications 51051 and 51052, and in fact proved perfection on some of the parcels or portions of those parcels.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998, and use of the water on other parts of the farm precludes a finding of an intent to abandon said water rights.

²⁰⁶ NRS chapter 533 and Order of Remand from Federal District Court.

RULING

The protests to Applications 51051 and 51052 are hereby overruled and the State Engineer's decisions granting the transfer of water rights under these applications is hereby re-affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustment of the permit.

APPLICATION 51058

GENERAL

I.

Application 51058 was filed on June 18, 1987, by Taylor L. and Linda A. Stack²⁰⁷ to change the place of use of 18.23 acre-feet annually (however, upon analysis the State Engineer determined 14.18 was the correct amount that should have been applied for under the application), a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 485-1, Claim No. 3, Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam.

The existing place of use is described as:

Parcel 1 - 4.05 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 16, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as being 4.05 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 16, T.19N., R.28E., M.D.B. & M.

II.

Application 51058 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁰⁸ and more specifically on the grounds as follows:²⁰⁹

Parcel 1 - Lack of perfection, forfeiture, abandonment.

Pursuant to the PLPT's evidentiary filing in this matter of March 8, 2001, which post-dates the filing of the applicants' evidence, the PLPT attempted to amend its contentions to the following:

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

²⁰⁷ File No. 51058, official records in the office of the State Engineer. The new owners of record in the office of the State Engineer are Jody E. Barnes and Marjorie Marvel-Barnes.

²⁰⁸ File No. 51058, official records in the office of the State Engineer.

²⁰⁹ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will remain those pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATE 51058

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains a "Water-right Application" dated March 26, 1920, which covers this existing place of use.²¹⁰ The State Engineer finds the contract date is March 26, 1920.

II.

PERFECTION

Parcel 1 - The contract date is March 26, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²¹¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and a road. The PLPT also provided evidence that from 1977 through 1987 2.41 acres were irrigated, thereby showing beneficial use of water on a portion of the parcel during that time frame.²¹² 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, and in fact, the protestant proved perfection on a portion of Parcel 1. Therefore, the State

²¹⁰ Official records in the office of the State Engineer, and Applicants' Petition for Certification as Intrafarm Transfer for Application 51058, filed September 11, 2000, official records in the office of the State Engineer.

²¹¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²¹² Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence for Application 51058 filed on March 8, 2001, official records in the office of the State Engineer.

Engineer finds 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 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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²¹³ which indicates from aerial photographs that in 1948, 1962, 1973, 1974 and 1975 the land use on this parcel was described as natural vegetation and a road. In 1977, 1980 and 1984, the land use was described as natural vegetation, portion irrigated and road, and in 1985, 1986 and 1987 as natural vegetation, portion irrigated, road and farm structure. At the 1989 administrative hearing on this application, the applicants described the land use this parcel in 1948 and 1988 as a farmstead and barren land.²¹⁴

Using the applicants' land use description it can be assessed that no water was placed to beneficial use on the existing place of use identified as Parcel 1 for the 40 year period from 1948

²¹³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²¹⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

through 1988; however, the PLPT's evidence demonstrates beneficial use on a 2.41 acre portion of the existing place of use from 1977 through 1987.

The State Engineer finds that a review of the documents attached to the applicants' petition²¹⁵ indicates that the existing and proposed places of use are both within the same farm unit and within lands that have been farmed as a single farm unit since 1970. The State Engineer finds that evidence was provided showing that the transfer from this parcel is an intrafarm transfer not subject to the doctrines of forfeiture or 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.²¹⁶

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

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

²¹⁵ Applicants' Petition for Certification as Intrafarm Transfer for Application 51058 filed on September 11, 2000, official records in the office of the State Engineer.

²¹⁶ NRS chapter 533 and Order of Remand from Federal District Court.

RULING

The protest to Application 51058 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcel 1 is hereby re-affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustment of the permit.

APPLICATION 51060
GENERAL

I.

Application 51060 was filed on June 18, 1987, by Ralph R. Bass and Richard R. and Alice R. Bass²¹⁷ to change the place of use of 147.60 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 117, 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** - 3.53 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 10, T.18N., R.28E., M.D.B.&M.
- Parcel 2** - 2.63 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M
- Parcel 3** - 1.15 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M.
- Parcel 4** - 5.46 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M.
- Parcel 5** - 5.30 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M.
- Parcel 6** - 3.00 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M
- Parcel 7** - 1.62 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M.
- Parcel 8** - 0.79 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M.
- Parcel 9** - 3.67 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 11, T.18N., R.28E., M.D.B.&M.
- Parcel 10** - 1.61 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 14, T.18N., R.28E., M.D.B.&M
- Parcel 11** - 5.00 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 14, T.18N., R.28E., M.D.B.&M.
- Parcel 12** - 8.41 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 14, T.18N., R.28E., M.D.B.&M

The proposed places of use are described as being 6.46 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 2.35 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, both in Section 10, T.18N., R.28E., M.D.B.& M., 16.21 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, 7.04 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, 4.46 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 0.95 of an acre in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 1.29 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, all within Section 11, T.18N., R.28E., M.D.B.& M., 0.41 of an acre in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, and 3.00 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, both within Section 14, T.18N., R.28E., M.D.B.& M.

By letter dated October 21, 1993, the applicants requested certain withdrawals. Upon further clarification, the following were withdrawn from the request for transfer: in Parcel 1 - 0.40

²¹⁷ File No. 51060, official records in the office of the State Engineer.

of an acre was withdrawn; in Parcel 2 - 0.50 of an acre was withdrawn; in Parcel 3 - 0.50 of an acre was withdrawn; in Parcel 4 - 0.35 of an acre was withdrawn; in Parcel 5 - 1.75 acres were withdrawn;²¹⁸ in Parcel 6 - 1.00 acre was withdrawn; in Parcel 7 - 0.70 of an acre was withdrawn; in Parcel 8 - 0.30 of an acre was withdrawn; in Parcel 9 - 2.10 acres were withdrawn; and in Parcel 10 - 0.70 of an acre was withdrawn.

II.

Application 51060 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²¹⁹ and more specifically on the grounds as follows:²²⁰

- Parcel 1 - Lack of perfection, abandonment
- Parcel 2 - Lack of perfection, abandonment
- Parcel 3 - Lack of perfection, abandonment
- Parcel 4 - Lack of perfection, abandonment
- Parcel 5 - Lack of perfection, abandonment
- Parcel 6 - Lack of perfection, abandonment
- Parcel 7 - Lack of perfection, abandonment
- Parcel 8 - Partial lack of perfection, partial abandonment
- Parcel 9 - Lack of perfection, abandonment
- Parcel 10 - Lack of perfection, abandonment
- Parcel 11 - Lack of perfection, abandonment
- Parcel 12 - Lack of perfection, abandonment.

²¹⁸ The State Engineer notes that the PLPT's evidence indicates that 1.25 acres were withdrawn and 4.05 acres remained after the withdrawal; however, the State Engineer's records indicate that 1.75 acres were withdrawn and 3.55 acres remained after the withdrawal.

²¹⁹ File No. 51060, official records in the office of the State Engineer.

²²⁰ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

Pursuant to the PLPT's evidentiary filing in this matter of March 8, 2001, which post-dates the filing of the applicants' evidence, the PLPT attempted to amend its contentions to the following:

- Parcel 1** - Lack of perfection, abandonment
- Parcel 2** - Lack of perfection, abandonment
- Parcel 3** - Partial lack of perfection, partial abandonment
- Parcel 4** - Lack of perfection, abandonment
- Parcel 5** - Lack of perfection, abandonment
- Parcel 6** - Lack of perfection, abandonment
- Parcel 7** - Lack of perfection, abandonment
- Parcel 8** - Lack of perfection, abandonment
- Parcel 9** - Lack of perfection, abandonment
- Parcel 10** - Lack of perfection, abandonment
- Parcel 11** - Lack of perfection, abandonment
- Parcel 12** - Partial lack of perfection, abandonment.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will remain those pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATES 51060

Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated May 7, 1903, under the names of L. Allen and C. Allen²²¹ covering the existing places of use in all these parcels and which indicates the water rights are based on pre-Project vested water rights. Exhibit LLL also contains another "Agreement" dated April

²²¹ Official records in the office of the State Engineer, and Applicants' Petition for Certification as Intrafarm Transfer for Application 51060, filed September 29, 2000, official records in the office of the State Engineer.

23, 1907, under the name of Lemuel Allen covering Parcels 8, 9, 11 and 12, and which also indicates that the water rights are based on pre-Project vested water rights. Exhibit LLL also contains a "Certificate of Filing Water Right Application" dated December 31, 1907, under the name of Lemuel Allen, which provides that in Parcel 4 there were 25 acres of vested water rights with 10 new acres of water rights, and in Parcel 7 there were 4 acres of vested water rights and 8 acres of new water rights. A handwritten note on the certificate indicates that the certificate was amended on February 8, 1908, to embrace the same subdivisions in Range 28 East. The State Engineer finds the three documents are sufficiently connected to have the 1907 documents relate back to the 1903 contract, and the pre-Project vested water rights; therefore, the contract date is May 7, 1903.

II.

PERFECTION

Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 - The contract date is May 7, 1903. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²² which indicates from aerial photographs that in 1948 the land uses on these parcels were described as follows: Parcels 1, 2, 11 and 12 as natural vegetation; Parcel 3 as a creek or natural drainage and bare land; Parcel 4 as natural vegetation and drain ditch; Parcel 5 as an on-farm supply ditch, drain ditch and farm yard; Parcel 6 as a drainage ditch; Parcel 7 as a farm structure; Parcel 8 as a farm yard, road and on-farm supply ditch; Parcel 9 as a road, on-farm supply ditch and natural vegetation; and Parcel 10 as a drainage ditch. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on these parcels between 1903/1907 and 1948; therefore, the protestant did not prove its claims of lack of perfection on

²²² PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

these parcels. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested 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.

III.

