

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

IN THE MATTER OF APPLICATIONS)
47840, 48423, 48467, 48468,)
48647, 48666, 48667, 48668,)
48672 - (GROUP 3) TRANSFER)
APPLICATIONS WITHIN THE TRUCKEE-))
CARSON IRRIGATION DISTRICT)

SUPPLEMENTAL RULING ON
REMAND

#4750

GENERAL

I.

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, and 48672, among others. These applications are part of what is known as the "Original 25" TCID transfer applications. An appeal of the 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 Judge Howard McKibben of the United States District Court filed an order in the matter of those appeals remanding certain issues identified below to the State Engineer to take additional evidence and to make additional findings and determinations.

The matters remanded were:

Application 47840

Parcels 1, 13

As to forfeiture - remanded for consideration of when the first step was taken to initiate the appropriations.

As to abandonment - remanded for applicant's evidence of no intent to abandon.

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Parcels 2, 3,
4, 6, 7, 8,
9, 10, 14,
15, 16, 17,
18, 19, 20

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Parcels 11, 12

As to perfection - remanded for consideration of the issue of perfection based on the applicant or the TCID providing a water right contract covering these parcels.

Application 48423

Parcel 1

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48467

Parcels 1, 2

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48468

Parcels 1, 2,
3, 6

As to forfeiture - remanded for consideration of when the first step was taken to initiate the appropriations.

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Parcels 4, 5,

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48647

Parcel 1

As to forfeiture - remanded for consideration of when the first step was taken to initiate the appropriation.

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Parcel 2

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48666

Parcels 1, 2,
3, 4

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48667

Parcel 1 As to forfeiture - remanded for consideration of when the first step was taken to initiate the appropriation.

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Parcel 7 As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48668

Parcel 1 As to forfeiture - remanded for consideration of when the first step was taken to initiate the appropriation.

As to abandonment - remanded for applicant's evidence of no intent to abandon.

Application 48672

Parcel 2 As to abandonment - remanded for applicant's evidence of no intent to abandon.

The Federal District Court agrees with the State Engineer that the Ninth Circuit Court of Appeals is mistaken as to the date water rights were initiated on the Newlands Reclamation Project ("Project"), and respectfully invited the Ninth Circuit to reconsider its decision on this point. However, in light of the Federal District Court's obligation to follow what it believes to be the law of the case, the District Court held that the State Engineer erred in his decision that all water rights in the Project were initiated in accordance with the law in effect prior to March 22, 1913. Where the transfer is not an intrafarm transfer, or is not based on a pre-Project vested water right, or is not based on a contract dated before March 22, 1913, and there is clear and convincing evidence of non-use of the water for the statutory period, the Federal District Court Judge ordered the State Engineer to make a determination as to when the first step was taken to initiate the appropriation of the water right for that particular

parcel, and if alleged, determine whether the water right is forfeited. The Judge further ruled that if on remand 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 right would not be subject to the doctrines of forfeiture or abandonment.

II.

After all parties of interest were duly noticed by certified mail, the administrative hearings were re-opened on November 5, 1998, at Carson City, Nevada, before representatives of the office of the State Engineer.¹

Prior to the hearings re-opening, the applicants were to serve on legal counsel for the protestant Pyramid Lake Paiute Tribe, and on legal counsel for the United States, by October 14, 1998, any documentary evidence and summaries of statements to be presented by any witnesses in support of the issues remanded, or any documentary evidence and summaries of evidence which support a claim of an intrafarm unit transfer.

III.

Since the Federal District Court's Order of September 3, 1998, remanding the above-referenced matters to the State Engineer, the Nevada Legislature convened and passed legislation identified as Assembly Bill 380 ("AB 380"). AB 380 created the Newlands Project Water Rights Fund which was established to allow for the acquisition of surface water rights appurtenant to not more than 6,500 acres of land in the Newlands Reclamation Project at fair market value. Once each water right purchase is completed, the water right will be retired by voluntary abandonment of the right by the owner.

¹ Exhibit No. 841 and Transcript, public administrative hearing before the State Engineer, November 5, 1998. (Hereinafter "Exhibit No." or "Transcript". Transcript refers to the cumulative transcripts relative to these transfer applications.)

AB 380 is intended to provide, among other things, a stimulus for the resolution of the many administrative and judicial proceedings through the acquisition and retirement of a specific quantity of water rights within the Newlands Reclamation Project, and to provide a funding mechanism for those acquisitions. The owner of any particular water right has the option of proceeding with the administrative and judicial proceedings involving the owner's water rights or pursuing the buyout program. For each water right for which the owner of a challenged water right obtains an irrevocable commitment of sale and retirement through the Fund, the protestant Pyramid Lake Paiute Tribe has committed to immediately withdraw and/or dismiss its challenge to an equal amount of water right of that owner. Joint Testimony presented to the Senate Committee on Natural Resources by the TCID, the Tribe, the City of Fallon, Churchill County and Sierra Pacific Power Company provides the following example: If owner X has water rights appurtenant to 2.5 acres of land under challenge and owner X delivers other water rights appurtenant to 2.5 acres of land owned by owner X or owner Y for acquisition by the Fund, the Tribe would immediately withdraw its protest to owner X's change application. Therefore, the individual water right as represented by a permit issued by the State Engineer will be free of challenge and eligible for the delivery of water.

