

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

IN THE MATTER OF APPLICATIONS)  
50005, 51037, 51380, 51601, )  
51645, 51732, 51960 )

RULING ON REMAND

# 4825

GENERAL INTRODUCTION

I.

FILING OF APPLICATIONS AND PROTESTS

Applications 50005, 51037, 51380, 51601, 51645, 51732, 51960<sup>1</sup> were filed to change the place of use of water decreed under the Truckee and Carson River Decrees, the decrees which adjudicated the waters of those rivers.<sup>2</sup> The applications represent requests to change the place of use of portions of the water rights decreed and contracted for use within the Newlands Reclamation Project ("Project").

The applications (also identified herein as the 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:

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<sup>1</sup> The protestant Pyramid Lake Paiute Tribe's original appeal to the Federal District Court included applications in what the State Engineer has identified as Group 1 consisting of 58 applications, Group 2 consisting of 44 applications, and Group 3 consisting of 27 applications (129 applications in total). In U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1219 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that the Pyramid Lake Paiute Tribe was precluded on appeal from challenging the forfeiture or abandonment of water rights for 104 of the subject transfer applications because it failed to protest the transfers before the State Engineer on these grounds. Based on the court's ruling, the 27 applications in Group 3 became the "original 25" transfer applications after excluding Applications 47822 and 47830 which were not protested on those grounds. Group 4 consisting of 24 applications, Group 5 consisting of 52 applications, Group 6 consisting of 62 applications, and Group 7 consisting of 52 applications became known commonly by the courts and the parties as the "subsequent 190" transfer applications.

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

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

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

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

## II.

### UNITED STATES INTERVENTION

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

## III.

### PREVIOUS HEARINGS ON 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 made evidentiary presentations and extensive testimony was received

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<sup>3</sup> DOI Exhibit No. 1, public administrative hearing before the State Engineer, November 26-29, 1984. Previous Record on Review filed with the Federal District Court in November 1985.

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

from experts and witnesses on behalf of the parties.<sup>5</sup> As the hearings progressed, the parties stipulated to incorporating the record of the previous administrative hearings on other transfer applications into the evidentiary record of the administrative hearings on Groups 3 through 5, inclusive.<sup>6</sup> While the transcripts from the February 16 and 22, 1989, administrative 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.<sup>7</sup> On February 12, 1987, the State Engineer issued his ruling with regard to the Group 4 transfer applications overruling the PLPT's protests and approving all the subject applications.<sup>8</sup> On June 2, 1988, the State Engineer issued his

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

<sup>6</sup> Transcript, Vol. I, p. 11, public administrative hearing before the State Engineer, June 24, 1985. Transcript Vol. I, p. 12, public administrative hearing before the State Engineer, February 4, 1985. Previous Record on Review filed with the Federal District Court in November 1985. Transcript, p. 12, public administrative hearing before the State Engineer, January 16, 1986. Transcript, pp. 4-5, public administrative hearing before the State Engineer, January 28, 1988, official records in the office of the State Engineer.

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

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

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

On July 25, 1990, the United States District Court remanded to the State Engineer those transfer applications which were decided by rulings of the State Engineer dated February 12, 1987 (Group 4), June 2, 1988 (Group 5), and April 14, 1989 (Group 6). 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.<sup>11</sup> 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.<sup>12</sup> On January 30, 1992, 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.<sup>13</sup>

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

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

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

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

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

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.<sup>14</sup>

#### IV.

##### ALPINE II

An appeal of the State Engineer's Ruling No. 3241 on the Group 3 transfer applications was taken to the United States District Court and the Ninth Circuit Court of Appeals resulting in what is commonly known as the Alpine II decision.<sup>15</sup> The Alpine II Court held that:

1. Nevada water law applied to the dispute arising from the State Engineer's approval of the transfer applications;
2. the finding of the State Engineer that the transfers did not threaten to prove detrimental to the public interest was supported by substantial evidence;
3. the decrees did not determine whether particular Newlands Project properties are entitled to receive Project water, that right being based on contracts and certificates issued by the Secretary of the Interior or the Truckee-Carson Irrigation District ("TCID");
4. the State Engineer's finding that the Alpine Decree disposed of the fact that the farmers were not using water on

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<sup>14</sup> The State Engineer's notes that an appeal from the remand of some of those applications has now just begun.

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

the exact acreage for which they had contracted was not supported by that decision;

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

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

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

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

V.

**FEDERAL DISTRICT COURT DECISION ON REMAND**

On remand, the U.S. District Court affirmed the State Engineer's approval of the Group 3 transfer applications and held with respect to the issues of perfection, abandonment and forfeiture that the State Engineer was correct. That decision was appealed to the Ninth Circuit Court of Appeals resulting in the "Alpine III" decision.<sup>16</sup>

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

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

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.<sup>17</sup>

#### VII.

#### ORDER OF REMAND TO STATE ENGINEER

On October 4, 1995, the U.S. District Court issued an order remanding the transfer application cases<sup>18</sup> to the Nevada State Engineer for consideration of the issues of perfection, abandonment and forfeiture. The U.S. District Court did not require the State Engineer to re-open the evidentiary hearings, but rather ordered if the State Engineer decided additional evidence was required he

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<sup>17</sup> Alpine III, 983 F.2d at 1496.

<sup>18</sup> Order Remanding Transfer Application Cases to Nevada State Engineer Pursuant to Minutes of the Court of Status Conference Held 4/13/95, U.S. v. Alpine, D-184-HDM, dated October 9, 1995.

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.<sup>19</sup> The State Engineer had determined a status conference was warranted to discuss procedure in the resolution of the matter remanded by the Federal District Court. At the conference, the parties expressed their desire to re-open the evidentiary hearings and further agreed upon a process for the exchange of evidence and settlement conferences to be held between the applicants and the protestant.<sup>20</sup> At the status conference, applicants from Groups 4 through 7 also requested they be included in the pre-hearing briefing process so as not to be prejudiced when their cases came up for hearing by the early resolution of legal issues without their input.

**IX.**

**EXCHANGE OF INFORMATION AND LEGAL BRIEFS**

After the status conference, by notices dated February 12, 1996,<sup>21</sup> and March 6, 1996,<sup>22</sup> 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

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

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

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

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

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 rebuttal<sup>23</sup> evidence they had to refute the PLPT's claims of lack of perfection, abandonment or forfeiture. Finally, the notice established a timetable for holding conferences wherein the parties were to attempt to stipulate to any facts not in dispute, to attempt settlement of the protests, if possible, and to inform the State Engineer as to any recommendation any party had for the grouping of any of the referenced transfer applications for hearing.<sup>24</sup>

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.

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<sup>23</sup> The State Engineer notes that the use of the word rebuttal evidence in the February 12, 1996, and the March 6, 1996, notices presented confusion in these proceedings. The use of the word rebuttal evidence was intended to mean any evidence to rebut/refute the PLPT's claims of lack of perfection, abandonment or forfeiture.

<sup>24</sup> Several water right owners in the Newlands Reclamation Project had applications in more than one group. They requested the State Engineer to hold hearings on their multiple applications at one time.

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 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 these petitions to declare certain transfer applications as intrafarm transfers, the State Engineer by notice dated July 7, 1999, ordered the protestant PLPT to serve on the applicant's legal counsel and file with the State Engineer by July 30, 1999, its evidence regarding the protest issues remanded to the State Engineer, those being lack of perfection, forfeiture and abandonment. The State Engineer then indicated these transfer applications would be ruled upon based on the documentary evidence attached to the petitions and that evidence filed by the protestant in compliance with the July 7, 1999, notice.

X.

STATE ENGINEER'S INTERIM RULING NO. 4411

On August 30, 1996, the State Engineer issued Interim Ruling No. 4411<sup>25</sup> regarding some of the issues of law that had been addressed in the pre-hearing legal briefs and which pertained to matters the State Engineer determined could be ruled on as a matter of law at that time. Those issues included the following:

1. Is the PLPT through its protests to the transfer applications attempting to modify, relitigate or collaterally attack the Orr Ditch Decree and the Alpine Decree, and should the protest grounds of lack of perfection, forfeiture or abandonment be barred by the doctrine of *res judicata*?
2. Does the State Engineer have the authority to entertain these challenges?
3. Should the transfer applications have been filed at all?
4. Did the Nevada legislature's clarification of Nevada Revised Statute § 533.324 after the entry of Alpine II affect these cases?
5. Should the State Engineer apply a rule that a rebuttable presumption of abandonment is created when there is evidence of prolonged non-use of a water right submitted by the protestant, thereby, shifting the burden of going forward to the applicant?

State Engineer's Interim Ruling No. 4411 also addressed a multitude of motions for summary judgment and motions to dismiss. Pursuant to Interim Ruling No. 4411, the State Engineer found, among other things, that he would not pre-judge the evidence before the actual administrative hearing by granting the motions to dismiss or motions for summary judgment and denied said motions. The State Engineer concluded that the PLPT was not precluded by the doctrine of *res judicata* from being heard on the issues of lack of perfection, abandonment and forfeiture and that it is within the State Engineer's authority to consider the issues of lack of

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

perfection, abandonment and forfeiture as ordered by the Federal District Court. The State Engineer concluded he would not judge whether or not the applications should have been filed nor would he declare whether the applications were moot and dismiss said applications. Rather, the State Engineer concluded that he would act on the applications before him as ordered by the Federal District Court.