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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcels 1, 2 and 11 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²³ 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 natural vegetation. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 1 as barren land and slough, on Parcel 2 as a slough and on Parcel 11 as a farmstead and barren land.²²⁴

Parcel 3 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²⁵ which indicates from aerial photographs that in 1948, 1962 and 1972 the land use on

²²³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²²⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²²⁵ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

this parcel was described as a creek or natural drainage and bare land. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a creek or natural drainage and portion irrigated. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 3 as a slough.²²⁶

Parcel 4 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²⁷ 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 natural vegetation and drain ditch. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 4 as a road and ditch.²²⁸

Parcel 5 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²⁹ 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 on-farm supply ditch, drain ditch and farm yard. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 5 as a farmstead, ditch and road.²³⁰

²²⁶ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²²⁷ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²²⁸ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²²⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²³⁰ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

Parcels 6 and 10 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³¹ 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 a drainage ditch. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 6 as a road and ditch, and Parcel 10 as a ditch.²³²

Parcel 7 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³³ 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 farm structure. At the 1989 administrative hearing on this application, the applicants described the land use in 1948 on Parcel 7 as a farmstead and in 1988 as barren land and farmstead.²³⁴

Parcel 8 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³⁵ 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 farm yard, road and on-farm supply ditch. At the 1989 administrative hearing on this application, the

²³¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²³² Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²³³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²³⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²³⁵ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

applicants described the land use in 1948 on Parcel 8 as a farmstead and barren land and in 1988 as farmstead, ditch and road.²³⁶

Parcel 9 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³⁷ 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 road, on-farm supply ditch and natural vegetation. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 9 as a farmstead, ditch and road.²³⁸

Parcel 12 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³⁹ 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 natural vegetation and a portion irrigated, and in 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as natural vegetation and a farm structure. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 as barren land.²⁴⁰

²³⁶ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²³⁷ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²³⁸ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²³⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁴⁰ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

Using the applicants' land use description, the State Engineer finds it can be assessed that no water was placed to beneficial use on the existing places of use identified under this application for the 39 year period from 1948 through 1987; however, the PLPT's evidence demonstrates beneficial use on a 0.27 of an acre portion of Parcel 3 from 1973 through 1987.²⁴¹ Further, using the PLPT's post-1984 aerial photographs one can clearly see that prior to the time of the filing of this application the proposed places of use were well-developed existing fields.²⁴²

The State Engineer finds that a review of the documents attached to the applicants' petition²⁴³ indicates that the existing and proposed places of use are both within the same farm unit and within lands that have been farmed as a single farm unit since at least 1974 by this family. The State Engineer finds that evidence was provided showing 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.²⁴⁴

²⁴¹ Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁴² Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁴³ Applicants' Petition for Certification as Intrafarm Transfer for Application 51060 filed on September 29, 2000, official records in the office of the State Engineer.

²⁴⁴ NRS chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

III.

ABANDONMENT

The State Engineer concludes that this 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 51060 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed.

APPLICATION 51228

GENERAL

I.

Application 51228 was filed on August 27, 1987, by Louis and Bernice Mori²⁴⁵ to change the place of use of 120.87 acre-feet annually (however, upon analysis the State Engineer determined 100.61 was the correct amount that should have been applied for under the application), a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 346 and 556-8, 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 - 3.16 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 17.50 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 25, T.19N., R.26E., M.D.B.&M.

Parcel 3 - 2.80 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 25, T.19N., R.26E., M.D.B.&M.

Parcel 4 - 1.70 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 25, T.19N., R.26E., M.D.B.&M.

Parcel 5 - 1.70 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 25, T.19N., R.26E., M.D.B.&M.

The proposed places of use are described as being 0.80 of an acre in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 2.56 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 17.60 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 0.10 of an acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 1.50 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, 1.50 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 2.80 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, all within Section 25, T.19N., R.26E.

By letter dated March 16, 1993,²⁴⁶ the applicants withdrew 1.40 acres from the Parcel 2 request for transfer, and 0.75 of an acre from the Parcel 5 request for transfer.

II.

Application 51228 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁴⁷ and more

²⁴⁵ File No. 51228, official records in the office of the State Engineer.

²⁴⁶ File No. 51228, official records in the office of the State Engineer.

²⁴⁷ File No. 51228, official records in the office of the State Engineer.

specifically on the grounds as follows:²⁴⁸

- Parcel 1** - Lack of perfection, abandonment
- Parcel 2** - Lack of perfection, abandonment
- Parcel 3** - Lack of perfection, abandonment
- Parcel 4** - Lack of perfection, abandonment
- Parcel 5** - Lack of perfection, abandonment.

Pursuant to the PLPT's evidentiary filing in this matter of March 8, 2001, which post-dates the filing of the applicants' evidence, it is unclear if the PLPT was attempting to amend its contentions since it did not list any contentions as to Parcel 5.

FINDINGS OF FACT

I.

CONTRACT DATES 51228

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains a "Water-right Application" dated January 30, 1913, under the name of Joseph York²⁴⁹ covering this existing place of use. The State Engineer finds the contract date is January 30, 1913.

Parcels 2, 3, 4 and 5 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated December 3, 1907, under the names of Jason and Emma J. Spooner²⁵⁰ covering these existing places of use, and which indicates the water rights are based on pre-Project vested water rights. Exhibit LLL also contains a "Certificate of Filing Water Right Application" under the name of Jason Spooner dated December 21, 1907, which provides for an additional 59 new acres of water rights covering Parcels 2 and 3

²⁴⁸ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

²⁴⁹ Official records in the office of the State Engineer, and Applicants' Petition for Certification as Intrafarm Transfer for Application 51228, filed September 29, 2000, official records in the office of the State Engineer.

²⁵⁰ Official records in the office of the State Engineer, and Applicants' Petition for Certification as Intrafarm Transfer for Application 51228, filed September 29, 2000, official records in the office of the State Engineer.

and indicating that 8 acres of vested water rights were in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 25, T.19N., R.26E., M.D.B.&M. There is also a "Certificate of Filing Water Right Application" under the name of Edmund Dietz dated May 22, 1909, which covers Parcels 2 and 3, but it is clear from another document in Exhibit LLL, which is a filing of record from the recorder's office, and from the chains of title provided in the applicants' petition, that Edmund and Lena Dietz were successors to Jason Spooner and were apparently putting the water right certificate in their name.

The State Engineer specifically adopts and incorporates General Finding of Fact IV and finds that by review of the TCID maps it can be determined that as to Parcel 2 the large single hatched area is covered by applied for water rights under the December 21, 1907, certificate, but that the narrow strips of existing place of use along the southwestern corner of the $\frac{1}{4}$ $\frac{1}{4}$ and at the very bottom of the $\frac{1}{4}$ $\frac{1}{4}$ coming off the large single hatched area are pre-Project vested water rights. The Parcel 3 water rights are the applied for water rights under the December 21, 1907, certificate, and the Parcels 4 and 5 water rights are both pre-Project vested water rights. However, the State Engineer finds that the December 3, 1907, Agreement and the December 21, 1907, certificate are so close in time that one can be related back to the other, and finds that the contract date for Parcels 2, 3, 4 and 5 is December 3, 1907.

II.

PERFECTION

Parcel 1 - The contract date is January 30, 1913. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁵¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard. The State Engineer finds that a 1948 photograph is not sufficient

²⁵¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

evidence to prove that a water right was never perfected on this parcel between 1913 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.

Parcels 2, 3, 4 and 5 - The State Engineer found the contract date for Parcels 2, 3, 4 and 5 is December 3, 1907.

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁵² which indicates from aerial photographs that in 1948 the land use on Parcel 2 was described as natural vegetation, farm yard, farm structure, road, and on-farm supply ditch. The land use on Parcel 3 was described as a creek or natural drainage. The land use on Parcel 4 was described as a road and on-farm supply ditch, and the 1948 land use on Parcel 5 was described as a road, on-farm supply ditch and natural vegetation.

As to Parcel 3, at the 1989 administrative hearing, the applicants described the land use as the river bank.²⁵³ The State Engineer does not believe the Reclamation Service would have contracted for the exchange of pre-Project vested water rights for lands that were not considered irrigated, or contracted for new water rights for lands that were not considered irrigable. Furthermore, based on the Reclamation Service policy of excluding areas not considered irrigable from the contract area and on the policy of perfection before contract, perhaps this area of river bank was considered a type of pasture.

²⁵² PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁵³ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

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. 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 VIII that pre-Project vested water rights were perfected as a matter of fact and law.

III.

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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁵⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, and in 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a farm yard and farm structures. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 1 as stackyard and corrals.²⁵⁵

²⁵⁴ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁵⁵ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

Parcel 2 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁵⁶ 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 natural vegetation, farm yard, farm structures, road and on-farm supply ditch. At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 2 as barren land and stackyard.²⁵⁷

Parcel 3 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁵⁸ 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 on this application, the applicants described the land use in both 1948 and 1988 on Parcel 3 as a river bank.²⁵⁹

Parcel 4 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁶⁰ 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 road and on-farm supply ditch. At the 1989

²⁵⁶ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁵⁷ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁵⁸ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁵⁹ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁶⁰ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 4 as a road and ditch.²⁶¹

Parcel 5 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁶² which indicates from aerial photographs that in 1948, 1962, 1973, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, on-farm supply ditch and natural vegetation.

At the 1989 administrative hearing on this application, the applicants described the land use in both 1948 and 1988 on Parcel 5 as a road and barren land.²⁶³

Using the applicants' land use description it can be assessed that, except for Parcel 3, no water was placed to beneficial use on the existing places of use identified under this application for the 39 year period from 1948 through 1987; however, the PLPT's evidence demonstrates beneficial use as to a portion of Parcels 4 and 5 since parts of those parcels are occupied by the on-farm supply ditches, which are considered water-righted areas. The State Engineer is unable to use the PLPT's post-1984 aerial photographs as they appear to be mis-marked as they indicate a Section 30, which is not relevant to this application.²⁶⁴

²⁶¹ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁶² PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁶³ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁶⁴ Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

The State Engineer finds that a review of the documents attached to the applicants' petition²⁶⁵ indicates that the existing and proposed places of use are lands that have all been jointly owned by this family since at least 1978. The State Engineer finds that even though the Section 27 property is not adjacent to the Section 25 property, and no evidence was provided if lands in Section 26 belong to these applicants, it was Judge McKibben's intent that those persons moving water within their own properties and not purchasing water rights from some removed third party should have the benefit of his equitable ruling. The State Engineer finds that the water rights requested for transfer under this application are all owned by the applicants, and are thereby 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.²⁶⁶

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4 and 5.