The State Engineer decided that while AB 380 was proceeding through the legislature he would not issue any decisions pursuant to the remand order, but would rather allow the legislative process to work in order to see if anything could be fashioned which would assist with the resolution of the many applications before him and related challenges before the Federal District Court. After AB 380 was enacted, the State Engineer decided that before he would issue any decisions or continue with the hearing process as ordered by the Federal District Court he needed to know whether the applicants wished to have a decision issued on the merits of their applications and related protests on those matters remanded by the

Court, or whether the applicants wanted to take advantage of the provisions of AB 380. Therefore, by letter dated June 11, 1999, the State Engineer requested the applicants to inform him whether they wished to have the State Engineer's decision on the merits of their application and protest or wished to take advantage of the provisions of AB 380.

As, indicated below, in this ruling one applicant (47840) informed the State Engineer of his desire to participate in the program established by AB 380, therefore, the State Engineer will not issue a decision on that application. Another applicant (48667) indicated they could not decide which way to go and requested the State Engineer abstain from ruling on their application at this point. The State Engineer is granting that request.

IV.

Counsel for certain transfer case applicants filed a request with the State Engineer to take administrative notice of the Order issued by the Honorable Lloyd D. George in the case of U.S.A. and Pyramid Lake Paiute Tribe v. Orr Water Ditch Co., in Equity A-3-LDG, dated May 14, 1999. Those applicants argue that the Order specifically addresses the issue of the priority date for water rights within the Newlands Reclamation Project and identifies that as being July 2, 1902, pursuant to both the Alpine and Orr Ditch decrees, and why statutory forfeiture under Nevada water law does not apply to water users within the Newlands Reclamation Project. Furthermore, and even more significant to those applicants is that Judge George rejected the arguments of the protestant Pyramid Lake Paiute Tribe that the mere non-use of water for extended periods of time on water-righted land even when coupled with the presence of permanent structures does not in and of itself establish an intent to abandon the water right.

While the State Engineer agrees with the applicants as to the issue of the priority of water rights in the Newlands Reclamation Project and its relation to whether statutory forfeiture is

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applicable, and notes that the Federal District Court in this case has requested the Ninth Circuit Court of Appeals revisit its previous decision on that issue, the State Engineer declines to take administrative notice of that Order in these cases. The Federal District Court and the Ninth Circuit Court of Appeals have established the law of the case in these transfer cases and the State Engineer is bound to follow the decisions of those courts in these cases.

APPLICATION 47840

FINDINGS OF FACT

I.

Application 47840 was filed on March 15, 1984, by Roger Mills to change the place of use of 160.65 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 692-A, 694-A, 738-A, 695-A, 732-A, 729-A, 94, 704-A, 714-5², 700-A-1, 700-B-1, 188-15-A, 188-A-1, 188-A-1-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 2.30 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 8, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 2.09 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.26, T.19N., R.29E., M.D.B.&M.
- Parcel 3 - 1.09 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.26, T.19N., R.29E., M.D.B.&M.
- Parcel 4 - 0.93 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.35, T.19N., R.29E., M.D.B.&M.
- Parcel 5 - 0.63 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.35, T.19N., R.29E., M.D.B.&M.
- Parcel 6 - 0.95 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.35, T.19N., R.29E., M.D.B.&M.
- Parcel 7 - 5.00 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.35, T.19N., R.29E., M.D.B.&M.
- Parcel 8 - 3.20 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.36, T.19N., R.29E., M.D.B.&M.
- Parcel 9 - 0.76 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.36, T.19N., R.29E., M.D.B.&M.
- Parcel 10 - 1.15 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.27, T.19N., R.29E., M.D.B.&M.
- Parcel 11 - 1.87 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.34, T.19N., R.29E., M.D.B.&M.
- Parcel 12 - 1.34 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.34, T.19N., R.29E., M.D.B.&M.
- Parcel 13 - 2.15 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.34, T.19N., R.29E., M.D.B.&M.
- Parcel 14 - 0.90 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.28, T.19N., R.29E., M.D.B.&M.
- Parcel 15 - 0.52 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.28, T.19N., R.29E., M.D.B.&M.
- Parcel 16 - 0.37 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.33, T.19N., R.29E., M.D.B.&M.
- Parcel 17 - 2.48 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec.33, T.19N., R.29E., M.D.B.&M.
- Parcel 18 - 2.08 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec.34, T.19N., R.29E., M.D.B.&M.

² The State Engineer notes that the Book Record entered as Exhibit No. 2, indicates serial number 715-5, which is a typographical error, as the original application and the application map identify serial number 714-5. Exhibit No. 2. ("RORR" stands for Record on Review on Remand filed with the Federal District Court on or around March 18, 1998.)