As to the issue of whether the Nevada legislature's clarification of NRS § 533.325, through the addition of NRS § 533.324, affected these cases, the State Engineer concluded, based on the clarification of law, that the Alpine II Court misinterpreted Nevada law, and that the State Engineer believed it was his obligation to follow the law of Nevada which allows for the permitting of a change application on a water right that has not yet been perfected. The State Engineer concluded that the doctrine of the law of the case is a procedural rule, a rule of policy, and will be disregarded when compelling circumstances call for a redetermination of the previously decided point of law on prior appeal, particularly where a clarification in the law has occurred overruling former decisions.

Finally, pursuant to Interim Ruling No. 4411, the State Engineer concluded that Nevada law does not shift the burden of going forward to the applicants upon the protestant's showing of an extended period of non-use. The State Engineer concluded, based on the Nevada Supreme Court case of Town of Eureka v. Office of the State Engineer<sup>26</sup>, that the PLPT has the burden of proving its case of abandonment by clear and convincing evidence of acts of abandonment and intent to abandon.

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

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 Groups 3 through 7 transfer applications were re-opened and hearings were continued on October 15-18, 1996,<sup>27</sup> November 12-15, 1996,<sup>28</sup> January 23-24, 1997,<sup>29</sup> and March 4, 1997,<sup>30</sup> April 14-16, 1997,<sup>31</sup> August 25-26, 1997,<sup>32</sup> September 22-24, 1997,<sup>33</sup> October 7-8, 1997,<sup>34</sup> October 20-23, 1997,<sup>35</sup> November 17, 1997,<sup>36</sup> and

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

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

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

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

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

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

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

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

February 2-3, 1998,<sup>37</sup> 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 Engineer, including, the prior hearings and rulings in this matter and the various rulings of the Federal District Court and the Ninth Circuit Court of Appeals relevant to these cases.<sup>38</sup>

XIII.

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

On December 22, 1997, the State Engineer issued State Engineer's Ruling on Remand No. 4591 regarding change applications filed to move water rights within the Truckee-Carson Irrigation District ("TCID"), specifically, transfer Applications 47840, 48423, 48467, 48468, 48647, 48666, 48667, 48668, 48672, among others. These applications are part of what are known as the

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

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

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

<sup>38</sup> Transcript p. 7, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer.

"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.<sup>39</sup> 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 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

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<sup>39</sup> *Order Remanding Transfer Application Cases to Nevada State Engineer Pursuant to Minutes of the Court of Status Conference Held 4/13/95, U.S. v. Alpine*, D-184-HDM, dated October 9, 1995.

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 a 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 the 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 presents the State Engineer's first decision on intrafarm matters.

**XIV.**

**INTRAFARM PETITIONS**

The State Engineer has before him in this ruling seven (7) 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 July 7, 1999, 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. The State Engineer then indicated these transfer applications would be ruled upon based on the documentary evidence attached to the petitions and that evidence filed by the protestant in compliance with the July 7, 1999, 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."<sup>40</sup> It is the policy of the Division of Water Resources, affirmed by the Nevada Supreme Court's decision in the Town of Eureka case, that whenever a private person files a protest claim or a petition alleging forfeiture or abandonment of a water right it is the protestant's or petitioner's burden to produce the evidence and prove said claims. 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

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<sup>40</sup> Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948, 952 (1992).

Engineer finds the protestant has the burden of proving lack of perfection. It is not the applicant's burden to prove perfection of an adjudicated and decreed water right certified by the TCID to be a valid water right available for transfer just because a protestant alleges a lack of perfection claim.

II.

**LANDS TO WHICH WATER RIGHTS ARE APPURTENANT**

Water rights on particular parcels of land within the Newlands Project are governed by underlying documents identified as agreements, contracts and certificates.<sup>41</sup> Certain applicants argue that the water right is appurtenant to the entire parcel of land described in a contract.<sup>42</sup>

Some of the "Agreements" submitted into evidence were grants by private persons of their pre-Project vested water rights to the United States in exchange for Project water for lands then presently under cultivation and irrigation.<sup>43</sup> Other "Agreements" described obtaining a water right for the **total irrigable** area of the entire ownership susceptible of being served water.<sup>44</sup>

A "Certificate of Filing Water Right Application" provided

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<sup>41</sup> Alpine II, 878 F.2d at 1221. Agreements, contracts and certificates relevant to particular applications will be identified in the section of this ruling that deals with that application.

<sup>42</sup> It should be noted that the State Engineer in this ruling uses the term "contract" to generically describe the various different kinds of documents that were introduced into evidence to demonstrate the dates water rights were obtained for the various parcels of land. It should also be noted that there have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by the owner's name and later issued serial numbers to the contract owner's Homestead Entries. The State Engineer does not believe a serial number can be used to relate any contract to the date which the contract was obtained.

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

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

that the person had filed for a certain number of **irrigable** acres and the supply furnished was limited to the amount of water beneficially used on said **irrigable** land.<sup>45</sup> In an "Application For Permanent Water Right - For all lands except entries under the reclamation law" the applicant applied for a permanent water right for the irrigation of and to be appurtenant to all of the **irrigable** area **now or hereafter developed** within the tract of land described. The description of the tract of land identified a total number of acres of which a certain portion were then classed as **irrigable**.<sup>46</sup>

In a "Water-Right Application - Homesteads Under The Reclamation Act" and in a "Water-Right Application For Lands in Private Ownership And Lands Other Than Homesteads Under The Reclamation Act" the applicant applied for a permanent water right for the irrigation of and to be appurtenant to a certain number of **irrigable** acres as shown on plats approved by the Secretary of the Interior within the tract of land described. The description of the land identified a total number of acres of which a certain portion were then classed as **irrigable**.<sup>47</sup>

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

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<sup>45</sup> Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997, official records of the office of the State Engineer.

<sup>46</sup> Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997, official records of the office of the State Engineer.

<sup>47</sup> Exhibit Nos. 45 and 59, public administrative hearing before the State Engineer, October 1996 through March 1997, official records of the office of the State Engineer.

water rights.<sup>48</sup> Further evidence and testimony provides that there were hand drawn colored maps prepared over the decades by the Reclamation Service (now known as the U.S. Bureau of Reclamation) and/or the TCID showing the location of the **irrigable** acreage within the Project.<sup>49</sup> These maps were produced around 1913, 1925<sup>50</sup>, 1960<sup>51</sup> and 1981 with colors on the maps indicating the various kinds of water rights and water righted lands, e.g., green depicts areas having vested water rights (areas in irrigation prior to the inception of the Project in 1902).

A recent opinion from the Supreme Court of Washington held in the context of a water rights adjudication that an irrigation district's water right is not appurtenant to **irrigated** acreage, but rather the **irrigable** acreage.<sup>52</sup> The State Engineer finds that the

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<sup>48</sup> Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 76, public administrative hearing before the State Engineer, February 4, 1985, official records of the office of the State Engineer.

<sup>49</sup> Transcript, pp. 1797-1817, 1845-1847, public administrative hearing before the State Engineer, March 4, 1997, official records of the office of the State Engineer.

<sup>50</sup> Transcript, pp. 1804-1806, public administrative hearing before the State Engineer, March 4, 1997, official records of the office of the State Engineer.

<sup>51</sup> "The colored water right maps were developed in the mid-1960's utilizing the Property and Structure Maps (P & S Maps) as base maps and compiling information from BOR irrigable acreage maps, topographic maps, farm unit survey maps, soil reclassification maps, seeped and alkaline area maps, etc. Colors were employed to illustrate the location of water right acreages within each ¼ 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 of the office of the State Engineer., official records of 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.

<sup>52</sup> In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin; State of Washington, Dept. of Ecology v. Acquavella, et al., 1997 WL 197268 (Wash.). The Court further 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

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.<sup>53</sup> However, in 1947, the U.S. Department of Interior approved a transfer on the same farm unit/contract area through the application for a permanent water right process, but, in the mid-1960's transfers were again prohibited.<sup>54</sup> 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.

After the Alpine Decree in 1980, and after the United States Supreme Court's 1983 decision in Nevada v. U.S.,<sup>55</sup> the Court for the first time affirmed ownership of the water rights in the name of the Project water right holders. Subsequently, the users were instructed by the United States to file these transfer applications to put water rights on those lands being irrigated for which no water contracts had been issued. By following those instructions

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district on which the water can be beneficially used, on any irrigable acreage.

<sup>53</sup> Transcript, p. 1795, public administrative hearing before the State Engineer, March 4, 1997. See also, Exhibit No. 49 (Exhibit 1 attached to Exhibit No. 49), public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer.

<sup>54</sup> Transcript, pp. 1789-1795, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

<sup>55</sup> Nevada v. U.S., 463 U.S.110, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983).

there now exists the possibility of the users losing their water rights. Judge Noonan in a concurring opinion in Alpine II<sup>56</sup> stated that "[t]raditional equitable principles govern whether the strict requirements of Nevada water law are to be relaxed with regard to a present application." The Judge indicated that on remand (to the Federal District Court) it may be that a determination must be made whether each individual transfer application can be upheld in equity.

Judge McKibben in his Order of September 3, 1998, relevant to transfer applications from Group 3, recognized that in some situations equity should act and held that intrafarm transfers of water rights within the Newlands Project should be upheld as a matter of equity, and the principles of forfeiture and abandonment would not apply. 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 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 State<sup>57</sup> and the Bureau of Reclamation also

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<sup>56</sup> Alpine II, 878 F.2d at 1229.