III.

ABANDONMENT

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

²⁶⁵ Applicants' Petition for Certification as Intrafarm Transfer for Application 51228 filed on September 29, 2000, official records in the office of the State Engineer.

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

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RULING

The protest to Application 51228 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed.

APPLICATION 51234
GENERAL

I.

Application 51234 was filed on August 27, 1987, by Churchill County²⁶⁷ to change the place of use of 8.75 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 48, Claim No. 3, Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.50 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.

The proposed place of use is described as being 2.50 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.&M.

II.

Application 51234 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁶⁸ and more specifically on the grounds as follows:²⁶⁹

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

FINDINGS OF FACT

I.

CONTRACT DATES 51234

Parcel 1 - Exhibit LLL from the 1989 administrative hearing also contains a "Certificate of Filing Water Right Application" dated December 27, 1907, under the name of Charles M. Hicks, which covers Lots 1 and 2 in the NE $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.&M.²⁷⁰ Exhibit LLL also contains a "Water-right

²⁶⁷ File No. 51234, official records in the office of the State Engineer.

²⁶⁸ File No. 51234, official records in the office of the State Engineer.

²⁶⁹ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

²⁷⁰ Official records in the office of the State Engineer.

Application" dated September 25, 1919, under the name of N.J. Nelson, which originally indicated that it covered Farm Unit A or Lots 1 and 2 in Section 1, T.18N., R.28E., M.D.B.&M., with the "NE NE" handwritten below it. The typed description of Farm Unit A or Lots 1 and 2 is crossed out and typed above it is "Farm Unit D or Lot 5", Section 1, T.18N., R.28E., M.D.B.&M. This document indicates that N.J. Nelson is the assignee of Stephen J. Coatney.

The chain of title documents supplied by the applicant in its petition indicate that in 1919 S.J. Coatney and Georgia A. Coatney conveyed Lots 1 and 2 to N.J. Nelson. There is no documentation that ties the property from Hicks to Coatney in the chain of title, and the applicant indicates that a patent was issued to Joseph York as the assignee of Stephen J. Coatney; therefore, the State Engineer can only assume that any entry by Charles Hicks perhaps failed.

The State Engineer finds the contract date is September 25, 1919, since there is nothing which ties the chain back to the 1907 document and Mr. Hicks.

II.

PERFECTION

Parcel 1 - The contract date is September 25, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁷¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and residential (airport), in 1962, 1972, 1973 and 1974 as a road, residential (race track), in 1975 and 1977 as a road and bare land, in 1980, 1984, 1985, 1986 and 1987 as a road, bare land and portion irrigated. The PLPT provided evidence that 1.18 acres of the 2.50 acres requested for transfer were irrigated from 1980

²⁷¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

through 1987. At the 1989 administrative hearing on this application, the applicant described the land use in 1948 as marginal/barren land and 1988 as a road.²⁷²

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 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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcel 1 - Using the applicant's land use description the State Engineer cannot find non-use by clear and convincing evidence. Using the PLPT's land use descriptions it is clear that nearly half the acreage was irrigated from 1980 up to the time of the filing of the water right application; however, using both parties' land use descriptions no water was put to beneficial use on 1.32 acres of the parcel for the 39 year period from 1948 through 1987.

The State Engineer finds that a review of the documents attached to the applicant's petition²⁷³ indicates that the existing

²⁷² Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁷³ Applicants' Petition for Certification as Intrafarm Transfer for Application 51234 filed on September 29, 2000, official records in the office of the State Engineer.

and proposed places of use have been owned by Churchill County since at least 1973. The State Engineer finds this is an intrafarm transfer not subject to the doctrines of forfeiture or 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.²⁷⁴

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this 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 51234 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed.

²⁷⁴ NRS chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51376

GENERAL

I.

Application 51376 was filed on September 28, 1987, by Dorothy H. Buck²⁷⁵ to change the place of use of 26.19 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 412-1-A, 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 - 5.25 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 17, T.19N., R.27E., M.D.B.&M.

Parcel 2 - 0.57 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 17, T.19N., R.27E., M.D.B.&M.

The proposed places of use are described as being 5.00 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 0.82 of an acre in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, both in Section 17, T.19N., R.27E., M.D.B.&M.

II.

Application 51376 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁷⁶ and more specifically on the grounds as follows:²⁷⁷

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

Parcel 2 - Partial lack of perfection, partial forfeiture, partial abandonment.

Pursuant to the PLPT's evidentiary filing in this matter of March 8, 2001, which post-dates the filing of the applicant's evidence, the PLPT attempted to amend its contentions to the following:

²⁷⁵ File No. 51376, official records in the office of the State Engineer.

²⁷⁶ File No. 51376, official records in the office of the State Engineer.

²⁷⁷ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

Parcel 1 - None

Parcel 2 - Partial lack of perfection, partial forfeiture, partial abandonment.

In all other instances, the State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will remain those pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATES 51376

Parcels 1 and 2 - Exhibit LLL contains a two page document that is an "Application for Permanent Water Right" dated August 17, 1955, under the name of John C. Mall which covers Parcels 1 and 2.²⁷⁸ However, it became apparent from the review of the applicant's documents found in Attachments B and C to her petition²⁷⁹ that the document contained in Exhibit LLL was missing pages and had pages of two separate documents mixed. The document in Exhibit LLL has paragraph 4 ending on page 1 and starts with paragraph 11 on page two.

In the applicant's petition there is an "Application for Permanent Water Right" dated April 21, 1944, which is 3 pages long and is under the name of John C. Mall. This document contains the missing second page of Exhibit LLL and shows the third page was also missing. The second document in the applicant's petition contains the second page of the document found in Exhibit LLL. The 1944 application provides for 9 acres of water rights in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, T.19N., R.27E., M.D.B.&M. (Parcel 1).

²⁷⁸ Official records in the office of the State Engineer.

²⁷⁹ Applicants' Petition for Certification as Intrafarm Transfer for Application 51376 filed on September 11, 2000, official records in the office of the State Engineer.

The second document in the applicant's petition is an "Application for Permanent Water Right" dated August 17, 1955, under the name of Clark and Fleeta Walker, which covers Parcels 1 and 2. The 1955 application indicates that in Parcel 1 9 acres of water rights already existed and the 1955 application was for an additional 3 acres of water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section (Parcel 1), and applied for 4 acres of water rights in Parcel 2.

The State Engineer finds as to Parcel 1 he is unable to determine if the contract date is April 21, 1944, or August 17, 1955; however, as to Parcel 2 the contract date is August 17, 1955.

II.

PERFECTION

Parcel 1 - The contract date is either April 21, 1944, or August 17, 1955. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁸⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and a portion irrigated. In 1962, 1973, 1974, 1975 and 1977 it was described as an on-farm supply ditch and a portion irrigated. In 1980, 1984, 1985, 1986 and 1987 the land use was described as irrigated. The State Engineer finds the evidence indicates a water right was perfected on this parcel.

Parcel 2 - The contract date is August 17, 1955. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁸¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation, and in 1962 as an on-farm supply ditch. In 1973, 1974, 1975 and 1977 it was described as an on-farm supply ditch and a farm yard, and in 1980, 1984, 1985, 1986 and 1987 as a

²⁸⁰ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁸¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

portion irrigated and a farm yard. At the 1989 administrative hearing on this application, the applicant described the land use in 1948 as barren land and 1988 as cultivated/marginal land.²⁸²

The State Engineer finds that a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1955 and 1962, and finds the description in 1962 as an on-farm supply ditch reaffirms the State Engineer's finding that on-farm supply ditches were treated as irrigated land. Therefore, the State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel, and in fact proved perfection of the water right.

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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcels 1 and 2 - Using the protestant's land use description the State Engineer finds as to Parcel 1 use of the water was proved for the 7 year period prior to the filing of the water right application, and the PLPT's protest claim is without merit. As to Parcel 2, the PLPT provided evidence that 0.19 of an acre of the 0.57 of an acre proposed for transfer was irrigated for the 7 year period prior to the filing of the transfer application.²⁸³

²⁸² Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

²⁸³ Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

The State Engineer finds the PLPT's and applicant's land use descriptions are conflicting on this very small parcel of land. Further, that the PLPT's post-1984 aerial photographs are all the State Engineer has to attempt to resolve the discrepancy and they are of a scale which is nearly impossible to even pick out the parcel or identify its land use. Therefore, the State Engineer specifically adopts and incorporates General Finding of Fact IV and uses the applicant's land use description and finds non-use was not proven by clear and convincing evidence.

The State Engineer finds that a review of the documents attached to the applicant's petition²⁸⁴ indicates that the existing and proposed places of use are lands have been owned by applicant since at least 1968, and were part of a single farm unit since at least 1944 at the time when the property was owned by John Mall. The State Engineer finds this is an intrafarm transfer not subject to the doctrines of forfeiture or 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.²⁸⁵

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment

²⁸⁴ Applicants' Petition for Certification as Intrafarm Transfer for Application 51376 filed on September 11, 2000, official records in the office of the State Engineer.

²⁸⁵ NRS chapter 533 and Order of Remand from Federal District Court.

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pursuant to Judge McKibben's Order of September 3, 1998, and that beneficial use of the water was demonstrated for an extended period of time prior to the filing of the transfer application on Parcel 1, and as to Parcel 2 non-use was not proven by clear and convincing evidence.

RULING

The protest to Application 51376 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed.

APPLICATION 51600

GENERAL

I.

Application 51600 was filed on December 4, 1987, by W.L. Eckert, Inc.²⁸⁶ to change the place of use of 38.25 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 527, 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 - 4.40 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 4.10 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as being 7.00 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, and 1.50 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, both in Section 23, T.19N., R.28E., M.D.B.&M. By letter dated September 20, 1993, the applicant filed a map which showed corrections for shifted areas to correct discrepancies between the Bureau of Reclamation and TCID section line locations.²⁸⁷

II.