³ Exhibit No. 2, public administrative hearing before the State Engineer, October 15-18, 1996.

Parcel 19 - 0.45 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.27, T.19N., R.29E., M.D.B.&M.

Parcel 20 - 0.84 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec.29, T.19N., R.29E., M.D.B.&M.

Parcel 21 - 4.60 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.31, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as 15.20 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 2.20 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 11.80 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, and 6.50 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 8, T.18N., R.28E., M.D.B. & M.

II.

Application 47840 was protested by the PLPT on the grounds listed as follows:⁴

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Forfeiture, abandonment
- Parcel 3 - Forfeiture, abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Forfeiture, abandonment
- Parcel 8 - Forfeiture, abandonment
- Parcel 9 - Forfeiture, abandonment
- Parcel 10 - Lack of perfection, forfeiture, abandonment
- Parcel 11 - Lack of perfection, forfeiture, abandonment
- Parcel 12 - Lack of perfection, forfeiture, abandonment
- Parcel 13 - Lack of perfection, forfeiture, abandonment
- Parcel 14 - Lack of perfection, forfeiture, abandonment
- Parcel 15 - Lack of perfection, forfeiture, abandonment
- Parcel 16 - Abandonment
- Parcel 17 - Abandonment
- Parcel 18 - Abandonment
- Parcel 19 - Lack of perfection, forfeiture, abandonment
- Parcel 20 - Abandonment
- Parcel 21 - Abandonment.

III.

By letter dated July 12, 1999, the State Engineer was informed that the applicant wishes to participate in the AB 380 buyout program and requested the State Engineer not rule on his

⁴ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

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application. The State Engineer finds since the applicant has indicated his desire to participate in the AB 380 buyout program he will not rule on the merits of the issues remanded on the grounds that participation in the buyout program will result in the protestant Pyramid Lake Paiute Tribe withdrawing its protest and dismissing its legal challenge to the application.

APPLICATION 48423

FINDINGS OF FACT

I.

Application 48423 was filed on September 20, 1984, by E. & B. Hoeksema⁵ to change the place of use of 5.445 acre-feet annually, a portion of the waters of the Truckee River previously appropriated under Serial Numbers 1031-1-B-2H, 1045 and 1015-A⁶, Claim No. 3 Orr Ditch Decree. The proposed point of diversion is described as being located at Derby Dam. The existing places of use are described as:

Parcel 1 - 0.170 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 14, T.20N., R.24E., M.D.B.&M.

Parcel 2 - 0.368 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 24, T.20N., R.24E., M.D.B.&M.

Parcel 3 - 0.672 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T.20N., R.24E., M.D.B.&M.

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

II.

Application 48423 was protested by the PLPT on the grounds listed as follows:⁷

Parcel 1 - Abandonment

Parcel 2 - Forfeiture, abandonment

Parcel 3 - Lack of perfection, forfeiture, abandonment.

III.

FEDERAL DISTRICT COURT ORDER

As to Parcel 3, the Federal District Court affirmed the State Engineer's decision that the protestant had not proved its claim of lack of perfection. As to Parcels 2 and 3, the Court held that the protestant had not proven its claims of forfeiture or abandonment since it had not proven five consecutive years of non-use on either parcel.

⁵ The current owners of record are Jack and Nancy Cook.

⁶ Exhibit No. 166, public administrative hearing before the State Engineer, January 23-24, 1997.

⁷ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

The Federal District Court in its Order of September 3, 1998, remanded Parcel 1 to the State Engineer for further evidence of the applicant's lack of intent to abandon the water right on this parcel. On or around October 14, 1998, the applicant withdrew its application as to Parcel 1, therefore, there are no issues remaining as to this parcel for decision on remand.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

ABANDONMENT

Parcel 1 - The State Engineer concludes the applicant withdrew its request to transfer water rights from Parcel 1, therefore, there is no protest claim of abandonment remaining for decision by the State Engineer under the order of remand.

RULING

The Federal District Court affirmed the State Engineer's decision in Ruling on Remand No. 4591 granting the transfer of water rights appurtenant to Parcels 2 and 3. The applicant withdrew its request to transfer water from Parcel 1, therefore, no water right will be transferred under this application from Parcel 1. Therefore, the permit granted under Application 48423 is amended to allow the transfer of water rights appurtenant to 1.04 acres of land totalling 4.68 acre-feet to be perfected at the proposed place of use.

⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48467

FINDINGS OF FACT

I.

This water right application was remanded by the Federal District Court for further decision by the State Engineer, however, on January 19, 1998, the applicant requested that the permit previously granted be withdrawn.

CONCLUSIONS

The State Engineer concludes there are no matters remaining to rule upon as this water right permit has been withdrawn.

RULING

Since Permit 48467 has been withdrawn there is nothing remaining on which the State Engineer must rule.

APPLICATION 48468

FINDINGS OF FACT

I.