<sup>57</sup> The State Engineer assumes the witness was referring to the State Engineer's office.

have copies of those maps.<sup>58</sup> It was indicated that those maps were prepared by starting with the original contracts on a particular piece of property and then the old land classifications and soil classifications were reviewed, since a person could only apply for water rights on irrigable land. Further, testimony indicated that the Bureau of Reclamation was planning to hire an independent contracting firm to confirm the TCID's water right records and maps.<sup>59</sup>

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

A February 1980 report, known as the "Criddle Report", prepared by Clyde-Criddle-Woodward, Inc. for the Bureau of Indian Affairs was intended to be a determination of the water righted acreage on the Newlands Project using aerial photos and various water right documents made available by the TCID.<sup>60</sup> In September 1984, Intermountain Professional Services, Inc. entered into a contract with the Bureau of Reclamation for a review of the Criddle Report.<sup>61</sup> The review was to include the production of a set of accurate maps on mylar showing the locations and amount of water

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<sup>58</sup> Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 314, public administrative hearing before the State Engineer, November 28, 1984, official records in the office of the State Engineer.

<sup>59</sup> Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, pp. 314-318, public administrative hearing before the State Engineer, November 28, 1984, official records in the office of the State Engineer.

<sup>60</sup> "Criddle Report" Review, prepared by Intermountain Professional Services, Inc., dated January 31, 1985, p. 2, official records in the office of the State Engineer.

<sup>61</sup> Id. at 3.

righted land as identified in the Criddle Report.<sup>62</sup> Intermountain was to analyze the source documents (copies of the contracts and certificates and the Property and Structure Maps) as provided to Mr. Criddle by the TCID, and was to then derive an independent number of water righted acres from the contracts and certificates, and from the Property and Structure Maps.<sup>63</sup>

During the course of its analysis, Intermountain reviewed 1,721 water right contracts and applications covering 2,584 land divisions. Since Intermountain's analysis was limited to the documents Mr. Criddle used in his report, Intermountain did not reach definitive conclusions about the actual water righted acres in the Newlands Project.<sup>64</sup> Intermountain concluded its review by proposing suggestions for further research, including further research for all water right contracts and applications and updating maps.<sup>65</sup>

By letter dated October 31, 1984, the United States Department of Interior, Bureau of Reclamation, wrote to then State Engineer Peter G. Morros and requested that he review the water rights maps of the TCID and advise whether they accurately and correctly depicted the status under Nevada law of water rights on the Newlands Project.<sup>66</sup> 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.<sup>67</sup>

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> "Criddle Report" Review at 21.

<sup>65</sup> "Criddle Report" Review at 25-30.

<sup>66</sup> Official records in the office of the State Engineer.

<sup>67</sup> Letter from Douglas Olson, Project Manager to Peter G. Morros, State Engineer, dated December 31, 1986, official records in the office of the State Engineer.

On August 22, 1984, Chilton entered into a contract with the United States Bureau of Reclamation to study the water rights on the Newlands Project. The original scope of the work included a complete review and compilation of all water righted acreages, ownerships, and locations within the Newlands Project.<sup>68</sup> In Milestone 1, Chilton was to tabulate by ¼ ¼ sections the water righted acreage according to the TCID colored water right maps<sup>69</sup> and the Intermountain Study, and to tabulate by ¼ ¼ sections the discrepancies between the sources, and to prepare an estimate of costs to investigate and analyze all discrepancies.

In May 1985, the Bureau of Reclamation directed Chilton to proceed with Milestone 2 to investigate all discrepancies found by Milestone 1 to the point where the differences between the TCID colored water right maps and the Intermountain Study source document column were resolved or no resolution was found.<sup>70</sup> In Milestone 2, Chilton resolved all but 110.4 acres of the discrepancies. Chilton found through its research that the records on file at the TCID office in Fallon together with the Bureau of Reclamation ledgers covering the period from 1903 to 1928 were complete and comprehensive enough to document the reasons for all but a fraction of the discrepancies.<sup>71</sup>

Chilton also reached the conclusion that the TCID colored water right maps are the **best evidence** of the documented location of water rights within the Newlands Project.<sup>72</sup> Milestone 4 would have produced a map showing the physical location of water rights

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<sup>68</sup> Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, second p. 1 in exhibit. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996, official records in the office of the State Engineer.

<sup>69</sup> Id. at 1-2.

<sup>70</sup> Report on Milestone 2 at 3.

<sup>71</sup> Report on Milestone 2 at 5.

<sup>72</sup> Report on Milestone 2 at 6.

within the ¼ ¼ sections<sup>73</sup> according to the records available at the TCID. However, it was Chilton's conclusion that a great deal of time and effort went into the preparation of the maps and that the **TCID colored water right maps substantially conform to the original areas documented to have water rights.**<sup>74</sup>

Based on Chilton's work, the United States Bureau of Reclamation concluded that the TCID water right records **are the most accurate available, and should be used to determine water-righted acreage on the Newlands Project,** and the United States Bureau of Reclamation agreed with Chilton that further investigations were not warranted.<sup>75</sup>

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

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<sup>73</sup> Historically, the location of water rights within the Newlands Project had been defined by the irrigable areas inside ownership parcels or farm units. Report on Milestone 2 at 28.

<sup>74</sup> Report on Milestone 2 at 28-29.

<sup>75</sup> Letter from Douglas Olson, Project Manager, to Peter G. Morros, State Engineer, dated December 31, 1986, official records of the office of the State Engineer.

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 1987<sup>76</sup> (no photographs were introduced into evidence) at various scales as summarized below:

1948 March	- black and white, approximate scale 1" = 400'
1962 Sept.	- black and white, approximate scale 1:20,000
1972 June	- color infrared, approximate scale 1:34,000
1973 August	- color infrared, approximate scale 1:12,000
1974 May, June	- color infrared, approximate scale 1:12,000
1975 May	- color infrared, approximate scale 1:12,000
1977 Sept., Oct.	- black and white, approximate scale 1" = 400'
1980	- color infrared, approximate scale 1:58,000 enlarged to 1" = 600'
1984 June	- color infrared, approximate scale 1:24,000 <sup>77</sup>

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

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<sup>76</sup> There is no evidence in the record as to the scale of the 1985, 1986 and 1987 aerial photographs.

<sup>77</sup> Exhibit No. 15, public administrative hearing before the State Engineer, October 15-18, 1996, official records in the office of the State Engineer.

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 acres square. Taking that 0.15 acres and multiplying it by the 43,560 ft<sup>2</sup> found in an acre equals 6,534 ft<sup>2</sup> or 80.83 feet on a single side of the 0.15 acre parcel. Measuring the 80.83 feet on an aerial photograph of the scale of 1:20,000 means we are looking to specifically locate a piece of land that is 0.00404 of a foot or 0.05 inches long on the photograph. This means we are looking for a parcel of land the size of a dot made from the lead of a mechanical pencil.

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

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

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.<sup>78</sup>

## 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.<sup>79</sup> 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 1996-98 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

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<sup>78</sup> 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.

<sup>79</sup> Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 80, public administrative hearing before the State Engineer, June 24, 1985, 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.

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 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 1996-98 hearings, the PLPT used a series of aerial photographs and satellite images to illustrate the nature of the land use at the existing places of use for each parcel of land involved in each transfer application. The PLPT focused all of its testimony and evidence on the existing place of use and provided nothing as to the proposed place of use. However, it was clear to the State Engineer upon review of the images<sup>80</sup> 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

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<sup>80</sup> 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.

rights."<sup>81</sup> "Such nonstatutory appropriations were made by actually diverting the water from the source of supply, with intent to apply the water to a beneficial use, followed by application to such beneficial use within a reasonable time."<sup>82</sup>

"Prior to the approval of the Newlands Project, approximately 30,000 acres of land had been irrigated for many years from the Carson River" within what are now Project lands.<sup>83</sup> "In the early stages of the Newlands Project the United States acquired by contract the vested water rights to 29,884 acres of land with priority dates ranging from 1865 to 1902."<sup>84</sup> These rights were conveyed by private landowners to the United States in exchange for the government's promise to deliver a full season supply from Project water to these farms.<sup>85</sup>

The Alpine Decree, in a tabulation of vested rights acquired by contract, identifies 30,482 "former irrigated" acres with priority dates ranging from 1865 to 1902.<sup>86</sup> Testimony was provided that at the time the Project was turned over to the TCID in 1926<sup>87</sup> for operation and maintenance there were 20,145 acres of vested water rights on land within the Project and those lands had been

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<sup>81</sup> W.A. Hutchins, THE NEVADA LAW OF WATER RIGHTS 12 (1955), citing to Ormsby County v. Kearney, 37 Nev. 314, 352, 142 Pac. 803 (1914).

<sup>82</sup> Ibid.

<sup>83</sup> Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, p. 38. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996, official records in the office of the State Engineer.

<sup>84</sup> Alpine, 503 F.Supp. at 881.

<sup>85</sup> Ibid.

<sup>86</sup> Alpine Decree at 151-152.

<sup>87</sup> 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.

put to use and irrigated back in the 1800's.<sup>88</sup> Based on the fact that the Alpine Decree identifies and tabulates vested water right acreage as "former irrigated acreage", the State Engineer finds that challenges to lack of perfection of said vested water rights could have and should have been raised in the decree courts. Many of the PLPT's protest claims of lack of perfection as to pre-Project vested water rights were dropped during the pendency of these proceedings, and if they were not dropped, the State Engineer finds that those pre-statutory vested water rights exchanged for Project water rights were perfected as a matter of fact and law pursuant to the Orr Ditch and Alpine decrees.