Application 51600 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁸⁸ and more specifically on the grounds as follows:²⁸⁹

Parcel 1 - Lack of perfection, abandonment

Parcel 2 - Lack of perfection, abandonment.

²⁸⁶ File No. 51600, official records in the office of the State Engineer.

²⁸⁷ File No. 51600, official records in the office of the State Engineer.

²⁸⁸ File No. 51600, official records in the office of the State Engineer.

²⁸⁹ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

FINDINGS OF FACT

I.

CONTRACT DATES 51600

Parcels 1 and 2 - Exhibit LLL contains a "Certificate of Filing Water Right Application" dated August 6, 1907, under the name of William H. Lowry which covers Parcels 1 and 2.²⁹⁰ The State Engineer finds the contract dates are August 6, 1907.

II.

PERFECTION

Parcel 1 - The contract date is August 6, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁹¹ 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 an on-farm supply ditch, farm yard and farm structures. The PLPT provided evidence that 0.54 of an acre was covered by an on-farm supply ditch from 1962 through 1987.²⁹² At the 1989 administrative hearing on this application, the applicant described the land use in 1948 and 1988 as a farmstead, ditch and roads.²⁹³

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 Conclusion of Law II which held that for lands which have

²⁹⁰ Official records in the office of the State Engineer.

²⁹¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁹² Map On-Farm Supply Ditches Within Existing Places of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁹³ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

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 August 6, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁹⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation, and in 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 as a drainage ditch and road. At the 1989 administrative hearing on this application, the applicant described the land use in 1948 and 1988 as a ditch and roads.²⁹⁵

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 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 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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcels 1 and 2 - Using the applicant's and protestant's land use descriptions the State Engineer finds that no water was placed to beneficial use on Parcel 1, except for the 0.54 of an acre covered

²⁹⁴ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁹⁵ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

by the on-farm supply ditch, and on Parcel 2 for the 39 year period prior to the filing of the application. However, the PLPT's evidence provided in its post-1984 aerial photographs²⁹⁶ clearly shows that the water was being used on the proposed place of use prior to the filing of the transfer application demonstrating beneficial use of the water within the farm unit.

The State Engineer finds that a review of the documents attached to the applicant's petition²⁹⁷ indicates that the existing and proposed places of use are lands which have been owned by applicant as a corporation since at least 1972, but were obviously owned by the person the corporation was named after since the late 1940's and early 1950's, and were part of a single farm unit since at least the early 1950's. The State Engineer finds this 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.²⁹⁸

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection.

III.

ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to

²⁹⁶ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

²⁹⁷ Applicants' Petition for Certification as Intrafarm Transfer for Application 51600 filed on July 24, 2000, official records in the office of the State Engineer.

²⁹⁸ NRS chapter 533 and Order of Remand from Federal District Court.

Judge McKibben's Order of September 3, 1998, and that beneficial use of the water was demonstrated on the proposed place of use for several years prior to the filing of the transfer application.

RULING

The protest to Application 51600 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustment of the permit.

APPLICATION 51604

GENERAL

I.

Application 51604 was filed on December 4, 1987, by Clarence C. Silva²⁹⁹ to change the place of use of 24.50 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 798, Claim No. 3, Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 7.00 acres NW¼ NW¼, Sec. 26, T.19N., R.30E., M.D.B.&M.

The proposed place of use is described as being 7.00 acres in the NW¼ NW¼ of Section 26, T.19N., R.30E., M.D.B.&M.

II.

Application 51604 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁰⁰ and more specifically on the grounds as follows:³⁰¹

Parcel 1 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51604

Parcel 1 - Exhibit LLL contains a "Water-right Application" dated December 11, 1944, under the name of Charles Sebus which covers Parcel 1.³⁰² The State Engineer finds the contract date is December 11, 1944.

²⁹⁹ File No. 51604, official records in the office of the State Engineer.

³⁰⁰ File No. 51604, official records in the office of the State Engineer.

³⁰¹ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

³⁰² Official records in the office of the State Engineer.

II.

PERFECTION

Parcel 1 - The contract date is December 11, 1944. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁰³ which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, natural vegetation and bare land. At the 1989 administrative hearing on this application, the applicant described the land use in 1948 and 1988 as a road, ditch and barren land.³⁰⁴

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 1944 and 1948. The State Engineer finds the protestant did not prove its claim of lack of perfection on this parcel.

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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

Parcel 1 - Using the applicant's and protestant's land use descriptions the State Engineer finds that no water was placed to beneficial use on Parcel 1 for the 39 year period prior to the filing of the application. The State Engineer finds that a review

³⁰³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁰⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

of the documents attached to the applicant's petition³⁰⁵ indicates that the existing and proposed places of use are lands which have been a farm unit since at least 1944, and owned by this applicant since 1981. The State Engineer finds this is an intrafarm transfer not subject to the doctrines of forfeiture and 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.³⁰⁶

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

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

RULING

The protest to Application 51604 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed.

³⁰⁵ Applicants' Petition for Certification as Intrafarm Transfer for Application 51604 filed on September 5, 2000, official records in the office of the State Engineer.

³⁰⁶ NRS chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51606

GENERAL

I.

Application 51606 was filed on December 4, 1987, by Walter Davis³⁰⁷ to change the place of use of 18.59 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 204 and 204-1, 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 - 2.11 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 5, T.18N., R.29E., M.D.B.&M.

Parcel 2 - 3.20 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 5, T.18N., R.29E., M.D.B.&M.

The proposed places of use are described as being 5.05 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and 0.26 of an acre in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, both in Section 5, T.18N., R.29E., M.D.B.&M.

II.

Application 51606 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁰⁸ and more specifically on the grounds as follows:³⁰⁹

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51606

Parcels 1 and 2 - Exhibit LLL contains a "Certificate of Filing

³⁰⁷ File No. 51606, official records in the office of the State Engineer. Permit 51606 has been assigned in the records of the State Engineer to Adin James Davis.

³⁰⁸ File No. 51606, official records in the office of the State Engineer.

³⁰⁹ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

Water Right Application" dated May 9, 1907, under the name of Bernard McGowan for Farm Unit D, the S½ NE¼ of Section 5, T.18N., R.29E., M.D.B.&M.³¹⁰

Exhibit LLL also contains a "Water-right Application" dated November 3, 1915, under the name of W.P. Clark which covers Parcels 1 and 2, and describes the area as the S½ NE¼ of Section 5, T.18N., R.29E., M.D.B.&M. or Farm Unit D. This document further indicates there was a homestead entry application made on May 26, 1906, and the water right was assigned subject to the Reclamation law by W.P. Clark by Kate McGowan, widow Thomas McGowan.³¹¹ The document further assigned to W.P. Clark all right, title and interest in and to any credits heretofore paid under water right application No. 296 for the S½ NE¼ of Section 5, T.18N., R.29E., M.D.B.&M.

Exhibit LLL contains a third document which is a "Water-right Application" dated September 28, 1916, under the name of James Davis which covers Parcels 1 and 2, which again indicates it was assigned subject to the Reclamation law under the same homestead application referenced in the 1915 water-right application, and again further assigns all right, title and interest in and to any credits heretofore paid under water right application No. (illegible) for the S½ NE¼ of Section 5, T.18N., R.29E., M.D.B.&M.

The State Engineer finds there is sufficient evidence to tie the water right contracts together and back to the 1907 document, and the contract date is May 9, 1907.

³¹⁰ Official records in the office of the State Engineer.

³¹¹ The documents provided in the Applicant's Petition for Certification as Intrafarm Transfer indicate that Thomas McGowan was deeded the property in 1911 from an heir of Bernard McGowan. Applicant's Petition for Certification as Intrafarm Transfer for Application 51606 filed on August 21, 2000, official records in the office of the State Engineer.

II.

PERFECTION

Parcel 1 - The contract date is May 9, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³¹² which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 the land use on this parcel was described as natural vegetation. In 1985, 1986 and 1987 the land use was described as a farm yard. At the 1989 administrative hearing on this application, the applicant described the land use in 1948 a road, ditch and barren land, and 1988 as a road and ditch.³¹³

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 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 9, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³¹⁴ 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 farm structure, on-farm supply ditch (unlined), road and delivery ditch (unlined). At the

³¹² PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³¹³ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

³¹⁴ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

1989 administrative hearing on this application, the applicant described the land use in 1948 and 1988 as a ditch and farmstead.³¹⁵

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 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 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 the water rights would not be subject to the doctrines of forfeiture or abandonment.

For Parcel 1, upon review of the applicant's and protestant's land use descriptions, the State Engineer finds there is a substantial discrepancy. The applicant described it as a road, ditch and barren land in 1948 and a road and ditch in 1989, and the protestant described it as natural vegetation from 1948 through 1984 and a farm yard from 1985 through 1987. These descriptions are in no way similar. The protestant's photographs from its September 21, 2000, field inspection³¹⁶ did not provide any other substantial assistance in resolving this discrepancy. Those photographs appear to show a road with equipment perhaps on

³¹⁵ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

³¹⁶ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

the other side, but the State Engineer does not see a farm yard or a ditch in those photographs. The State Engineer finds the land use on this parcel has not been described by clear and convincing evidence. If the applicant's description is correct, there is apparently a ditch within the existing place of use; however, the evidence is not clear whether it is an on-farm supply ditch or some type of delivery canal going through the property. If the protestant's description of natural vegetation is correct, this land was perhaps pasture or sage brush up until 1985 and if a pasture then it perhaps does not provide 5 years of non-use prior to the filing of the transfer application.

As for Parcel 2, the applicant described the land use in both 1948 and 1989 as a ditch and farmstead, while the protestant described it as a farm structure, on-farm supply ditch, road and delivery ditch. The State Engineer finds the evidence is not clear whether the applicant is intending the transfer of water off the road and merely believes it was the ditch. The protestant also provided evidence³¹⁷ that from 1948 through 1972 0.90 of an acre was covered by an on-farm supply ditch, that from 1973 through 1977 0.26 of an acre was covered by an on-farm supply ditch, but that from 1984 through 1987 it was again covered by the 0.90 of an acre being an on-farm supply ditch. The State Engineer does not find it convincing that part of the ditch went away for the 3 year period from 1973 to 1977. As to Parcel 2 the State Engineer finds there was no beneficial use of water on the area covered by the farmstead for the 39 year period from 1948 to 1987, but there is no quantification of the size of that area within the record; therefore, non-use on any specific portion of this parcel is not shown by clear and convincing evidence, and beneficial use of the water was shown on the areas covered by on-farm supply ditches.