Application 48468 was filed on October 5, 1984, by Larry Fritz to change the place of use of 42.20 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 617-27-B-3, 131 and 131-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 0.20 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.
- Parcel 2 - 1.90 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E., M.D.B.&M.
- Parcel 3 - 4.50 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E., M.D.B.&M.
- Parcel 4 - 0.80 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E., M.D.B.&M.
- Parcel 5 - 2.10 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 7, T.18N., R.29E., M.D.B.&M.
- Parcel 6 - 2.50 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, T.18N., R.29E., M.D.B.&M.

The proposed places of use are described as 3.50 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, 4.70 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 2.70 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, and 1.10 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T.18N., R.29E., M.D.B.& M.

II.

Application 48468 was protested by the PLPT on the grounds listed as follows:¹⁰

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

⁹ Exhibit No. 30, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁰ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

III.

FORFEITURE

Parcel 1 - In Ruling on Remand No. 4591, the State Engineer found the contract date was May 4, 1945. The May 4, 1945, contract states that in Section 36 three acres already had an existing water right and the applicant was requesting 20 acres of new water right which covered the total 23 acres of irrigable land in the SE¼ NW¼ of said Section 36. Nothing in the record clarifies which land was covered by the three acres of existing water right and which land got the 20 acres of new water right.

On remand from the Federal District Court, the applicant was provided another opportunity to show that the first step taken to initiate a water right on this parcel was prior to March 22, 1913. The applicant did not provide any additional evidence at the re-opened hearing. Therefore, the State Engineer re-affirms his finding that the contract date or the date the water right was initiated on this parcel is May 4, 1945, and the water right on Parcel 1 is subject to the forfeiture provision of NRS § 533.060. In Ruling on Remand No. 4591, the State Engineer found that from 1977 through 1984, a period of 7 years, no water was placed to beneficial use on Parcel 1, and there was no challenge to that factual finding on appeal.

Parcels 2, 3 and 6 - In Ruling on Remand No. 4591, the State Engineer found the contract dates were February 13, 1953. On remand from the Federal District Court, the applicant was provided another opportunity to show that the first steps taken to initiate water rights on these parcels were prior to March 22, 1913. The applicant did not provide any additional evidence at the re-opened hearing. Therefore, the State Engineer re-affirms his finding that the contract dates or the dates the water rights were initiated on Parcels 2, 3 and 6 are February 13, 1953. As discussed below, the transfers from these parcels are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 4 - In Ruling on Remand No. 4591, the State Engineer found the contract date was February 5, 1953. The contract indicates that within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T.18N., R.29E., M.D.B.& M. there are 34 acres of irrigable land that were under cultivation and that water would be delivered without charges for the construction of the Project, indicating that the water rights were pre-Project vested water rights not subject to the forfeiture provision of NRS § 533.060.

Parcel 5 - In Ruling on Remand No. 4591, the State Engineer found the contract date was February 5, 1953. The contract indicates that within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, T.18N., R.29E., M.D.B.& M. there are 36 acres of irrigable land that were under cultivation and that water would be delivered without charges for the construction of the Project, indicating that the water rights were pre-Project vested water rights not subject to the forfeiture provision of NRS § 533.060.

IV.

INTRAFARM TRANSFERS

Parcels 2, 3, 4, 5 and 6 - The existing places of use for these parcels are within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the SW $\frac{1}{4}$ of Section 7, T.18N., R.29E., M.D.B.& M. The proposed places of use are all described as being located within the SW $\frac{1}{4}$ of Section 7, T.18N., R.29E., M.D.B.& M. Mr. Fritz testified that after he found out he was irrigating non-water righted areas he was instructed to either file the change application or stop irrigating those lands, and he then applied to transfer water from other places within the farm.¹¹

The contract dated February 5, 1953, describes the total irrigable area of the farm described under that contract to include nearly all the acreages in each of the $\frac{1}{4}$ $\frac{1}{4}$ sections of land

¹¹ Transcript, pp. 4500-4509, public administrative hearing before the State Engineer, November 5, 1998.

described as Parcels 2 through 6, inclusive.¹² The State Engineer finds that the transfers from Parcels 2, 3, 4, 5 and 6 were made to move water to areas being irrigated at the time of the application from other areas within the same farm and, therefore, are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

V.

ABANDONMENT

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

Parcel 1 - The State Engineer has determined the water right on this parcel is subject to forfeiture and is below declared forfeited, therefore, the protestant's claim of abandonment is moot.

Parcels 2, 3, 4, 5 and 6 - The State Engineer finds that the transfers from Parcels 2, 3, 4, 5 and 6 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹³

II.

FORFEITURE

Parcel 1 - The State Engineer concludes that the first step taken to initiate a water right on Parcel 1 was on May 4, 1945, no water

¹² Exhibit No. 44, public administrative hearing before the State Engineer, October 15-18, 1996.

¹³ NRS Chapter 533 and Order of Remand from Federal District Court.

was placed to beneficial use on Parcel 1 from 1977 through 1984, a period of 7 years, the water right on Parcel 1 is subject to the forfeiture provision of NRS § 533.060, and the water right on Parcel 1 is subject to forfeiture.