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.<sup>89</sup> For example, evidence indicated that an oversight was made and no deduction taken in accordance with the uniform practice from the defined irrigable acreage for the right of way for the G-line canal when the plats showing the irrigable area were approved on a

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<sup>88</sup> 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.

<sup>89</sup> 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.

particular farm unit.<sup>90</sup> The G-line canal should have been excluded from the defined irrigable acreage of the farm unit which confirms that the practice was to exclude those areas.

The State Engineer finds that if all or a portion of the existing place of use is covered by a railroad, road, canal, drain, lateral, waste ditch, house, other structure or right-of-way and the TCID by its certification indicates that area is within the irrigable area of the parcel, the irrigable area must include the area covered by the structure. Since the Reclamation Service regulations excluded such structures from the irrigable area, the structure must not have existed at the time of the contract. If the colored water right maps include the area now encompassing the lands taken up by said canal, drain, etc. those structures must have come into existence after the date of the 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 NEWLANDS PROJECT  
IN THE ORR DITCH DECREE**

An argument was raised in the pre-hearing briefs that the issuance of the Orr Ditch Decree is, as a matter of law, a determination that the water rights of the Project have been perfected; thus, any challenges to the lack of perfection of said rights are barred by the doctrine of *res judicata*. In most

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<sup>90</sup> Exhibit No. 203, public administrative hearing before the State Engineer, March 4, 1997, official records in the office of the State Engineer.

instances, a decree is a determination of perfection as a matter of fact and as a matter of law; however, the history of the Orr Ditch Decree, as refined by the Ninth Circuit Court of Appeals decisions in these transfer cases, and the United States Supreme Court decision in Nevada v. U.S., has injected great uncertainty as to what was actually accomplished by the Orr Ditch Decree. While the Orr Ditch Decree itself appears to have determined that the water right was perfected as a matter of law, later court decisions have brought that determination into question.

The Special Master in the Orr Ditch Court treated the United States' water right for the Project as a type of implied federal reserved water right when he indicated that the withdrawal of lands for reclamation carried with it by implication the reservation of unappropriated water required for irrigation.<sup>91</sup> As such, perfection was not an issue. When the United States withdraws land from the public domain and reserves it for a federal purpose it impliedly reserved unappropriated water to the extent necessary to accomplish the reservation and the water right **vests** on the date of the reservation.<sup>92</sup>

The Special Master noted that the United States was not constrained by the doctrine of due diligence in placing the water to beneficial use, but also noted that the Government proceeded with due diligence to construct the Derby Dam, Truckee Canal and Lahontan Reservoir, and that if the enterprise had been a private one the right to the water diverted for storage and irrigation would have been complete,<sup>93</sup> i.e., the water right was perfected. Under these conditions the State Engineer would find that the water right for the entire Project was perfected as a matter of law

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<sup>91</sup> Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, p. 44 (1925).

<sup>92</sup> U.S. v. Jesse, 744 P.2d 491 (Col. 1987).

<sup>93</sup> Talbot, G.F., U.S. v. Orr Water Ditch Co., The Truckee River Case, Special Master's General Explanatory Report, pp. 33, 45 (1925).

pursuant to the decree even though the decree only established an agreed upon maximum aggregate amount of water to which the United States (now Project farmers) was entitled for the development of the Project.<sup>94</sup>

But then, the Ninth Circuit Court of Appeals in the Alpine III decision proclaimed there are two sets of water rights on the Project, a concept with which the State Engineer and the Federal District Court strongly disagree. One set, the amalgamation of water rights obtained by the United States for the entire Project and, the other set, those rights appurtenant to the particular tracts of land.<sup>95</sup> This decision of the Ninth Circuit Court of Appeals is internally inconsistent and illogical as the decision also indicates there is no appropriation of water until water is actually put to beneficial use, but fails to consider how the United States could have perfected water rights under Nevada law absent the United States itself having a place to put that water to beneficial use. All water rights associated with the Project had to either be established under Nevada law or they are the implied reserved water rights noted by the Special Master.<sup>96</sup> However, even though the Special Master treated the United States' water right for the Project as a federal reserved right, the Reclamation Act itself provides that water for reclamation projects is appropriated pursuant to state law.

In Prosole v. Steamboat Canal Co.,<sup>97</sup> the Nevada Supreme Court considered the issue of who was the appropriator and owner of the water as between a diverter and a conveyor of the water and the owner of the reclaimed lands upon which the water was applied to beneficial use. The Court held that no water right was created by

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<sup>94</sup> Alpine II, 878 F.2d at 1224.

<sup>95</sup> Alpine III, 983 F.2d at 1495.

<sup>96</sup> California v. U.S., 438 U.S. 645, 665 (1978).

<sup>97</sup> Prosole v. Steamboat Canal Co., 37 Nev. 154 (1914).

the mere diversion of water from a public watercourse. An appropriation was only accomplished by the act of diversion coupled with the act of application to a beneficial use.<sup>98</sup> It necessarily follows from the principle established by Prosole that no water right was created by the mere diversion and storage of water by the United States and that under Nevada law the appropriation is not accomplished until the water is put to beneficial use. Since the United States Supreme Court in Nevada v. U.S. has now said that the water rights belong to the farmers and not the United States, it appears to have disregarded the Orr Ditch Decree Court's determination that the water rights for the Project are implied reserved rights which means that nearly 40 years after the fact the Court changed the rules of the game and perfection was made an issue.

Under the 1944 Orr Ditch Decree, the United States was granted the right to divert up to 1,500 cubic feet per second (cfs) of water from the Truckee River at Derby Dam; however, physical canal constraints limit diversions to a capacity of approximately 900 cfs and the maximum amount of water ever diverted since the installation of the present gage is 967 cfs.<sup>99</sup> The Orr Ditch Decree determined a right of diversion for a quantity to be fully perfected in the future, but did not determine perfection of the entire decreed quantity as a matter of fact, except as to those pre-statutory vested water rights exchanged for Project rights as previously discussed. As a matter of fact, the entire 1,500 cfs quantity of water was not perfected as the entire quantity has never been placed to beneficial use or diverted from the Truckee River.

In conducting a water rights adjudication, the trial court generally determines several elements when confirming existing

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<sup>98</sup> Id. at 159-60.

<sup>99</sup> Water Resources Data for Nevada, published by the U.S. Geological Survey for gaging station #10351300.

rights, two of which are: (1) the amount of water that has been put to beneficial use, and (2) the priority of water rights relative to each other.<sup>100</sup> However, if a right being determined pursuant to an adjudication was a right still in the diligence phase of development, as reflected in NRS § 533.115, the claimant's proof of claim must show the date when the water was first used for irrigation, the amount of land reclaimed the first year, the amount reclaimed in subsequent years, and the area and location of the lands which are **intended to be irrigated**.

From the historical records it appears that the 1,500 cfs water right from the Truckee River for the Project was a quantity set aside for the Project to be fully developed in the future. The Ninth Circuit Court of Appeals has already rejected the State Engineer's determination that water rights within the Project had vested in the United States upon the creation of the Project in 1902 prior to the passage of Nevada's forfeiture statute, and concluded that the water rights in the Project did not vest in the year 1902.<sup>101</sup> Rather, the Court held as a matter of Nevada law "the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land,"<sup>102</sup> i.e., that the right vests only upon beneficial use of the water on the land. Therefore, the State Engineer concludes that the water rights for the Project were not perfected as a matter of law in the Orr Ditch Decree.

## II.

### PERFECTION AS MATTER OF LAW UPON OBTAINING A CONTRACT

Another argument presented was that the water rights were perfected once a person obtained a contract. Testimony was

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<sup>100</sup> In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin; State of Washington, Dept. of Ecology v. Acquavella, et al., 1997 WL 197268 (Wash.).

<sup>101</sup> Alpine III, at 1495-96.

<sup>102</sup> Id. at 1496.

provided that the last new water right contract in the Project was approved by the United States in the 1960's. Prior to that, if someone sought a new water right, the Bureau of Reclamation instructed them to develop the land, put it into production, then the Bureau of Reclamation determined irrigability and productivity constituting Bureau approval of the irrigation of the water-righted land.<sup>103</sup> 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 II<sup>104</sup> (that the State Engineer may not grant an application to transfer a water right that has not been put to beneficial use) the Nevada Legislature re-affirmed that Nevada law does allow for the transfer of a water right before perfection on the transferor place of use, indicating that the Ninth Circuit was mistaken in its interpretation of Nevada law.<sup>105</sup>

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<sup>103</sup> 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.

<sup>104</sup> Alpine II, 878 F.2d at 1226.

<sup>105</sup> There is nothing in the Reclamation Law or the Alpine Decree on this issue, except that the Reclamation Law provides that water is appropriated pursuant to state law.

After the Court's decision in Alpine II, the Nevada Legislature added NRS § 533.324 to clarify that as used in NRS § 533.325<sup>106</sup> "water already appropriated" **includes** water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended beneficial use before an application to change the point of diversion, place or manner of use is made. In other words, an unperfected water right can be changed under Nevada law.

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

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

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

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<sup>106</sup> NRS § 533.325 provides that any person who wishes to change the point of diversion, place or manner of use of water already appropriated, shall, before performing any work in connection with such change, apply to the State Engineer for a permit to do so.

other types of water rights which are available to be changed.