³¹⁷ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

The State Engineer finds that a review of the documents attached to the applicant's petition³¹⁸ indicates that the existing and proposed places of use are lands which have been a farm unit since at least 1907, owned apparently by this applicant's family since 1916, and this applicant in particular since 1938. The State Engineer finds this is an intrafarm transfer not subject to the doctrines of forfeiture and abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that the water right pre-dates March 22, 1913, and is therefore, not subject to the forfeiture provision of NRS § 533.060.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³¹⁹

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrines of forfeiture and abandonment pursuant to Judge McKibben's Order of September 3, 1998, that based on the date of the water right contract the water right is not subject to the forfeiture provision of NRS § 533.060, and non-use was not proven by clear and convincing evidence.

³¹⁸ Applicant's Petition for Certification as Intrafarm Transfer for Application 51606 filed on August 21, 2000, official records in the office of the State Engineer.

³¹⁹ NRS chapter 533 and Order of Remand from Federal District Court.

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RULING

The protest to Application 51606 is hereby overruled and the State Engineer's decision granting the transfer of water rights under the application is hereby re-affirmed.

APPLICATION 51608

GENERAL

I.

Application 51608 was filed on December 4, 1987, by Ted J. and Lois de Braga³²⁰ to change the place of use of 41.83 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 821-5, 828, 830 and 777, 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 - 1.80 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 13, T.19N., R.30E., M.D.B.&M.
- Parcel 2 - 0.48 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.30E., M.D.B.&M
- Parcel 3 - 2.70 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T.19N., R.30E., M.D.B.&M
- Parcel 4 - 0.30 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.30E., M.D.B.&M.
- Parcel 5 - 2.80 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.30E., M.D.B.&M
- Parcel 6 - 0.85 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 24, T.19N., R.30E., M.D.B.&M
- Parcel 7 - 0.30 acres Lot 3, Sec. 18, T.19N., R.31E., M.D.B.&M
- Parcel 8 - 0.37 acres Lot 1, Sec. 19, T.19N., R.31E., M.D.B.&M
- Parcel 9 - 2.35 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 14, T.19N., R.30E., M.D.B.&M

The proposed places of use are described as being 0.30 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 3.28 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, 2.37 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 3.80 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, all within Section 13, T.19N., R.30E., M.D.B.&M., 0.39 of an acre in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.19N., R.30E., M.D.B.&M., 1.70 acres in Lot 3, Section 18, T.19N., R.31E., M.D.B.&M., and 0.11 of an acre in Lot 1, Section 19, T.19N., R.31E., M.D.B.&M.

By letter dated September 5, 2000, the applicant withdrew the Parcel 3, 4, 6 and 8 requests for transfer, withdrew 2.00 acres from the Parcel 5 request for transfer, and withdrew 0.05 of an acre from the Parcel 7 request for transfer.³²¹

³²⁰ File No. 51608, official records in the office of the State Engineer.

³²¹ File No. 51608, official records in the office of the State Engineer.

II.

Application 51608 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³²² and more specifically on the grounds as follows:³²³

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Partial lack of perfection, forfeiture, abandonment
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 9 - Lack of perfection, forfeiture, abandonment.

Pursuant to the filing of the PLPT's evidence in this matter on March 8, 2001, which post-dates the filing of the applicant's evidence, the Tribe attempted to amend its contentions to the following:

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Abandonment
- Parcel 3 - None
- Parcel 4 - None
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 6 - None
- Parcel 7 - Lack of perfection, abandonment
- Parcel 8 - None
- Parcel 9 - Lack of perfection, forfeiture, abandonment.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand for those parcels remaining after the withdrawals will be the contentions pursuant to which the State Engineer will rule.

³²² File No. 51608, official records in the office of the State Engineer.

³²³ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997, official records in the office of the State Engineer.

FINDINGS OF FACT

I.

CONTRACT DATES 51608

Parcel 1 - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application" dated April 28, 1919, in the name of Leslie Kolstrup³²⁴ which covers the land identified as Parcel 1, and which indicates that the land was entered subject to the Reclamation law by a homestead application dated April 20, 1908, which was thereafter assigned to Leslie Kolstrup by the homesteader's heirs. The document further indicates that Alice, Esma and Allene Simmons assigned all their right, title and interest in and to any credits paid on a water right application. The applicants provided evidence of a "Certificate of Filing Water Right Application" dated April 20, 1908, under the name of James T. Simmons,³²⁵ which covers this existing place of use. The State Engineer finds the assignment of rights under the Kolstrup application from Simmons sufficiently ties the two documents together, and the contract date is April 20, 1908.

Parcel 2 - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated April 1, 1909, in the name of Paul Kolstrup³²⁶ which covers Parcel 2. The applicants also refer to this document in their Application for Certification. The State Engineer finds the contract date is April 1, 1909.

Parcel 5 - Exhibit RRR from the 1991 administrative hearing contains an "Application for Permanent Water Right" dated April

³²⁴ Official records in the office of the State Engineer.

³²⁵ Applicants' Petition for Certification as Intrafarm Transfer for Application 51608 filed on September 29, 2000, official records in the office of the State Engineer.

³²⁶ Official records in the office of the State Engineer.

10, 1929, under the name of M. Z. Kolstrup, which covers the E½ SE¼ of Section 13, T.19N., R.30E. M.D.B.&M.³²⁷ The State Engineer finds the contract date is April 10, 1929.

Parcel 7 - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water-right Application" dated May 22, 1912, under the name of Mauricio T. Freitas, which covers Lot 2 and the SE¼ NW¼ in Section 18, T.19N., R.31E. M.D.B.&M.,³²⁸ and which indicates that the land was entered under a homestead application dated May 22, 1912. Exhibit RRR also contains a "Water-right Application" dated December 12, 1918, under the name of Mauricio T. Freitas, which covers Lots 2 and 3 in Section 18, T.19N., R.31E. M.D.B.&M.,³²⁹ and which indicates that the land was entered under a homestead application dated May 22, 1912, as amended on May 8, 1919. The State Engineer finds while the May 22, 1912, document indicates that Mauricio Frietas was in the area farming it does not indicate he was farming on Lot 3; therefore, the contract date is December 12, 1918.

Parcel 9 - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application" dated December 18, 1913, under the name of E.F. Owens, covering this existing place of use. The document further indicates that the land was entered by Fred W. Williams under a homestead application dated March 19, 1907, and that Fred H. Williams assigned any right, title and interest he had to any credits paid under the water right application No. 508 to E.F. Owens. The applicants provided evidence of a "Certificate of Filing Water Right Application" dated April 20, 1908, under the name of Fred H. Williams,³³⁰ which covers this

³²⁷ Official records in the office of the State Engineer.

³²⁸ Official records in the office of the State Engineer.

³²⁹ Official records in the office of the State Engineer.

³³⁰ Applicants' Petition for Certification as Intrafarm Transfer for Application 51608 filed on September 29, 2000, official records in the office of the State Engineer.

existing place of use. The State Engineer finds the assignment of rights under the Williams application to Owens sufficiently ties the two documents together, and the contract date is April 20, 1908.

II.

PERFECTION

Parcel 1 - The contract date is April 20, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³³¹ 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 delivery ditch and a drain ditch. At the 1991 administrative hearing, the applicants described the land use on this parcel in 1948 and 1989 as a ditch and road.³³²

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 2 - The contract date is April 1, 1909. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³³³ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975 and 1977 the land use on this parcel was described as irrigated. In 1980, 1984, 1985 and 1987 the land use

³³¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³³² Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

³³³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

was described as a farm yard. At the 1991 administrative hearing, the applicants described the land use on this parcel in 1948 and 1989 as a stackyard.³³⁴ The State Engineer finds that the protestant's evidence proved a water right was perfected on this parcel.

Parcel 5 - The contract date is April 10, 1929. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³³⁵ 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 drain ditch. At the 1991 administrative hearing, the applicants described the land use on this parcel in 1948 and 1989 as a slough.³³⁶ The State Engineer finds that the April 10, 1929, contract indicates that this "slough" was considered water-righted land; therefore, one must assume the Reclamation Service considered this area as irrigated.

Further, 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.

Parcel 7 - The contract date is December 12, 1918. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³³⁷ 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 natural vegetation. At

³³⁴ Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

³³⁵ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³³⁶ Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

³³⁷ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

the 1991 administrative hearing, the applicants described the land use on this parcel in 1948 and 1989 as a slough.³³⁸ The State Engineer finds that the May 22, 1912, contract indicates that this "slough" was considered water-righted land; therefore, one must assume the Reclamation Service considered this natural vegetation as irrigated. Further, 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 9 - The contract date is April 20, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³³⁹ which indicates from aerial photographs that in 1948, the land use on this parcel was irrigated, and 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use was described as a farm yard. At the 1991 administrative hearing, the applicants described the land use on this parcel in 1948 and 1989 as a farmstead and stackyard.³⁴⁰ The State Engineer finds the protestant's own evidence indicates its claim of lack of perfection is without merit as it indicated the land was irrigated in 1948. Further, the State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never

³³⁸ Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

³³⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁴⁰ Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

perfected on this parcel between 1908 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact proved perfection of the water right.

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Groups 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 or abandonment.

Parcels 1, 2 and 9 - The contract dates alone provide the evidence that the water rights are not subject to the forfeiture provision of NRS § 533.060.

Parcel 1, 2, 5, 7 and 9 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake a brevity, the State Engineer will not repeat them in this section.