Parcels 2, 3 and 6 - The contract dates are February 13, 1953. The State Engineer concludes that the transfers from Parcels 2, 3 and 6 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

Parcels 4 and 5 - The State Engineer concludes the water rights appurtenant to these existing places of use are pre-Project vested water rights not subject to the forfeiture provision of NRS § 533.060, and further are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

III.

ABANDONMENT

The State Engineer concludes the water right on Parcel 1 is subject to forfeiture, therefore, the protestant's claim of abandonment is moot. The State Engineer concludes that Parcels 2 through 6, inclusive, are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The water right appurtenant to Parcel 1 is declared forfeited and is not available for transfer. The State Engineer re-affirms his decision in Ruling on Remand No. 4591 granting the transfer of water rights from Parcels 2, 3, 4, 5 and 6. Therefore, the permit granted under Application 48468 is amended to allow the transfer of water rights appurtenant to 11.80 acres of land totalling 41.30 acre-feet to be perfected at the proposed place of use.

APPLICATION 48647

FINDINGS OF FACT

I.

Application 48647 was filed on December 20, 1984, by Wayne Whitehead to change the place of use of 1.44 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 538 and 715-1-A-AA, Claim No. 3 Orr Ditch Decree, and Alpine Decree.¹⁴ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

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

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

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

II.

Application 48647 was protested by the PLPT on the grounds listed as follows:¹⁵

Parcel 1 - Forfeiture, abandonment

Parcel 2 - Forfeiture, abandonment.

III.

FORFEITURE

Parcel 1 - In Ruling on Remand No. 4591, the State Engineer found that the 1946 contract covers five acres of land out of the ten acres described as the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 31, T.19N., R.29E., M.D.B.& M. The agreement dated December 30, 1907,¹⁶ provided by the Bureau of Reclamation covers four acres of land out of the 40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 31, however, the State Engineer

¹⁴ Exhibit No. 70, public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁵ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

¹⁶ Exhibit No. 80, public administrative hearing before the State Engineer, November 13, 1996.

found he was unable to determine if the 1907 contract covers the existing place of use.

The State Engineer also found that the 1912-1914 maps introduced by the applicant were not of sufficient clarity, particularly since the reproductions are in black and white as opposed to the original colored maps, to be able to discern if the existing place of use was water righted land or not. In fact, the State Engineer found in Ruling on Remand No. 4591 that the map appeared to indicate that perhaps the land was excluded from the water righted area, rather than included, since the area encompassing the existing place of use is enclosed by a line with an acreage number that on other maps for other parcels appears to be a number of acres excluded from the irrigable area. Therefore, the State Engineer found, based on General Finding of Fact VIII, that the contract date is April 1, 1946. On remand from the Federal District Court, the applicant was provided another opportunity to show that the first step taken to initiate a water right on this parcel was prior to March 22, 1913.

At the re-opened evidentiary hearing, the applicant introduced an Assessment Roll of the Property of Churchill County, Nevada, which indicated that in 1907 the $\frac{1}{4}$ $\frac{1}{4}$ section of land which includes the Parcel 1 existing place of use was described as a 40-acre farm.¹⁷ The applicant also introduced a deed dated 1909 and a contract dated 1907 one of which indicated there were pre-Project vested rights on at least 4 acres in this $\frac{1}{4}$ $\frac{1}{4}$ section.¹⁸ The applicant is alleging that since water rights were developed on a portion of this 40-acre farm pre-1913 that water rights developed under the 1946 contract on another portion of that 40-acre farm

¹⁷ Exhibit No. 842, public administrative hearing before the State Engineer, November 5, 1998.

¹⁸ Exhibit Nos. 843 and 844, public administrative hearing before the State Engineer, November 5, 1998.

should be considered as being initiated in accordance with the law in effect prior to March 22, 1913.

The evidence presented does demonstrate that water rights were being developed on this $\frac{1}{4}$ $\frac{1}{4}$ section of land prior to March 22, 1913. While the State Engineer has already stated his belief that all water rights in the Project were initiated in accordance with the law in effect prior to March 22, 1913, and any water right developed in the Project should relate back to the 1902 priority date for the Project, the law of the case has not upheld that position. Therefore, even though there is evidence that a 4.00 acre portion of the $\frac{1}{4}$ $\frac{1}{4}$ section in which Parcel 1 is located was developed in 1907, there is insufficient evidence to tie that development to the 1946 contract date.

The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the date a first step was taken to initiate a water right on Parcel 1 is April 1, 1946, and the water right is subject to the forfeiture provision of NRS § 533.060. In Ruling on Remand No. 4591, the State Engineer found that the evidence was undisputed that from 1962 through 1984 the existing place of use was within a residential area and this determination was not challenged on appeal.