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

The State Engineer testified during the legislative hearings that it was his belief that the law would not apply to other than permitted water rights, as certificated rights, decreed rights and claims of pre-statutory water rights were already presumed to have gone to beneficial use and could be changed under the current definition of "water already appropriated".<sup>107</sup> The State Engineer submitted a briefing paper during the legislative process indicating that he has interpreted "water already appropriated" to mean **all** water rights, including permits.<sup>108</sup> The State Engineer specifically addressed the Alpine II decision and the transfer applications filed within the TCID. The PLPT's legal counsel testified that if the law were enacted it would clearly reverse the decision that "water already appropriated" means water that had already been put to beneficial use.<sup>109</sup> Yet, the law was enacted.

The Nevada legislature specifically addressed, and in its addition of NRS § 533.324, clarified the court's decision in Alpine II as to Nevada law. The State Engineer's Interim Ruling No. 4411

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<sup>107</sup> Assembly Committee on Government Affairs, March 24, 1993.

<sup>108</sup> Briefing paper submitted by R. Michael Turnipseed, P.E., State Engineer to the 1993 Nevada State Legislature, dated March 16, 1993.

<sup>109</sup> Assembly Committee on Government Affairs, March 24, 1993.

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...<sup>110</sup>

Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of

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<sup>110</sup> Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

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.<sup>111</sup>

As reflected in the Nevada statutes, when a project or integrated system is comprised of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.<sup>112</sup> If these waters had been appropriated under the Nevada statutory scheme for appropriating water, NRS § 533.380(1)(a) requires that the construction of the work must be completed within five years after the date of approval of the permit, and NRS § 533.380(1)(b) requires that the application of the water to its intended beneficial use must be made within ten years after the date of approval of the permit. The statute provides that for good cause shown the State Engineer may extend the time in which the construction work must be completed or the water applied to its intended beneficial use.<sup>113</sup>

The State Engineer concludes that the Alpine II Court misinterpreted Nevada law when it stated that all water rights in Nevada must be perfected prior to transfer; however, the State Engineer further concludes that not all unperfected water rights within the Newlands Project are available to be transferred. If the protestant proves a water right was not perfected prior to the filing of one of the transfer applications, the issue becomes whether that particular water right is still within the diligence phase of development. If it is within the diligence phase, the unperfected water right can be moved. If it is not within the

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<sup>111</sup> Id. at 546.

<sup>112</sup> NRS § 533.395(5) (work on a portion of the project may be considered diligence as to the whole project). Application for Water Rights, 731 P.2d 665 (Colo. 1987) (court concluded that work was being pursued with reasonable diligence from project's inception in 1952 through current state of the then still unfinished project, a period of 35 years).

<sup>113</sup> NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

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 50005

GENERAL

I.

Application 50005 was filed on July 16, 1986, by Robert Smith<sup>114</sup> to change the place of use of 87.435<sup>115</sup> acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 174, 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 - 9.85 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.18N., R.28E., M.D.B.&M.

Parcel 2 - 3.88 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 34, T.18N., R.28E., M.D.B.&M

Parcel 3 - 5.70 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 34, T.18N., R.28E., M.D.B.&M

The proposed places of use are described as being 8.38 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  and 11.05 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , both in said Section 34.

By letter dated February 25, 1993, the applicant withdrew 3.17 acres from the Parcel 1 request for transfer and 2.88 acres from the Parcel 2 request for transfer for a total of 27.225 acre-feet annually. By letter dated October 12, 1994, the applicant withdrew another 1.75 acres from the Parcel 1 request for transfer and withdrew 1.45 acres from the Parcel 3 request for transfer for a total of 14.4 acre-feet annually.<sup>116</sup>

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<sup>114</sup> File No. 50005, official records in the office of the State Engineer.

<sup>115</sup> The State Engineer notes that while the application was actually filed for 87.44 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 87.435 acre-feet.

<sup>116</sup> The State Engineer notes the applicant does not mention this second withdrawal in its petition; however, see File No. 50005, official records in the office of the State Engineer.

II.

Application 50005 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>117</sup> and more specifically on the grounds as follows:<sup>118</sup>

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

FINDINGS OF FACT

I.

CONTRACT DATES 50005

Parcels 1 and 3 - Exhibit UU from the 1988 administrative hearing contains three documents covering these existing places of use. The first is a "Water-right Application" dated November 18, 1919, under the name of J.L. Wightman. The second is an "Application for Permanent Water Right" dated January 14, 1925, under the name of Alethea Hillhouse which indicates that J. L. Wightman assigned his water right to Alethea Hillhouse. The third is a "Supplemental Application for Permanent Water Right" dated March 12, 1926, which covers Farm Unit F which is a smaller farm than the Farm Unit B described under the 1919 and 1925 applications.

A document attached to the applicant's petition for certification as an intrafarm transfer shows that Parcels 1 and 3 were patented on November 9, 1929, by Alethea Fix (formerly Alethea Hillhouse) as the assignee of J.L. Wightman.<sup>119</sup> The State Engineer finds the contract date is November 18, 1919, and the other applications were merely ways that the water rights were transferred from the name of J.L. Wightman to Alethea Fix.

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<sup>117</sup> File No. 50005, official records in the office of the State Engineer.

<sup>118</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997, official records in the office of the State Engineer.

<sup>119</sup> Exhibit E to applicant's petition., official records in the office of the State Engineer.

**Parcel 2** - Exhibit UU from the 1988 administrative hearing contains five documents covering this existing place of use. The first is a "Water-right Application" dated November 29, 1919, under the name of W.F. Browder. The second is a "Water Right Application" dated February 11, 1921, under the name of A.J. Hillhouse as the assignee of W.F. Browder. The third is a "Water Right Application" dated May 1, 1922, under the name of W.F. Hayes as assignee of A.J. Hillhouse. The fourth is an "Application for Permanent Water Right" dated May 18, 1925, under the name of A.J. Hillhouse as assignee of W.F. Hayes, and the fifth is a "Supplemental Application for Permanent Water Right" dated May 18, 1925, under the name of A.J. Hillhouse.

A document attached to the applicant's petition for certification as an intrafarm transfer shows that Parcel 2 was patented on November 9, 1929, by A.J. Hillhouse as the assignee of W.F. Hayes.<sup>120</sup> The State Engineer finds that while the land was not patented by A.J. Hillhouse until 1929 as the assignee of W.F. Hayes, based on the assignment of Browder's water right to Hillhouse then to Hayes and back to Hillhouse resulting in a supplemental application describing a smaller farm unit in Hillhouse's name, that the land was developed or was being developed by 1919 through 1929. The State Engineer finds the contract date is November 29, 1919, and the other applications were merely ways that the water right was transferred from W.F. Browder to A.J. Hillhouse.

## II.

### PERFECTION

**Parcels 1 and 3** - The contract date is November 18, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing

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<sup>120</sup> Exhibit D to applicant's petition, official records in the office of the State Engineer.

Place(s) of Use"<sup>121</sup> which indicates from aerial photographs that in 1948 the land uses on these parcels were described as a canal and natural vegetation (Parcel 1) or as a canal, road, farm yard and structures (Parcel 3). 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 1919 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.

**Parcel 2** - The contract date is November 29, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>122</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal and natural vegetation. 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

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<sup>121</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>122</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

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 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>123</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1986 the land uses on these parcels were described as a canal and natural vegetation (Parcel 1) or as a canal, road, farm yard and structures (Parcel 3). Aerial photographs from 1985 and 1986 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1988 administrative hearing, the applicant described the land use on the existing places of use in 1948 as barren ground, drain and housesite<sup>124</sup> and in 1987 as drains, laterals, housesite and roadway.<sup>125</sup> Exhibit No. YY<sup>126</sup> from the 1988 administrative hearing indicated that the applicant was transferring water from impracticable to irrigate sites, e.g., drains, laterals, housesite and roadway to new field sites.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>127</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975,

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<sup>123</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>124</sup> Exhibit No. 449, public administrative hearing before the State Engineer, September 24, 1997, which is the same as Exhibit No. XX from the 1988 administrative hearing, official records in the office of the State Engineer.

<sup>125</sup> Exhibit No. 608, public administrative hearing before the State Engineer, October 23, 1997, official records in the office of the State Engineer.

<sup>126</sup> Exhibit No. 608, public administrative hearing before the State Engineer, October 23, 1997, official records in the office of the State Engineer.

<sup>127</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

1977, 1980, 1984, 1985 and 1986 the land use on this parcel was described as a canal and natural vegetation. Aerial photographs from 1985 and 1986 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1988 administrative hearing, the applicant described the land use on the existing place of use in 1948 as barren ground, drain and housesite<sup>128</sup> and in 1987 as drains, laterals, housesite and roadway.<sup>129</sup> Exhibit No. YY<sup>130</sup> from the 1988 administrative hearing indicated that the applicant was transferring water from impracticable to irrigate sites, e.g., drains, laterals, housesite and roadway to new field sites.

The applicant 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 since 1971.<sup>131</sup> The State Engineer finds using the applicant's land use description that while no water was placed to beneficial use on Parcels 1, 2 and 3 for the 36 year period from 1948 through 1986, 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.

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<sup>128</sup> Exhibit No. 449, public administrative hearing before the State Engineer, September 24, 1997, which is the same as Exhibit No. XX from the 1988 administrative hearing, official records in the office of the State Engineer.

<sup>129</sup> Exhibit No. 608, public administrative hearing before the State Engineer, October 23, 1997, official records in the office of the State Engineer.

<sup>130</sup> Exhibit No. 608, public administrative hearing before the State Engineer, October 24, 1997, official records in the office of the State Engineer.

<sup>131</sup> Attachments D through K to applicant's petition, 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.<sup>132</sup>

II.