The State Engineer finds no water was placed to beneficial use on Parcel 1 for the 39 year period from 1948 through 1987, on Parcel 2 for the 7 year period from 1980 through 1987, and Parcel 9 for the 25 year period from 1962 through 1987. The protestant provided evidence as to the current status of the land use on Parcel 5,³⁴¹ which shows this existing place of use as at the time of the administrative hearing as being covered by cattails and native vegetation, but in light of the fact that the land was considered by the Reclamation Service as an irrigable area, and that these pictures were taken 13 years after the filing of the water right application, the State Engineer cannot find he has clear and convincing evidence of the non-use of the land for five

³⁴¹ Photographs taken during September 21, 2000, field inspections, photograph 15-7, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

years prior to the filing of the water right application. The protestant provided evidence as to the current status of the land use on Parcel 7,³⁴² which shows this existing place of use as being covered by a fairly heavy stand of native shrubs and trees. Based on the fact that the Reclamation Service considered this irrigable land, and that these pictures were taken 13 years after the filing of the water right application, the State Engineer cannot find he has clear and convincing evidence of the non-use of the land for five years prior to the filing of the water right application. If the area is a slough as indicated by the applicants in their original hearing, that indicates water flowing through the area, which could cause a fairly rapid growth of native vegetation.

The PLPT also presented evidence in its post-1984 photographs, which shows that the proposed places of use appear to be well established fields by 1985.³⁴³

The applicants provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicants in total since 1980, but sections of the farm were acquired by members of the de Braga family as early as 1944, 1952 and 1977.³⁴⁴ The State Engineer finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

³⁴² Photographs taken during September 21, 2000, field inspections, photograph 15-5, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁴³ Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁴⁴ Applicants' Petition for Certification as Intrafarm Transfer for Application 51608 filed on September 29, 2000, official records in the office of the State Engineer.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁴⁵

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 5, 7 and 9.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this 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 the contract dates as to Parcel 1, 2 and 9 provide they are not subject to the forfeiture provision of NRS § 533.060, and that non-use was not proven by clear and convincing evidence as to Parcels 5 and 7.

RULING

The protest to Application 51608 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed, except as to those portions withdrawn by the applicants.

³⁴⁵ NRS chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51733

GENERAL

I.

Application 51733 was filed on January 5, 1988, by Leon Belaustegui³⁴⁶ to change the place of use of 26.10 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 479 and Application 48472, 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 - 0.90 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.28E., M.D.B.&M.³⁴⁷

Parcel 2 - 4.90 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 18, T.19N., R.29E., M.D.B.&M.³⁴⁸

The proposed places of use are described as being 3.20 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, and 2.60 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, both within Section 18, T.19N., R.29E., M.D.B.&M.

II.

Application 51733 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁴⁹ and more specifically on the grounds as follows:³⁵⁰

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Lack of perfection, forfeiture, abandonment.

³⁴⁶ File No. 51733, official records in the office of the State Engineer. The owners of record in office of the State Engineer are currently Carl and Lisa Erquiaga and Daniel and Anne Fagundes.

³⁴⁷ 0.45 acres under Application 48472.

³⁴⁸ 0.30 acres under Application 48472.

³⁴⁹ File No. 51733, official records in the office of the State Engineer.

³⁵⁰ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997, official records in the office of the State Engineer.

Pursuant to the filing of the PLPT's evidence in this matter on March 8, 2001, which post-dates the filing of the applicant's evidence, the Tribe attempted to amend its contentions to the following:

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Partial lack of perfection, forfeiture, abandonment.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will be the contentions pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATES 57133

Parcel 1 - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated September 7, 1909, in the name of Philip Atkinson³⁵¹, which covers the land identified as the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13, T.19N., R.28E., M.D.B.&M., which includes Parcel 1, and which further indicates it was made in connection with homestead entry No. 04252, dated September 7, 1909. The applicant in his petition³⁵² provided a copy of a "Certificate of Filing Water Right Application" dated July 10, 1907, in the name of William H. Hubbard, which covers the land identified as the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 13, T.19N., R.28E., M.D.B.&M., which includes Parcel 1, and which further indicates it was made in connection with homestead entry No. 690, dated February 28, 1903. The State Engineer specifically adopts and incorporates General Finding of Fact VI and finds that he is not sufficiently convinced that the

³⁵¹ Official records in the office of the State Engineer.

³⁵² Applicant's Petition for Certification as Intrafarm Transfer for Application 51733 filed on September 29, 2000, official records in the office of the State Engineer.

applicant's document is the correct document instead of the document found in Exhibit RRR, particularly since it appears that perhaps the homestead entry made in connection with the July 10, 1907, Certificate may have failed since a new homestead entry was made in connection with the 1909 Certificate, and since the applicants in their petition acknowledge that there does not appear to be a conveyance of record from Hubbard to Atkinson. The State Engineer finds the contract date is September 7, 1909.

Parcel 2 - Exhibit RRR from the 1991 administrative hearing contains a "Water-right Application" dated February 25, 1920, in the name of John Belaustegui, which covers the land identified as Lots 3 and 4 of Section 18, T.19N., R.29E., M.D.B.&M., and which further indicates it was made in connection with homestead application No. 01323, made by Martin Stephenson, dated December 19, 1908. The applicant in his petition³⁵³ provided a copy of a "Certificate of Filing Water Right Application" dated December 19, 1908, in the name of Martin S. Stephenson, which covers the land identified as Lots 3 and 4 of Section 18, T.19N., R.29E., M.D.B.&M., and which further indicates it was made in connection with homestead entry No. 01323, dated December 19, 1908. The State Engineer finds that the documents can be sufficiently tied together to show that the contract date is December 19, 1908.

II.

PERFECTION

Parcel 1 - The contract date is September 7, 1909. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁵⁴ which indicates from aerial photographs that in 1948 and 1962 the land use was identified as a road, natural

³⁵³ Applicant's Petition for Certification as Intrafarm Transfer for Application 51733 filed on September 29, 2000, official records in the office of the State Engineer.

³⁵⁴ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

vegetation and farm structure. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, on-farm supply ditch and farm structure. The protestant provided evidence that 0.02 of an acre was covered by an on-farm supply ditch from 1973-1987,³⁵⁵ which the State Engineer has previously found demonstrates beneficial use of water on that parcel. At the 1991 administrative hearing, the applicant did not describe the 1948 land use as he did not believe there was an aerial photograph which covered this place of use, and in 1991 he described the land use on this parcel as a ditch, road and farmstead.³⁵⁶

The State Engineer finds that 0.45 of an acre of water rights was moved on to the parcel under Permit 48472, which was granted in 1985. The water right that was moved on to this existing place of use under Permit 48472 was requested to be moved under Application 51733 before proof of beneficial use of the water was even due to be filed under Permit 48472.³⁵⁷ 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 application is filed.³⁵⁸ 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 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

³⁵⁵ Map On-Farm Supply Ditches Within Existing Places of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁵⁶ Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

³⁵⁷ File No. 48472, official records in the office of the State Engineer.

³⁵⁸ NRS §§ 533.324 and 533.325.

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 19, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁵⁹ which indicates from aerial photographs that in 1948 the land use was identified as a drain ditch (Lower Soda Lake Drain), road and natural vegetation. In 1962 the land use was described as a drain ditch (Lower Soda Lake Drain), road, farm yard, natural vegetation and portion irrigated. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as drain ditches (Lower Soda Lake Drain and unnamed ditch), farm yard and road. The protestant provided evidence that 1.45 acres of the 4.90 acres making up Parcel 2 was irrigated in 1962 demonstrating perfection of the water right on that portion of the place of use.³⁶⁰ At the 1991 administrative hearing, the applicant did not describe the 1948 land use as he did not believe there was an aerial photograph which covered this place of use, and in 1991 he described the land use on this parcel as a ditch and road.³⁶¹

The State Engineer finds that 0.30 of an acre of water rights was moved on to the parcel under Permit 48472, which was granted in 1985. The water right that was moved on to this existing place of use under Permit 48472 was requested to be moved under Application 51733 before proof of beneficial use of the water was

³⁵⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁶⁰ Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁶¹ Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997.

even due to be filed under Permit 48472.³⁶² 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.³⁶³ 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.

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Groups 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 or abandonment.

Parcels 1 and 2 - The contract dates alone provide the evidence that the water rights are not subject to the forfeiture provision of NRS § 533.060.

Parcel 1 and 2 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity ,the State Engineer will not repeat them in this section. Using the applicant's and the protestant's land use descriptions, the State Engineer finds no water was placed to beneficial use on Parcel 1, except for the 0.02 of an acre covered by the on-farm supply ditch, and on Parcel 2 for the 14 year period from 1973 through 1987. The PLPT also presented evidence

³⁶² File No. 48472, official records in the office of the State Engineer.

³⁶³ NRS §§ 533.324 and 533.325.

in its post-1984 photographs, which shows that the proposed places of use appear to be well established fields by 1985.³⁶⁴

The applicant provided evidence showing that the existing and proposed places of use are within a farm unit owned by the applicant's family in total since 1919.³⁶⁵ The State Engineer finds these water rights are not subject to the forfeiture provision of NRS § 533.060 because the water rights contracts pre-date March 22, 1913, and further finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁶⁶

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this 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

³⁶⁴ Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁶⁵ Applicant's Petition for Certification as Intrafarm Transfer for Application 51733 filed on September 29, 2000, official records in the office of the State Engineer.

³⁶⁶ NRS chapter 533 and Order of Remand from Federal District Court.

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the contract dates as to Parcel 1 and 2 provide the evidence that they are not subject to the forfeiture provision of NRS § 533.060.

RULING

The protest to Application 51733 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustment of the permit.

APPLICATION 51734

GENERAL

I.

Application 51734 was filed on January 5, 1988, by Ernest F. Bright³⁶⁷ to change the place of use of 28.57 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 483 and Application 47808, 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 - 1.90 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 14, T.19N., R.28E., M.D.B.&M.³⁶⁸

Parcel 2 - 1.20 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 14, T.19N., R.28E., M.D.B.&M.

Parcel 3 - 3.25 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 23, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as being 3.15 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, and 3.20 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, both within Section 14, T.19N., R.28E., M.D.B.&M.

II.

Application 51734 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁶⁹ and more specifically on the grounds as follows:³⁷⁰

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Partial lack of perfection, forfeiture, abandonment

Parcel 3 - Lack of perfection, abandonment.

³⁶⁷ File No. 51734, official records in the office of the State Engineer.

³⁶⁸ 0.80 acres under Application 47808.

³⁶⁹ File No. 51734, official records in the office of the State Engineer.