Parcel 2 - In Ruling on Remand No. 4591, the State Engineer found the contract date was December 6, 1907. The State Engineer finds the date a first step was taken to initiate a water right on this parcel was prior to March 22, 1913, and the water right is not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

Under Nevada common law, abandonment of a water right "is the relinquishment of the right by the owner with the intention to forsake and desert it."¹⁹ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

¹⁹ In re Manse Spring, 60 Nev. 280, 287 (1940).

surrounding circumstances."²⁰ Intent to abandon a water right may be inferred from the acts of the water right holder. Likewise, a lack of intent to abandon may also be inferred from acts of the water right holder. The Nevada Supreme Court has clearly stated that the owner's non-use of a water right is only a piece of the evidence of an intent to abandon the right.²¹ The Federal District Court held in its Order of September 3, 1998, that the payment of assessments is a circumstance to be taken into consideration in determining whether there is an intent to abandon a water right.

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

Parcel 1 - The State Engineer has determined the water right on this parcel is subject to forfeiture and is below declared forfeited, therefore, the protestant's claim of abandonment is moot.

Parcel 2 - The State Engineer found the evidence was undisputed that from 1962 through 1984 the existing place of use was within a residential area. Therefore, the State Engineer finds the land use is inconsistent with irrigation. Mr. Whitehead testified at the re-opened hearing that Parcel 2 belonged to his mother-in-law who is deceased.²² He further testified that in the 1970's he discussed with his mother-in-law transferring the water right from her parcel in or near Fallon to the farm, and went to the TCID offices with her to inquire about transferring the water to the

²⁰ Revert v. Ray, 95 Nev. 782, 786 (1979).

²¹ Franktown Creek Irrigation Co. v. Marlette Lake Co., 77 Nev. 348, 354 (1961).

²² Transcript, pp. 4462-4463, public administrative hearing before the State Engineer, November 5, 1998.

farm.²³ They were told that she would first have to give the water to the TCID, however, she refused since she wanted the water transferred directly to the farm and her daughter's family.²⁴

From 1973 through 1984, the U.S. Bureau of Reclamation prohibited transfers of water rights within the Project.²⁵ In the 1980's, when it was learned that water rights could again be transferred this change application was filed with the State Engineer and the water was deeded to the son-in-law (the applicant) in September 1984.²⁶ Evidence was presented that the operation & maintenance assessments on the existing place of use had been paid to date.²⁷ The State Engineer finds the owner of the existing place of use demonstrated a lack of intent to abandon the water right appurtenant to Parcel 2 since she attempted to exercise dominion over those water rights in the 1970's to transfer it to Mr. Whitehead at the farm and the assessments were paid. The prohibition on transfers from 1973 through 1984 prevented actual movement of the water until the time transfers were again permitted.

The State Engineer finds there is insufficient evidence in this record to demonstrate an intent to abandon the water right on Parcel 2. Besides the payment of assessments due, the holder of the water right at the existing place of use and the holder of the proposed place of use both tried to exercise dominion over the water right by requesting it be transferred in the 1970's, then

²³ Transcript, pp. 4463-4467, public administrative hearing before the State Engineer, November 5, 1998.

²⁴ Transcript, pp. 4463-4464, public administrative hearing before the State Engineer, November 5, 1998.

²⁵ Transcript, p. 4439, public administrative hearing before the State Engineer, November 5, 1998.

²⁶ Transcript, pp. 4464-4469, public administrative hearing before the State Engineer, November 5, 1998.

²⁷ Exhibit No. 49, public administrative hearing before the State Engineer, October 17, 1996.

only to be met in 1973 with a refusal of the Bureau to allow transfers to be processed.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁸

II.

FORFEITURE

Parcel 1 - The State Engineer concludes that the first step taken to initiate a water right on Parcel 1 was on April 1, 1946, no water was put to beneficial use on Parcel 1 from 1962 through 1984, the water right on Parcel 1 is subject to the forfeiture provision of NRS § 533.060, and the water right on Parcel 1 is subject to forfeiture.

Parcel 2 - The State Engineer concludes the contract alone shows that the water right was initiated in accordance with the law in effect prior to March 22, 1913, and thus, is not subject to the forfeiture provision of NRS § 533.060.

III.

ABANDONMENT

Parcel 1 - The water right on Parcel 1 is forfeited, therefore, the State Engineer concludes the protestant's claim of abandonment is moot.

Parcel 2 - The State Engineer concludes that the applicant and his mother-in-law attempted to exercise dominion over these water rights just prior to or about the time the Bureau of Reclamation suspended any transfer of water rights and the assessments were paid demonstrating a clear lack of intent to abandon the water right appurtenant to Parcel 2.

²⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

RULING

The water right appurtenant to Parcel 1 is declared forfeited. The water right on Parcel 2 is not subject to the forfeiture provision of NRS § 533.060 as it was initiated in accordance with the law in effect prior to March 22, 1913. The protestant's claim of abandonment of the water right on Parcel 2 is denied and the State Engineer's decision in Ruling on Remand No. 4591 allowing the transfer of the water right appurtenant to Parcel 2 is re-affirmed. Therefore, the permit granted under Application 48647 is amended to allow the transfer of water rights appurtenant to 0.21 acres of land totalling 0.735 acre-feet to be perfected at the proposed place of use.