**PERFECTION**

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

III.

**FORFEITURE 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 50005 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1, 2 and 3 is hereby re-affirmed.

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<sup>132</sup> NRS Chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 51037**

**GENERAL**

**I.**

Application 51037 was filed on June 18, 1987, by Ray E. and Bruna L. Mertens<sup>133</sup> to change the place of use of 14.245<sup>134</sup> acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 257, 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** - 1.65 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 16, T.18N., R.29E., M.D.B.&M.

**Parcel 2** - 2.42 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 16, T.18N., R.29E., M.D.B.&M

The proposed places of use are described as being 3.00 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  and 1.07 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , both in said Section 16.

**II.**

Application 51037 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>135</sup> and more specifically on the grounds as follows:<sup>136</sup>

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

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

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 51037**

**Parcel 1** - Exhibit ZZ-2 from the 1988 administrative hearing contains a "Certificate of Filing Water-Right Application" dated

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<sup>133</sup> File No. 51037, official records in the office of the State Engineer.

<sup>134</sup> The State Engineer notes that while the application was actually filed for 14.25 acre-feet, 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 14.245 acre-feet.

<sup>135</sup> File No. 51037, official records in the office of the State Engineer.

<sup>136</sup> Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997, official records in the office of the State Engineer.

May 25, 1907, in the name of George G. Roy which provides for 74 acres of irrigable land within the S½ NW¼ of Section 16, T.18N., R.29E., M.D.B. & M. The applicant alleged in its petition that a Certificate for 74 water righted acres was issued to George G. Roy on May 23, 1908.<sup>137</sup> The protestant in its Table 1 seems to have mistakenly picked up on that date as it indicates the contract date is May 23, 1908, however, the protestant also shows the document as being from Exhibit ZZ-1 and ZZ-2 from the 1988 administrative hearing. The State Engineer's copy of ZZ-2, the relevant section of the exhibit from the 1988 hearing as to contract dates for this application, does not have a copy of the 1908 document, but rather contains the 1907 Certificate of Filing Water-right Application. The State Engineer notes that Attachment C to the Applicant's Petition is not a Certificate, but rather is a Receipt for payment of the first annual installment under the water right application. The State Engineer specifically adopts and incorporates General Finding of Fact VI and finds the contract date is May 25, 1907.

**Parcel 2** - Exhibit ZZ-2 from the 1988 administrative hearing contains a "Certificate of Filing Water-Right Application" dated August 14, 1911, which provides for 80 acres of irrigable land within the N½ SW¼ of Section 16, T.18N., R.29E., M.D.B. & M. The State Engineer finds the contract date is August 14, 1911.

## II.

### PERFECTION

**Parcel 1** - The contract date is May 25, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>138</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as irrigated. In light of that land use description, the State Engineer finds the protestant

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<sup>137</sup> Attachment C to Applicant's Petition, official records in the office of the State Engineer.

<sup>138</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

claim of lack of perfection is without merit based on its own evidence. Therefore, the protestant did not prove its claim of lack of perfection on this parcel and in fact proved perfection of the water right.

**Parcel 2** - The contract date is August 14, 1911. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>139</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and canal (partial photograph). The State Engineer finds that a partial 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1911 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** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>140</sup> which indicates from aerial photographs that in 1962, 1972, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described

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<sup>139</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>140</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

as a farm yard and structures. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1988 administrative hearing, the applicant described the land use on the existing place of use in 1948 and 1988 as a homestead and stack yard.<sup>141</sup> Exhibit No. DDD<sup>142</sup> from the 1988 administrative hearing indicated that the applicant was transferring water within ownership to commingled areas in existing fields.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>143</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road and canal. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1988 administrative hearing, the applicant described the land use on the existing place of use in 1948 and 1988 as a road and a ditch.<sup>144</sup> Exhibit No. DDD<sup>145</sup> from the 1988 administrative hearing indicated that the applicant was transferring water within ownership to

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<sup>141</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997, which is the same as Exhibit No. CCC from the 1988 administrative hearing, official records in the office of the State Engineer.

<sup>142</sup> Exhibit No. 733, public administrative hearing before the State Engineer, November 18, 1997, official records in the office of the State Engineer.

<sup>143</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>144</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997, which is the same as Exhibit No. CCC from the 1988 administrative hearing, official records in the office of the State Engineer.

<sup>145</sup> Exhibit No. 733, public administrative hearing before the State Engineer, November 18, 1997, official records in the office of the State Engineer.

commingled areas in existing fields.

The applicant provided evidence in that the existing and proposed places of use of use are within the farm unit owned by the applicants,<sup>146</sup> and that the proposed place of use was cultivated land at the time of the filing of the transfer application.<sup>147</sup> The State Engineer finds that while no water was placed to beneficial use on Parcel 1 for the 25 year period from 1962 through 1987, and on that portion of Parcel 2 described as a road for the 39 years period from 1948 through 1987, 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, and the water was being used on other parts of the farm precluding an intent to abandon.

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>148</sup>

##### II.

#### PERFECTION

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

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<sup>146</sup> Attachments A through H to Applicants' Petition, official records in the office of the State Engineer.

<sup>147</sup> Exhibit No. DDD from the 1988 administrative hearing as reproduced in the protestant's package of materials filed on July 29, 1999, provides the water was moved to existing fields.

<sup>148</sup> NRS Chapter 533 and Order of Remand from Federal District Court.

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 fining of an intent to abandon said water rights.

**RULING**

The protest to Application 51037 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1 and 2 is hereby re-affirmed.

APPLICATION 51380

GENERAL

I.

Application 51380 was filed on September 28, 1987, by Samuel R. Guazzini<sup>149</sup> to change the place of use of 14.7 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 735, 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 - 2.10 acres SE¼ SE¼, Sec. 35, T.19N., R.29E., M.D.B.&M.

Parcel 2 - 2.10 acres SW¼ SE¼, Sec. 35, T.19N., R.29E., M.D.B.&M

The proposed place of use is described as being 4.20 acres in the SE¼ SE¼ of Section 35, T.19N., R.29E., M.D.B. & M.

II.

Application 51380 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>150</sup> and more specifically on the grounds as follows:<sup>151</sup>

Parcel 1 - Lack of perfection, abandonment

Parcel 2 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51380

Parcels 1 and 2 - Exhibit LLL from the 1989 administrative hearing contains a "Certificate of Filing Water Right Application" dated August 7, 1908. The State Engineer finds the contract date is August 7, 1908.

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<sup>149</sup> File No. 51380, official records in the office of the State Engineer.

<sup>150</sup> File No. 51380, official records in the office of the State Engineer.

<sup>151</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

II.

**PERFECTION**

**Parcels 1 and 2** - The contract date is August 7, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>152</sup> which indicates from aerial photographs that in 1948 the land uses on these parcels were described as a canal (Parcel 1) or as a road, canal and irrigated (Parcel 2). 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 1908 and 1948, and in fact, the protestant proved perfection on a portion of Parcel 2. Therefore, the State Engineer finds 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.

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** - As to Parcel 1, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>153</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land

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<sup>152</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>153</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

use on this parcel was described as a canal. As to Parcel 2, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>154</sup> which indicates from aerial photographs that in 1948 the land use was described as a road, canal and irrigated. In 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, canal, farm yard and structures. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1989 administrative hearing, the applicant described the land use on the Parcel 1 existing place of use in 1948 and 1988 as a ditch and farmstead, and the Parcel 2 existing place of use as a ditch.<sup>155</sup>

The State Engineer finds because of the discrepancy in the protestant's and the applicant's land use descriptions that the protestant did not prove non-use by clear and convincing evidence. The applicant in 1989 described both Parcel 1 and 2 as being a ditch, and if this is an on-farm, dirt-lined, water-righted ditch the State Engineer finds the water was beneficially used if the ditch was used. The applicant provided evidence that the existing and proposed places of use are both within the farm unit owned by the applicant.<sup>156</sup>

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<sup>154</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>155</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997, which is the same as Exhibit No. 000 from the 1989 administrative hearing, and Exhibit No. PPP from the same 1989 hearing, official records in the office of the State Engineer.

<sup>156</sup> Attachments A through H to applicant's petition, 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.<sup>157</sup>

**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 the protestant did not prove non-use by clear and convincing evidence.

**RULING**

The protest to Application 51380 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1 and 2 is hereby re-affirmed.

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<sup>157</sup> NRS Chapter 533 and Order of Remand from Federal District Court.

### APPLICATION 51601

Application 51601 was filed on December 4, 1987, by Esther P. Casey<sup>158</sup> to change the place of use of 25.20 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 159, 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 NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 0.70 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M
- Parcel 3 - 3.30 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M.
- Parcel 4 - 2.30 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 24, T.18N., R.28E., M.D.B.&M

The proposed places of use are described as being 1.50 acres in the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 0.70 of an acre in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 2.50 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , and 2.50 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , all in Section 24, T.18N., R.28E., M.D.B. & M.

### II.

Application 51601 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>159</sup> and more specifically on the grounds as follows:<sup>160</sup>

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

### FINDINGS OF FACT

#### I.

#### CONTRACT DATES 51601

Parcels 1, 2, 3 and 4 - Exhibit LLL from the 1989 administrative hearing contains a "Certificate of Filing Water Right Application"

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<sup>158</sup> File No. 51601, official records in the office of the State Engineer. The records of the State Engineer show this file has been assigned to Esther P. Slagle as the owner of record.

<sup>159</sup> File No. 51601, official records in the office of the State Engineer.