³⁷⁰ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

Pursuant to the filing of the PLPT's evidence in this matter on March 8, 2001, which post-dates the filing of the applicant's evidence, the Tribe attempted to amend its contentions to the following:

- Parcel 1** - Lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, abandonment.

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will be the contentions pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATES 51734

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains an "Application for Permanent Water Right" dated April 28, 1954, in the name of Floyd Bright³⁷¹, which covers the land identified as the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, T.19N., R.28E., M.D.B.&M. The State Engineer notes the protestant in its exhibit identified as Table 1 also indicates this application applies to Parcel 2, but upon the State Engineer's review of the document he finds this document does not cover Parcel 2. This document indicates that in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 14 there were no other water rights on that land at the time of the filing of the application. The State Engineer finds the contract date is April 28, 1954.

Parcels 2 and 3 - Exhibit LLL from the 1989 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 20, 1907, in the name of William D. Moody³⁷², which covers

³⁷¹ Official records in the office of the State Engineer.

³⁷² Official records in the office of the State Engineer.

the land identified as the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, T.19N., R.28E., M.D.B.&M., and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 23, T.19N., R.28E., M.D.B.&M., and which indicates it was filed in connection with homestead entry No. 1615 dated December 11, 1907. The State Engineer finds the contract date is December 20, 1907.

II.

PERFECTION

Parcel 1 - The contract date is April 28, 1954. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁷³ 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 natural vegetation. The State Engineer finds it confusing as to why a water right would have been applied for and granted in 1954 for 12 irrigable acres in comparison to the PLPT's description of the land use from 1948 through 1987 as natural vegetation, unless the applicant was planning to or did irrigate it as pasture. At the 1989 administrative hearing, the applicant did not describe the 1948 land use as he did not believe there was an aerial photograph which covered this place of use, and in 1988 he described the land use on this parcel as barren land.³⁷⁴ The State Engineer finds he is not clearly convinced that no water was ever placed to beneficial use on Parcel 1, particularly since the applicant described the land as barren, which appears to indicate that perhaps irrigation was attempted, but failed. The State Engineer finds that 0.80 of an acre of water rights was moved on to Parcel 1 under Permit 47808, which was granted in 1985. The water right that was moved on to this existing place of use under Permit 47808 was requested to be moved under Application 51734 before proof of

³⁷³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁷⁴ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

beneficial use of the water was even due to be filed under Permit 47808.³⁷⁵ 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.³⁷⁶ The State Engineer finds that 1948 and 1962 photographs are not sufficient evidence to prove that a water right was never perfected on this parcel between 1954 and 1962; therefore, the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 2 - The contract date is December 20, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁷⁷ which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as natural vegetation. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a farm yard. At the 1989 administrative hearing, the applicant did not describe the 1948 land use as he did not believe there was an aerial photograph which covered this place of use, and in 1988 he described the land use on this parcel as corrals and stackyard.³⁷⁸

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

³⁷⁵ File No. 47808, official records in the office of the State Engineer.

³⁷⁶ NRS §§ 533.324 and 533.325.

³⁷⁷ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁷⁸ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

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 20, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁷⁹ which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as an on-farm supply ditch, natural vegetation and road. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as an on-farm supply ditch, farm yard and road. The protestant provided evidence that 0.46 of an acre of the 3.25 acres making up Parcel 3 was covered by an on-farm supply ditch from 1948 through 1987 demonstrating what the State Engineer has previously held to be beneficial use of the water. At the 1989 administrative hearing, the applicant did not describe the 1948 land use as he did not believe there was an aerial photograph which covered this place of use, and in 1989 he described the land use on this parcel as roads and ditches.³⁸⁰

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 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.

³⁷⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁸⁰ Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

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 or abandonment.

Parcel 2 - The contract date alone provides the evidence that the water right is not subject to the forfeiture provision of NRS § 533.060.

Parcel 1, 2 and 3 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat them in this section.

As to Parcel 1, the applicant described the land use in 1988 as barren land, but there is not sufficient evidence to demonstrate whether it was always barren or became barren over time. Using the applicant's and the protestant's land use descriptions, the State Engineer finds there is not clear and convincing evidence of non-use of the water as to Parcel 1. As to Parcel 2, the State Engineer finds that no water was placed to beneficial use for the 14 year period from 1973 through 1987. As to Parcel 3, the State Engineer finds that no water was placed to beneficial use, except for the 0.46 of an acre taken up by the on-farm supply ditch, for the 40 year period from 1948 through 1987. However, the State Engineer also finds that the PLPT presented evidence in its post-1984 photographs, which shows that the proposed places of use appear to be well established fields by 1985.³⁸¹

³⁸¹ Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

The applicant provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicant's family in total since 1953.³⁸² While the protestant alleges that this applicant did not own the whole farm until 1985, that is the date when the applicant inherited the farm, but the evidence shows it was owned by a predecessor with the same surname as one farm since 1953. The State Engineer finds as to Parcel 2 that the water right is not subject to the forfeiture provision of NRS § 533.060 because the water right contract pre-dates March 22, 1913. The State Engineer further finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁸³

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 AND ABANDONMENT

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

³⁸² Applicant's Petition for Certification as Intrafarm Transfer for Application 51734 filed on July 24, 2000, official records in the office of the State Engineer.

³⁸³ NRS chapter 533 and Order of Remand from Federal District Court.

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protestant did not prove non-use as to Parcel 1, and that the contract date as to Parcel 2 provides that it is not subject to the forfeiture provision of NRS § 533.060.

RULING

The protest to Application 51734 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed. There are issues regarding bench-land and bottom-land designations which could require adjustment of the permit.

APPLICATION 51736

GENERAL

I.

Application 51736 was filed on January 5, 1988, by William D. Washburn³⁸⁴ to change the place of use of 10.15 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 294 and Permit 47899, 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 - 1.30 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, T.18N., R.29E., M.D.B.&M.³⁸⁵

Parcel 2 - 1.60 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 20, T.18N., R.29E., M.D.B.&M.³⁸⁶

The proposed places of use are described as being 1.20 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 0.50 of an acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, and 1.20 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, all within Section 29, T.18N., R.29E., M.D.B.&M.

II.

Application 51736 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁸⁷ and more specifically on the grounds as follows:³⁸⁸

Parcel 1 - Lack of perfection, abandonment

Parcel 2 - Lack of perfection, abandonment.

³⁸⁴ File No. 51736, official records in the office of the State Engineer. An assignment pending requesting transfer of ownership of Permit 51736 to William and Gwendolyn Washburn.

³⁸⁵ 0.60 acres under Permit 47899.

³⁸⁶ 0.20 acres under Permit 47899.

³⁸⁷ File No. 51736, official records in the office of the State Engineer.

³⁸⁸ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997, official records in the office of the State Engineer.

FINDINGS OF FACT

I.

CONTRACT DATES 51736

Parcel 1 - Exhibit RRR from the 1991 administrative hearing contains an "Agreement" dated October 21, 1908, in the name of Sam Krummes,³⁸⁹ which covers the land identified as the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, T.19N., R.28E., M.D.B.&M., and which indicates there were 14 acres of pre-Project vested water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. Exhibit RRR also contains a "Certificate of Filing Water Right Application" dated June 11, 1909, in the name of Mary Newcomb,³⁹⁰ which covers the land identified as the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.18N., R.29E., M.D.B.&M., and which indicates that there were 14 acres of pre-Project vested water rights in that $\frac{1}{4}$ $\frac{1}{4}$ section of land, and 5 new acres added under the application. The applicant alleges that the water right contract date is October 21, 1908,³⁹¹ and the protestant alleges the water right date is June 11, 1909. The State Engineer finds he cannot tell which lands were added under the June 11, 1909, contract, but that the two documents are sufficiently close in time to relate one back to the other and finds the contract date is October 21, 1908.

Parcel 2 - Exhibit RRR from the 1991 administrative hearing contains an "Agreement" dated October 21, 1908, in the name of Sam Krummes,³⁹² which covers the land identified as the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T.18N., R.29E., M.D.B.&M., and which provides the water rights are based on pre-Project vested water rights. Both the applicant and the protestant allege that the contract date is

³⁸⁹ Official records in the office of the State Engineer.

³⁹⁰ Official records in the office of the State Engineer.

³⁹¹ Applicant's Petition for Certification as Intrafarm Transfer for Application 51736 filed on September 29, 2000, official records in the office of the State Engineer.

³⁹² Official records in the office of the State Engineer.

October 21, 1908. The State Engineer finds the contract date is October 21, 1908, and the water rights are based on pre-Project vested water rights.

II.

PERFECTION

Parcel 1 - The contract date is October 21, 1908, and the water rights in part are based on pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁹³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a drain ditch and natural vegetation. In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use was described as a drain ditch and on-farm supply ditch. At the 1989 administrative hearing, the applicant described the 1948 and 1988 land use on this parcel as a ditch.³⁹⁴ The State Engineer finds that 0.60 of an acre of water rights was moved on to the parcel under Permit 47899, which was granted in 1985. The water right that was moved on to this existing place of use under Permit 47899 was requested to be moved under Application 51736 before proof of beneficial use of the water was even due to be filed under Permit 47899.³⁹⁵ The State Engineer finds that Nevada water law allows for 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.³⁹⁶ 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 1908/09 and 1948; therefore, the protestant did not prove its

³⁹³ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁹⁴ Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

³⁹⁵ File No. 47899, official records in the office of the State Engineer.

³⁹⁶ NRS §§ 533.324 and 533.325.

claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested 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 October 21, 1908, and evidences that 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"³⁹⁷ 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, road and drain ditch. At the 1989 administrative hearing, the applicant described the 1948 and 1988 land use on this parcel as ditch.³⁹⁸ The State Engineer finds that 0.02 of an acre of water rights was moved on to the parcel under Permit 47899, which was granted in 1985. The water right that was moved on to this existing place of use under Permit 47899 was requested to be moved under Application 51736 before proof of beneficial use of the water was even due to be filed under Permit 47899.³⁹⁹ The State Engineer finds that Nevada water law allows for 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.⁴⁰⁰ The State Engineer finds that a 1948 photograph is not sufficient

³⁹⁷ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

³⁹⁸ Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

³⁹⁹ File No. 47899, official records in the office of the State Engineer.