APPLICATION 48666

FINDINGS OF FACT

I.

Application 48666 was filed on December 31, 1984, by Darrell Craig²⁹ to change the place of use of 5.76 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 541-28-E-3-B-1 and 538, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³⁰ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 0.15 acres SE¼ SE¼, Sec. 25, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 0.30 acres NE¼ NW¼, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 3 - 0.52 acres SE¼ NE¼, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 4 - 0.31 acres SW¼ NE¼, Sec. 36, T.19N., R.28E., M.D.B.&M.

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

II.

Application 48666 was protested by the PLPT on the grounds listed as follows:³¹

Parcel 1 - Abandonment

Parcel 2 - Abandonment

Parcel 3 - Abandonment

Parcel 4 - Abandonment.

III.

ABANDONMENT

The Federal District Court held in its Order of September 3, 1998, that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with

²⁹ It is the State Engineer's understanding that Mr. Craig has conveyed this application/permit to another party, however, no assignment has ever been filed in the office of the State Engineer.

³⁰ Exhibit No. 124, public administrative hearing before the State Engineer, November 12-15, 1996.

³¹ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

irrigation, and the applicant has not made a sufficient showing of a lack of intent to abandon the water right, the water right will be deemed abandoned, unless it is an intrafarm transfer. The State Engineer finds the applicant did not appear at the time and place noticed for the re-opened hearing, therefore, no additional evidence was provided to supplement the record.

Parcel 1 - The State Engineer in Ruling on Remand No. 4591 found that from 1972 through 1984 the existing place of use was within a residential area and that determination was not challenged on appeal.

Parcel 2 - The State Engineer in Ruling on Remand No. 4591 found that from 1980 through 1984 there was clear and convincing evidence that no water had been placed to beneficial use on Parcel 2 and that determination was not challenged on appeal. In Judge McKibben's Order of September 3, 1998, he found in circumstances very similar to this one that the protestant had proved the statutory period of non-use.

Parcel 3 - The State Engineer in Ruling on Remand No. 4591 found that from 1962 through 1984 the existing place of use was within a residential area and that determination was not challenged on appeal.

Parcel 4 - The State Engineer in Ruling on Remand No. 4591 found that from 1973 through 1984 the existing place of use was within a residential area and that determination was not challenged on appeal.

The State Engineer finds the protestant proved a substantial period of non-use, land uses inconsistent with irrigation, and the applicant did not provide any additional evidence at the re-opened hearing to refute an intent to abandon the water right.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³²

II.

ABANDONMENT

The State Engineer concludes since the land uses are inconsistent with irrigation, no water has been placed to beneficial use on these parcels for the statutory period, and no additional evidence was provided to support any lack of intent to abandon the water rights, the water rights appurtenant to Parcels 1, 2, 3 and 4 are subject to abandonment.

RULING

The water rights appurtenant to Parcels 1, 2, 3 and 4 are declared abandoned. The State Engineer's prior rulings on Application 48666 are hereby reversed and rescinded and Application 48666 is denied.

³² NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48667

FINDINGS OF FACT

I.

Application 48667 was filed on December 31, 1984, by Mark Edson³³ to change the place of use of 46.22 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 553-3, 562-4, 617-9, 617-9-A, 526-1-H-3, 82-A-1 and 538, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³⁴ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

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

The proposed places of use are described as being 0.37 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T.19N., R.28E., 4.80 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, T.19N., R.28E., and 5.10 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T.19N., R.28E., M.D.B.&M. By letter received June 15, 1988, the applicant withdrew 0.55 of an acre from the Parcel 5 request for transfer.³⁵

³³ The current owners of record are Robert and Colleen Thomas.

³⁴ Exhibit No. 134, public administrative hearing before the State Engineer, November 12-15, 1996.

³⁵ Exhibit No. 135, public administrative hearing before the State Engineer, November 12-15, 1996.

II.

Application 48667 was protested by the PLPT on the grounds listed as follows:³⁶

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

III.

By letter dated July 12, 1999, the State Engineer was informed that the applicant wishes the State Engineer to abstain from ruling on his application. The State Engineer finds based on the applicants request he will not rule on the merits of the issues remanded.

³⁶ RORR, Vol. 27, Tab 200. Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

APPLICATION 48668

FINDINGS OF FACT

I.

Application 48668 was filed on December 31, 1984, by Gaylord Blue Equity Trust to change the place of use of 11.70 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 574, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³⁷ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.60 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 30, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 2.60 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.19N., R.28E., M.D.B. & M.

II.

Application 48668 was protested by the PLPT on the grounds listed as follows:³⁸

Parcel 1 - Lack of perfection, forfeiture, abandonment.

III.