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

dated December 21, 1907,<sup>161</sup> covering the existing places of use and upon which there is the notation "1124." Exhibit LLL also contains a "Certificate of Filing Water-right Application" dated May 6, 1911, which indicates that the applicant is the assignee of 1124. The State Engineer finds the two documents are sufficiently connected through the assignment process to have the 1911 document relate back to the 1907 contract, therefore, the contract date is December 21, 1907.

## II.

### PERFECTION

**Parcels 1, 2, 3 and 4** - The contract date is December 21, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>162</sup> which indicates from aerial photographs that in 1948 the land uses on these parcels were described as a road and canal (Parcel 1), a canal (Parcel 2), a farm yard, structures, road and canal (Parcel 3), and a road and canal (Parcel 4). 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 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

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<sup>161</sup> See also, Attachment B to applicant's petition to approve and certify as intrafarm transfer, official records in the office of the State Engineer.

<sup>162</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

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, 3 and 4** - As to Parcels 1 and 4, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>163</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land uses on these parcels were described as roads and canals. As to Parcel 2, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>164</sup> which indicates from aerial photographs that in 1948 the land use was described as a canal, however, in 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road and canal. As to Parcel 3, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>165</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a farm yard, structures, road and canal. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1989 administrative hearing, the applicant described the land use on the Parcel 1 existing place of use in 1948 and 1988 as a road and ditch, the Parcel 2 existing place of use as a ditch, the Parcel 3 existing place of use as a ditch and

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<sup>163</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>164</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>165</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

farmstead, and the Parcel 4 existing place of use as a ditch.<sup>166</sup>

The State Engineer finds because of the discrepancy between what the applicant identifies as a ditch and the protestant as a canal that the protestant did not prove non-use as to these parcels. The applicant provided evidence showing that the existing and proposed places of use of use are within the farm unit owned by the applicants.<sup>167</sup>

#### CONCLUSIONS OF LAW

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>168</sup>

##### II.

#### **PERFECTION**

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

##### 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 non-use was not proven by clear and convincing evidence.

#### RULING

The protest to Application 51601 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1, 2, 3 and 4 is hereby re-affirmed.

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<sup>166</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997, which is the same as Exhibit No. 000 from the 1989 administrative hearing; and Exhibit No. PPP from the same 1989 hearing, official records in the office of the State Engineer.

<sup>167</sup> Attachments A through P to applicant's petition to approve and certify as an intrafarm transfer, official records in the office of the State Engineer.

<sup>168</sup> NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51645

GENERAL

I.

Application 51645 was filed on December 22, 1987, by Georgeen E. Huber, Trustee, Huber Living Trust Agreement<sup>169</sup> to change the place of use of 3.24 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 513-1, 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 - 0.72 acre NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 20, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as being 0.72 of an acre in the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 20.

II.

Application 51645 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>170</sup> and more specifically on the grounds as follows:<sup>171</sup>

Parcel 1 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 51645

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains two contracts covering this existing place of use. A "Water-right Application" dated February 21, 1920, filed by Blanche Chinn provides for 73 irrigable acres within a 160 acre parcel of land identified as Farm Unit P in the N $\frac{1}{2}$  SW $\frac{1}{4}$  and the S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 20, T.19N., R.28E., M.D.B.&M. A "Supplemental Application for Permanent Water Right" dated March 3, 1926, also filed by Blanche Chinn provides for 51 irrigable acres within an 80 acre

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<sup>169</sup> File No. 51645, official records in the office of the State Engineer.

<sup>170</sup> File No. 51645, official records in the office of the State Engineer.

<sup>171</sup> Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

parcel of land identified as Farm Unit T. Exhibit C to the applicant's petition shows that Farm Unit P as applied for under the 1920 contract was revised to a smaller farm unit identified as Farm Unit T sometime after the 1920 contract was filed. The contract for Farm Unit T indicates it is a supplemental contract to that one filed for Farm Unit P, thereby, the two documents are tied to one another right from the face of the documents. The State Engineer finds based on the documents being tied to one another, and on the fact that they were executed by the same person and relatively close in time to each other that the contract date is February 21, 1920.

## II.

### PERFECTION

**Parcel 1** - The contract date is February 21, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>172</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

## III.

### FORFEITURE 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

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<sup>172</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

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"<sup>173</sup> which indicates from aerial photographs that in 1948, 1962 and 1973 the land use on this parcel was described as natural vegetation. The land use from 1974 through 1985 was described as residential and natural vegetation. A 1985 aerial photograph was supplied by the protestant, but it is of absolutely no value as it does not identify for the State Engineer the existing or the proposed place of use. At the 1989 administrative hearing, the applicant described the land use on the existing place of use in 1948 and 1988 as barren land.<sup>174</sup> Exhibit No. NNN from the 1989 administrative hearing<sup>175</sup> indicated that the applicant was transferring water within ownership to commingled land and from Exhibit No. PPP<sup>176</sup> it was shown that the proposed place of use was a garden area (cultivated land).

The applicant provided evidence showing that both the existing and proposed places of use of use are within the farm unit owned by the applicant, and that the proposed place of use was cultivated land at the time of the filing of the transfer application.<sup>177</sup> The State Engineer finds that no water was placed to beneficial use on

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<sup>173</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>174</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997, which is the same as Exhibit No. 000 from the 1989 administrative hearing, official records in the office of the State Engineer.

<sup>175</sup> Exhibit No. NNN, public administrative hearing before the State Engineer, February 16 and 23, 1989, official records in the office of the State Engineer.

<sup>176</sup> Exhibit No. PPP from the 1989 administrative hearing and package of evidence filed by the PLPT on July 29, 1999, official records in the office of the State Engineer.

<sup>177</sup> Exhibit No. NNN from the 1989 administrative hearing as reproduced in the protestant's package of materials filed on July 29, 1999, and Exhibit Nos. A through G attached to the applicant's petition for intrafarm transfer, official records in the office of the State Engineer.

Parcel 1 for the 39 year period from 1948 through 1987, however, the State Engineer further finds that evidence was provided 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, and use of the water at the proposed place of use precludes a finding of intent to abandon the water right.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>178</sup>

**II.**

**PERFECTION**

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

**III.**

**FORFEITURE AND ABANDONMENT**

The State Engineer concludes 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 precludes a conclusion of intent to abandon the water right.

**RULING**

The protest to Application 51645 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcel 1 is hereby re-affirmed.

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<sup>178</sup> NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51732

GENERAL

I.

Application 51732 was filed on January 5, 1988, by Dwight B and Joann Spencer<sup>179</sup> to change the place of use of 12.46 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 645-2, 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 - 1.86 acres NW¼ NW¼, Sec. 17, T.19N., R.29E., M.D.B.&M.

Parcel 2 - 1.70 acres NE¼ NW¼, Sec. 17, T.19N., R.29E., M.D.B.&M

The proposed places of use are described as being 0.66 of an acre in the NW¼ NW¼ and 2.90 acres in the NE¼ NW¼, both in said Section 17.

II.

Application 51732 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>180</sup> and more specifically on the grounds as follows:<sup>181</sup>

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

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

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<sup>179</sup> File No. 51732, official records in the office of the State Engineer. The current owners of record in the office of the State Engineer are Darrell J. and Jacqueline M. Hofheins.

<sup>180</sup> File No. 51732, official records in the office of the State Engineer.

<sup>181</sup> 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 51732

**Parcels 1 and 2** - Exhibit LLL from the 1989 administrative hearing contains an "Application for Permanent Water Right" dated May 10, 1948, which provides for 46.9 acres of irrigable land within 66 acres of land in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  and the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, T.19N., R.29E., M.D.B. & M. The application provides that out of the 40 acres of land comprising the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 17 there are 25 irrigable acres 16 acres of which already had a water right and 9 additional acres being added under the 1948 application. The application also provides that out of the west 860 feet of the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 17 there are 26 acres total in the area of which 21.9 were irrigable acres with a present water right on 10.9 acres and 11 additional acres being added under the 1948 application.

The applicants in their petition provided a copy of a June 20, 1905, "Agreement"<sup>182</sup> whereby pre-Project vested water rights were exchanged for Project water rights, however, that document does not list a specific number of acres irrigated, but it does cover the existing places of use under this application. The applicants also provided a copy of a February 9, 1907, "Agreement"<sup>183</sup> whereby pre-Project vested water rights were exchanged for Project water rights for 55 acres of irrigated land in parts of the N $\frac{1}{2}$  NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, T.19N., R.29E., M.D.B. & M.

The 1905 "Agreement" is not signed by anyone representing the United States. Since the 1907 document is between the same parties, George Mitchell and the United States, it raises the question as to whether the 1905 document was ever finalized.

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<sup>182</sup> Attachment A to petition, official records in the office of the State Engineer.

<sup>183</sup> Attachment D to petition, official records in the office of the State Engineer.

Either way, the 1907 document is sufficient to establish that at least part of the N $\frac{1}{2}$  NW $\frac{1}{4}$  was covered by pre-Project vested water rights. The State Engineer believes that evidence provided in the 1948 application shows that in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 17 there were 16 acres of pre-Project vested water rights, and in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 17 there were 10.9 acres of pre-Project vested water rights with additional acreage being added in each section under the 1948 contract. However, from the evidence presented the State Engineer is unable to determine which land at the existing places of use is covered by pre-Project vested water rights and which is covered under the 1948 contract. The State Engineer finds the contract dates are February 9, 1907, and May 10, 1948.