⁴⁰⁰ NRS §§ 533.324 and 533.325.

evidence to prove that a water right was never perfected on this parcel between 1908/1909 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 Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law.

III.

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 or abandonment.

Parcels 1 and 2 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat them in this section.

As to Parcels 1 & 2, the protestant described a portion of the land use as an on-farm supply ditch. The State Engineer specifically adopts and incorporates General Finding of Fact IX and finds as to that area covered by an on-farm supply ditch beneficial use of the water was demonstrated over time. The protestant did not provide any evidence as to the specific location or size of the on-farm supply ditches; therefore, it did not provide clear and convincing evidence of non-use of the water as to any specifically identifiable portion of Parcels 1 or 2. The State Engineer also finds that the PLPT presented evidence in its post-1984 photographs, which shows that the proposed places of use appear to be well established fields by 1985.⁴⁰¹

⁴⁰¹ Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

The applicant provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicant's family in total since the early to mid-1970's, but that the farm unit had existed long before that time, perhaps as early as 1909.⁴⁰² The State Engineer further finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁰³

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that the protestant did not prove non-use as to either Parcel 1 or 2 by clear and convincing evidence.

RULING

The protest to Application 51736 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed.

⁴⁰² Applicant's Petition for Certification as Intrafarm Transfer for Application 51736 filed on September 29, 2000, official records in the office of the State Engineer.

⁴⁰³ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51957

GENERAL

I.

Application 51957 was filed on March 30, 1988, by Harold P. & Ruth A. Olsen⁴⁰⁴ to change the place of use of 30.45 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 136, Claim No. 3, Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 8.70 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 14, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as being 4.80 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 3.90 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, both within Section 14, T.18N., R.28E., M.D.B.&M.

II.

Application 51957 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴⁰⁵ and more specifically on the grounds as follows:⁴⁰⁶

Parcel 1 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51957

Parcel 1 - Exhibit RRR from the 1991 administrative hearing contains an "Application for Permanent Water Right" dated December 30, 1946, in the name of Frank Brannan,⁴⁰⁷ which covers the land

⁴⁰⁴ File No. 51957, official records in the office of the State Engineer.

⁴⁰⁵ File No. 51957, official records in the office of the State Engineer.

⁴⁰⁶ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997, official records in the office of the State Engineer.

⁴⁰⁷ Official records in the office of the State Engineer.

identified as the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, T.18N., R.28E., M.D.B.&M. The applicant and protestant both agree the water right contract date is December 30, 1946.⁴⁰⁸ The State Engineer finds the contract date is December 30, 1946.

II.

PERFECTION

Parcel 1 - The contract date is December 30, 1946. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁰⁹ 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 natural vegetation. In 1986 and 1987 the land use was described as a natural vegetation and farm structure. At the 1991 administrative hearing, the applicant described the 1948 and 1989 land use on this parcel as brush land.⁴¹⁰ The State Engineer finds only using the applicants' and the protestant's land use descriptions that a water right may have not ever have been perfected on this parcel between 1946 and the filing of the application in 1988. However, by reviewing the protestant's post-1984 aerial photographs⁴¹¹, the State Engineer finds, based on the outline of old fields, that it is his belief someone tried to farm this area once, but it appears very alkaline; therefore, it was probably abandoned soon after trying to be farmed. The State Engineer finds the protestant did not prove its claim of lack of perfection.

⁴⁰⁸ Applicant's Petition for Certification as Intrafarm Transfer for Application 51957 filed on September 28, 2000, official records in the office of the State Engineer. Table 1, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴⁰⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴¹⁰ Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

⁴¹¹ Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

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 or abandonment.

Parcel 1 - The evidence as to the land use descriptions is adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat it in this section. As to Parcel 1, the State Engineer finds no water was placed to beneficial use on Parcel for the 40 year period from 1948 through 1988. The State Engineer finds that the PLPT presented evidence in its post-1984 photographs, which shows that the at least some of the proposed places of use appear to be well established fields by 1985.⁴¹²

The applicants provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicants' family in total since 1971, but that the farm unit had existed long before that time, at least as early as 1946.⁴¹³ The State Engineer further finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

⁴¹² Post-1984 aerial photographs, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴¹³ Applicants' Petition for Certification as Intrafarm Transfer for Application 51957 filed on September 28, 2000, official records in the office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴¹⁴

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

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

RULING

The protest to Application 51957 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed.

⁴¹⁴ NRS chapter 533 and Order of Remand from Federal District Court.

APPLICATION 52542

GENERAL

I.

Application 52542 was filed on September 23, 1988, by William E. & Laura M. Shepard⁴¹⁵ to change the place of use of 58.83 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 282, Claim No. 3, Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 4.60 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, T.18N., R.29E., M.D.B.&M.

Parcel 2 - 12.21 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, T.18N., R.29E., M.D.B.&M.

The proposed places of use are described as being 9.34 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 0.41 of an acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, and 7.06 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, all within Section 29, T.18N., R.29E., M.D.B.&M.

II.

Application 52542 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴¹⁶ and more specifically on the grounds as follows:⁴¹⁷

Parcel 1 - Partial lack of perfection, abandonment

Parcel 2 - Partial lack of perfection, partial abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 52542

Parcels 1 and 2 - Exhibit XXX from the 1991 administrative hearing contains an "Agreement" dated April 29, 1907, in the name of Howard B. Pratt and Sadie Pratt, Charles A. Brown, Howard

⁴¹⁵ File No. 52542, official records in the office of the State Engineer.

⁴¹⁶ File No. 52542, official records in the office of the State Engineer.

⁴¹⁷ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997, official records in the office of the State Engineer.

Davidson, William R. Lee and Sylvia Ann Lee⁴¹⁸, which covers the S $\frac{1}{2}$ NE $\frac{1}{4}$ and the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 19, T.18N., R.29E., M.D.B.& M., the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, T.18N., R.29E., M.D.B.&M., and provides the water rights are based on pre-Project vested water rights. Exhibit XXX also contains another "Certificate of Filing Water Right Application" dated December 31, 1907, in the name of William E. Frazier, which covers the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19 (18 acres vested water rights, 22 acres new water rights), the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19 (3 acres vested water rights, 37 acres new water rights), the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20 (6 acres vested water rights, 34 acres new water rights), the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20 (15 acres vested water rights, 25 acres new water rights), and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20 (18 acres vested water rights, 22 acres new water rights), all within T.18N., R.29E., M.D.B.&M. Exhibit XXX also contains a "Certificate of Filing Water Right Application" dated December 24, 1909, in the name of William E. Frazier, which covers the N $\frac{1}{2}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19, and the S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, all within T.18N., R.29E., M.D.B.&M., which indicates on those lands there were 150 acres of vested water rights within the 290 irrigable acres described.

The applicants provided evidence of an "Agreement" dated May 8, 1903, in the name of W.R. Lee and D.A. Lee which provides for the exchange of pre-Project vested water rights for 250 acres of Project water rights in parts of Sections 19 and 20, T.18N., R.29E., M.D.B.&M. Nothing in this record provides any further detail as to the location of those water rights.

The State Engineer specifically adopts and incorporates General Finding of Fact VI and finds the three documents found in Exhibit XXX are the contract documents that will be used to

⁴¹⁸ Official records in the office of the State Engineer.

determine a contract date and finds those three documents are close enough in time that they can be related back to each other. The State Engineer finds the contract date is April 29, 1907.

II.

PERFECTION

Parcel 1 - The contract date is April 29, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹⁹ which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975 and 1977 the land use on this parcel was described as a drain ditch, delivery ditch (L1-8-1 lateral), road and portion irrigated. In 1980, 1984, 1985, 1986, 1987 and 1988 the land use was described as a drain ditch, delivery ditch (L1-8-1 lateral) and road. The PLPT provided evidence that from 1948 through 1977 a 0.37 of an acre portion of the 4.60 acres proposed for transfer was irrigated.⁴²⁰

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, and proved perfection on a portion of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested 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.

⁴¹⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴²⁰ Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

Parcel 2 - The contract date is April 29, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴²¹ which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 the land use on this parcel was described as a drain ditch, road and portion irrigated. In 1985, 1986 and 1987 the land use was described as a drain ditch, road, portion irrigated, farm yard and farm structures. In 1988 the land use was described as a drain ditch, farm yard and farm structures. The PLPT provided evidence that from 1980 through 1984 8.46 acres of the 12.21 acres proposed for transfer were irrigated.⁴²²

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, and proved perfection on a portion of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested 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.

III.

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

⁴²¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴²² Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

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 or abandonment.

Parcel 1 and 2 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat them in this section. As to Parcel 1, the State Engineer finds no water was placed to beneficial use on the entire Parcel 1 for the 8 year period from 1980 through 1988. As to Parcel 2, the State Engineer finds that most of the parcel was irrigated through 1984, some unquantified amount of Parcel 2 was irrigated from 1985 through 1988, it is only the year of the filing of the application that the protestant's evidence shows the entire parcel was not irrigated. The State Engineer finds there is not clear and convincing evidence as to non-use on any specific portion of the parcel for the statutory forfeiture period.

The applicants provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicants' family in total since 1988.⁴²³ The State Engineer further finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴²⁴

⁴²³ Applicants' Petition for Certification as Intrafarm Transfer for Application 52542 filed on September 29, 2000, official records in the office of the State Engineer.

⁴²⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

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

III.

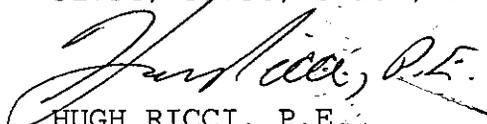
ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that the protestant did not prove non-use for the statutory period on any specifically identifiable portion of Parcel 2; therefore, did not prove non-use by clear and convincing evidence for the statutory forfeiture period.

RULING

The protest to Application 52542 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed.

Respectfully submitted as to
Applications 51045, 51051, 51052,
51058, 51060, 51228, 51234, 51376,
51600, 51604, 51606, 51608, 51733,
51734, 51736, 51957, and 52542,


HUGH RICCI, P.E.
State Engineer

HR/SJT/hf

Dated this 9th day of
August, 2001.