PERFECTION

The Federal District Court held that on the issues of fact the reviewing court must limit itself to a determination of whether substantial evidence in the record supports the State Engineer's decision.³⁹ The Court held the burden of proof is on the protestant and not the State Engineer to present its case of non-use, that neither the PLPT nor the United States contested the State Engineer's factual determinations regarding lack of perfection, and the arguments presented on appeal did not affect the State Engineer's factual finding that the protestant failed to

³⁷ Exhibit No. 33, public administrative hearing before the State Engineer, October 15-18, 1996.

³⁸ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

³⁹ Order, pp. 8-9, U.S. v. Alpine Land and Reservoir Co., D-184-HDM, dated September 3, 1998.

prove by clear and convincing evidence lack of perfection on the transferor parcel. Therefore, as to Application 48668 Parcel 1 no issue remains as to the protestant's claim of lack of perfection.

IV.

FORFEITURE

Parcel 1 - In Ruling on Remand No. 4591, the State Engineer found the contract date was November 11, 1916. On remand from the Federal District Court, the applicant was provided another opportunity to show that the first step taken to initiate a water right on this parcel was prior to March 22, 1913. The applicant did not provide any additional evidence at the re-opened hearing instead choosing to rely on the record of evidence already presented, and further requested the State Engineer certify that this is an intrafarm transfer.

The existing place of use is described as 2.60 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.19N., R.28E., M.D.B.& M. The proposed place of use is described as 2.60 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.19N., R.28E., M.D.B.& M. The contract for this parcel describes Lot 8 said Section 30 as being part of Farm Unit "F". The public records in the Nevada Division of State Lands indicate that Lot 8 encompasses 40.27 acres of land described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.19N., R.28E., M.D.B.& M. The State Engineer finds this is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

V.

ABANDONMENT

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

Judge McKibben's Order of September 3, 1998, the water right is not subject to the doctrine of abandonment.

CONCLUSIONS OF LAW

I.

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

II.

FORFEITURE

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

III.

ABANDONMENT

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

RULING

The State Engineer re-affirms his decision in Ruling on Remand No. 4591 granting the water right transfer under Application 48668.

⁴⁰ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48672

FINDINGS OF FACT

I.

Application 48672 was filed on December 31, 1984, by Herbert Lohse to change the place of use of 38.70 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 481, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁴¹ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 5.20 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 13, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 3.40 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 8.60 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T.19N., R.28E., M.D.B. & M.

II.

Application 48672 was protested by the PLPT on the grounds listed as follows:⁴²

Parcel 1 - Partial lack of perfection, abandonment

Parcel 2 - Partial lack of perfection, abandonment.

III.

PERFECTION

The Federal District Court held that on the issues of fact the reviewing court must limit itself to a determination of whether substantial evidence in the record supports the State Engineer's decision.⁴³ The court held the burden of proof is on the protestant and not the State Engineer to present its case of non-use, that neither the PLPT nor the United States contested the State Engineer's factual determinations regarding lack of

⁴¹ Exhibit No. 87, public administrative hearing before the State Engineer, November 12-15, 1996.

⁴² Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996.

⁴³ Order, pp. 8-9, U.S. v. Alpine Land and Reservoir Co., D-184-HDM, dated September 2, 1998.

perfection, and the arguments presented on appeal did not affect the State Engineer's factual finding that the protestant failed to prove by clear and convincing evidence lack of perfection on the parcels comprising the existing places of use. Therefore, as to Application 48672 no issues remain as to the protestant's claims of partial lack of perfection.

IV.

ABANDONMENT

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

Parcel 1 - The Federal District Court affirmed the State Engineer's decision that the protestant had not proved its abandonment claim on this parcel.

Parcel 2 - The existing place of use is 3.40 acres located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T.19N., R.28E., M.D.B. & M. The proposed place of use is described as being 8.60 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T.19N., R.28E., M.D.B. & M. The contract which covers this parcel⁴⁴ describes the land within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, T.19N., R.28E., M.D.B. & M. as being part of Farm Unit "C". The State Engineer finds this is an intrafarm transfer, therefore, pursuant to Judge McKibben's Order of September 3, 1998, the water right is not subject to the doctrine of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁵

⁴⁴ Exhibit No. 90, public administrative hearing before the State Engineer, November 12-15, 1996.

⁴⁵ NRS Chapter 533 and Order of Remand from Federal District Court.

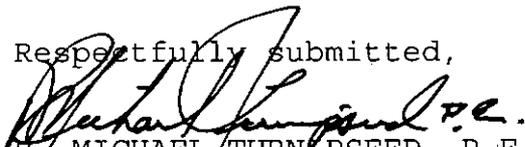
II.

ABANDONMENT

The State Engineer concludes that the Federal District Court affirmed the State Engineer's decision in Ruling on Remand No. 4591 that the protestant did not prove non-use of water on Parcel 1 by clear and convincing evidence. The State Engineer concludes that the water rights appurtenant to Parcel 2 are an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The State Engineer's decision in Ruling on Remand No. 4591 granting the transfer of the water rights requested under Application 48672 is re-affirmed.

Respectfully submitted,

R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 21st day of
July, 1999.