## II.

### PERFECTION

**Parcel 1** - The contract dates are February 9, 1907 and May 10, 1948. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>184</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as irrigated and natural vegetation. The protestant provided evidence in the form of a colored map which located those lands it believes were irrigated in 1948 as the portion of the existing place of use in this quarter quarter section on the eastern edge running north to south.<sup>185</sup> In 1962 the land use was described as irrigated, ditch and natural vegetation. The protestant provided photographs from 1999 as to the existing places of use under this application.<sup>186</sup> Those photographs show the place of use as being an on-farm, dirt-lined ditch, pasture, and what

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<sup>184</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>185</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>186</sup> Photographs taken during July 9, 1999, field inspections of existing place(s) of use. PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

appear to be windbreak trees. At the 1989 administrative hearing, the applicant described the land use on the existing place of use in 1948 as cultivated land and in 1989 as roads.<sup>187</sup> The protestant's photographs do not show any roads, therefore, there is a big enough discrepancy in the land use descriptions to call them into question.

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 as to those pre-Project vested water rights, therefore, the protestant did not prove its claim of lack of perfection on this parcel as to those rights. 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 a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1948 and 1962 as to those water rights added under the 1948 contract. The State Engineer finds there is insufficient evidence in this record to resolve the discrepancy in land use descriptions and to prove the water rights under the 1907 or 1948 contract were never perfected, therefore, the protestant did not prove its claim of lack of perfection on this parcel as to those rights.

**Parcel 2** - The contract dates are February 9, 1907 and May 10, 1948. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>188</sup> which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a creek or natural drainage. The protestant provided a photograph from 1999 as to this existing

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<sup>187</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997, which is the same as Exhibit No. 000 from the 1988 administrative hearing, official records in the office of the State Engineer.

<sup>188</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

place of use.<sup>189</sup> That photograph shows the place of use as being either a creek or an on-farm, dirt-lined ditch, native grasses, and what appear to be windbreak trees. At the 1989 administrative hearing, the applicant described the land use on the existing place of use in 1948 as cultivated land and a sandhill, and in 1989 as a road, stackyard and sandhill.<sup>190</sup> The protestant's photograph does not show any road, stackyard or sandhill, therefore, there is a big enough discrepancy in the land use descriptions to call them into question.

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 as to those pre-Project vested water rights, therefore, the protestant did not prove its claim of lack of perfection on this parcel as to those rights. 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 a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1948 and 1962 as to those water rights added under the 1948 contract. The State Engineer finds there is insufficient evidence in this record to resolve the discrepancy in land use descriptions and to prove the water rights under the 1907 or 1948 contract were never perfected, therefore, the protestant did not prove its claim of lack of perfection on this parcel as to those rights.

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<sup>189</sup> Photographs taken during July 9, 1999, field inspections of existing place(s) of use. PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>190</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997, which is the same as Exhibit No. 000 from the 1988 administrative hearing, 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 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"<sup>191</sup> which indicates from aerial photographs that in 1962, 1973, 1974, 1975 and 1977 the land use on this parcel was described as a irrigated, ditch and natural vegetation. In 1984, 1985, 1986 and 1987 the land use was described as ditch and natural vegetation. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. Exhibit No. PPP<sup>192</sup> from the 1989 administrative hearing indicated that the applicant was transferring water from a road, stackyard and sandhill. The State Engineer finds the discrepancy in land use descriptions calls both into question and no evidence was presented which allows the State Engineer to make his own determination as to which land use description is more likely correct. Therefore, the State Engineer finds non-use was not proven by clear and convincing evidence.

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>193</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975 and 1977

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<sup>191</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>192</sup> Exhibit No. PPP from the 1989 administrative hearing, official records in the office of the State Engineer.

<sup>193</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

the land use was described as a creek or natural drainage, In 1984, 1985, 1986 and 1987 the land use on this parcel was described as a creek or natural drainage and a road. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but they are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. The State Engineer has already noted questions as to the evidence of land use descriptions for this parcel. The State Engineer finds the discrepancy in land use descriptions calls both into question and no evidence was presented which allows the State Engineer to make his own determination as to which land use description is more likely correct. Therefore, the State Engineer finds non-use was not proven by clear and convincing evidence.

The applicants provided evidence that the existing and proposed places of use of use are within the farm unit owned by the applicants.<sup>194</sup> The State Engineer finds 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.<sup>195</sup>

##### II.

#### PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1 and 2, and in fact, proved perfection on a portion of Parcel 1.

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<sup>194</sup> Attachments A through I to applicants' petition, official records in the office of the State Engineer.

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

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 non-use was not proven by clear and convincing evidence.

**RULING**

The protest to Application 51732 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1 and 2 is hereby re-affirmed.

APPLICATION 51960

GENERAL

I.

Application 51960 was filed on January 5, 1988, by Bob Minner<sup>196</sup> to change the place of use of 23.45 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 167, 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 - 0.95 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 26, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 1.60 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 26, T.18N., R.28E., M.D.B.&M.
- Parcel 3 - 3.40 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 26, T.18N., R.28E., M.D.B.&M.
- Parcel 4 - 0.75 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 26, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as being 2.70 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  and 4.00 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , both in said Section 26.

II.

Application 51960 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>197</sup> and more specifically on the grounds as follows:<sup>198</sup>

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

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<sup>196</sup> File No. 51960, official records in the office of the State Engineer.

<sup>197</sup> File No. 51960, official records in the office of the State Engineer.

<sup>198</sup> 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 51960**

**Parcel 1** - Exhibit RRR from the 1991 administrative hearing contains a "Water-Right Application for Lands in Private Ownership" dated January 9, 1919, covering this parcel of land. The State Engineer finds the contract date is January 9, 1919.

**Parcel 2** - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated September 26, 1910, covering this parcel of land. The State Engineer finds the contract date is September 26, 1910.

**Parcel 3** - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated May 4, 1909, covering this parcel of land. The State Engineer finds the contract date is May 4, 1909.

**Parcel 4** - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated March 28, 1910, covering this parcel of land. The State Engineer finds the contract date is March 28, 1910.

II.

**PERFECTION**

**Parcel 1** - The contract date is January 9, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>199</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 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

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<sup>199</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

some point in time prior to the date of the contract the water right was perfected.

**Parcel 2** - The contract date is September 26, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>200</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, farm yard and structures. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1910 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

**Parcel 3** - The contract date is May 4, 1909. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>201</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal and natural vegetation. 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 General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

**Parcel 4** - The contract date is March 28, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

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<sup>200</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>201</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

of Use"<sup>202</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1909 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

### 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"<sup>203</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1991 administrative hearing, the applicant described the land use on the existing place of use

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<sup>202</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>203</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

in 1948 and 1989 as a road.<sup>204</sup>

**Parcel 2** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>205</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, farm yard and structures. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but they are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1991 administrative hearing, the applicant described the land use on the existing place of use in 1948 and 1989 as a road and farmstead.<sup>206</sup>

**Parcel 3** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>207</sup> which indicates from aerial photographs that in 1948, 1962, 1972 the land use was described as a canal and natural vegetation. In 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, canal and natural vegetation. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but they are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use. At the 1991 administrative hearing, the applicant described the land use on the existing place of use in 1948 and

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<sup>204</sup> Exhibit No. UUU from the 1991 administrative hearing. Also remarked as Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997, official records in the office of the State Engineer.

<sup>205</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>206</sup> Exhibit No. UUU from the 1991 administrative hearing. Also remarked as Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997, official records in the office of the State Engineer.

<sup>207</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

1989 as a ditch.<sup>208</sup>

**Parcel 4** - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>209</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road. Aerial photographs from 1985, 1986 and 1987 were supplied by the protestant, but they are of absolutely no value as they do not identify for the State Engineer the existing or the proposed places of use.

The State Engineer finds that while no water was placed to beneficial use as to Parcels, 1, 2 and 4 for the 39 year period from 1948 through 1987, evidence was provided showing that the existing and proposed places of use are within the farm unit owned by the applicants which has been operated as a farm unit since 1895.<sup>210</sup> Because of the applicant's description of the existing place of use as to Parcel 3 being a ditch, the State Engineer finds that non-use was not proven by clear and convincing evidence. The State Engineer finds 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.<sup>211</sup>

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<sup>208</sup> Exhibit No. UUU from the 1991 administrative hearing. Also remarked as Exhibit 563, public administrative hearing before the State Engineer, October 21, 1997, official records in the office of the State Engineer.

<sup>209</sup> PLPT package of evidence filed on July 29, 1999, official records in the office of the State Engineer.

<sup>210</sup> Attachments A through M to applicant's petition, official records in the office of the State Engineer.

<sup>211</sup> 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 and 4.

III.

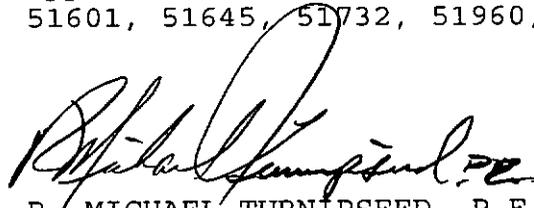
**FORFEITURE AND ABANDONMENT**

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 non-use was not proven by clear and convincing evidence as to Parcel 3.

**RULING**

The protest to Application 51960 is hereby overruled and the State Engineer's decision granting the transfer of water rights from Parcels 1, 2, 3 and 4 is hereby re-affirmed.

Respectfully submitted as to  
Applications 50005, 51037, 51380,  
51601, 51645, 51732, 51960,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/cl

Dated this 21st day of  
December, 1999.