

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

IN THE MATTER OF APPLICATIONS )  
62314, 62315, 62492, 63464, )  
63546, 63652, 63802 AND 63883 )  
FILED TO CHANGE THE PLACE OF USE )  
OF THE PUBLIC WATERS OF A )  
SURFACE WATER SOURCE WITHIN )  
THE CARSON DESERT HYDROGRAPHIC )  
BASIN (101), CHURCHILL COUNTY, )  
NEVADA. )

RULING

# 4979

GENERAL

I.

Application 62314 was filed on July 23, 1996, by Mike and Peggy Dempsey, c/o U.S. Fish and Wildlife Service ("USFWS") to change the place of use of 9.63 acre-feet annually (3.22 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under Truckee-Carson Irrigation District ("TCID") Serial Nos. 161-A, 161-A-1 and 161-A-2, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>1</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 3.22 acres NE¼ SE¼, Sec. 24, T.18N., R.28E., M.D.B.&M.

The proposed place of use is described as 77,364 acres - more or less - as described in Exhibit A attached to the application (and attached as Exhibit 1 to this ruling),<sup>2</sup> and as shown on the map filed for Permit 57748.<sup>3</sup> The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the

<sup>1</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").

<sup>2</sup> Exhibit No. 2, public administrative hearing before the State Engineer, June 27, 2000. Exhibits and Transcript sections from the public administrative hearing before the State Engineer, June 27-28, 2000, will hereinafter be referred to merely by "Exhibit No." and "Transcript, p. ".

<sup>3</sup> Exhibit No. 32.

application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 3.22 acres from which the 2.99 acre-feet per acre are transferred under this application.

## II.

Application 62315 was filed on July 23, 1996, by Arthur and Marjorie Wisnefski, c/o U.S. Fish and Wildlife Service to change the place of use of 203.11 acre-feet annually (67.93 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under TCID Serial No. 750, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>4</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 35.90 acres NW¼ SE¼, Sec. 2, T.19N., R.30E., M.D.B.&M.

Parcel 2 - 32.03 acres SW¼ SE¼, Sec. 2, T.19N., R.30E., M.D.B.&M.

The proposed place of use is described as 77,364 acres - more or less - as described in Exhibit A attached to the application (and attached as Exhibit 1 to this ruling), and as shown on the map filed for Permit 57748.<sup>5</sup> The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 67.93 acres from which the 2.99 acre-feet per acre are transferred under this application.

## III.

Application 62492 was filed on October 1, 1996, by the United States of America, Fish and Wildlife Service to change the place of use of 152.79 acre-feet annually (51.10 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under

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<sup>4</sup> Exhibit No. 6.

<sup>5</sup> Exhibit No. 32.

TCID Serial No. 794-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>6</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 35.10 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 23, T.19N., R.30E., M.D.B.&M.

**Parcel 2** - 16.00 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 23, T.19N., R.30E., M.D.B.&M.

The proposed place of use is described as 77,364 acres - more or less - as described in Exhibit A attached to the application (and attached as Exhibit 1 to this ruling), and as shown on the map filed for Permit 57748.<sup>7</sup> The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 51.10 acres from which the 2.99 acre-feet per acre are transferred under this application, and 3.50 acre-feet per acre for the 1 water-righted acre remaining at the existing place of use.

#### IV.

Application 63464 was filed on September 30, 1997, by the United States of America, Fish and Wildlife Service to change the place of use of 214.56 acre-feet annually (71.76 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under TCID Serial No. 759, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>8</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 37.41 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 11, T.19N., R.30E., M.D.B.&M.

**Parcel 2** - 34.35 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 11, T.19N., R.30E., M.D.B.&M.

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<sup>6</sup> Exhibit No. 10.

<sup>7</sup> Exhibit No. 32.

<sup>8</sup> Exhibit No. 15.

The proposed place of use is described as 77,364 acres - more or less - as described in Exhibit A attached to the application (and attached as Exhibit 1 to this ruling), and as shown on the map filed for Permit 57748.<sup>9</sup> The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 71.76 acres from which the 2.99 acre-feet per acre are transferred under this application, and 3.50 acre-feet per acre for each of the 3.40 water-righted acres remaining at the existing place of use.

V.

Application 63546 was filed on October 29, 1997, by the United States of America, Fish and Wildlife Service to change the place of use of 596.51 acre-feet annually (199.50 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under TCID Serial No. 744, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>10</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 29.00 acres Lot 1, Sec. 1, T.19N., R.30E., M.D.B.&M.

Parcel 2 - 38.00 acres Lot 2, Sec. 1, T.19N., R.30E., M.D.B.&M.

Parcel 3 - 33.80 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 1, T.19N., R.30E., M.D.B.&M.

Parcel 4 - 29.50 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 1, T.19N., R.30E., M.D.B.&M.

Parcel 5 - 34.80 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 1, T.19N., R.30E., M.D.B.&M.

Parcel 6 - 34.40 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 1, T.19N., R.30E., M.D.B.&M.

The proposed place of use is described as 77,364 acres - more or less - as described in Exhibit A attached to the application (and attached as Exhibit 1 to this ruling), and as shown on the map

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<sup>9</sup> Exhibit No. 32.

<sup>10</sup> Exhibit No. 18.

filed for Permit 57748.<sup>11</sup> The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 199.50 acres from which the 2.99 acre-feet per acre are transferred under this application, and 3.50 acre-feet per acre for each of the 15.50 water-righted acres remaining at the existing place of use.

VI.

Application 63652 was filed on December 24, 1997, by the United States of America, Fish and Wildlife Service to change the place of use of 1,420.34 acre-feet annually (454.46 acres at 2.99 acre-feet per acre and 41.00 acres at 1.50 acre-feet per acre) a portion of the water previously appropriated under TCID Serial No. 819-1-B, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>12</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 37.54 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 31, T.20N., R.31E., M.D.B.&M.
- Parcel 2 - 36.90 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 31, T.20N., R.31E., M.D.B.&M.
- Parcel 3 - 35.65 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 31, T.20N., R.31E., M.D.B.&M.
- Parcel 4 - 36.60 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 31, T.20N., R.31E., M.D.B.&M.
- Parcel 5 - 28.70 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 6 - 6.90 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 7 - 4.33 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 8 - 34.10 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 9 - 35.50 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 10 - 30.30 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 11 - 38.72 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.
- Parcel 12 - 37.64 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.

<sup>11</sup> Exhibit No. 32.

<sup>12</sup> Exhibit No. 22.

- Parcel 13** - 32.24 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.  
**Parcel 14** - 31.95 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 32, T.20N., R.31E., M.D.B.&M.  
**Parcel 15** - 37.67 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 6, T.19N., R.31E., M.D.B.&M.  
**Parcel 16** - 20.76 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 6, T.19N., R.31E., M.D.B.&M.  
**Parcel 17** - 7.43 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 6, T.19N., R.31E., M.D.B.&M.  
**Parcel 18** - 2.53 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 6, T.19N., R.31E., M.D.B.&M.

The proposed place of use is described as all Federally-owned or Federally-controlled lands within the approved boundary of Stillwater National Wildlife Refuge, as described in Exhibit A attached to the application (and attached as Exhibit 2 to this ruling), and the supporting map attached thereto. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 454.46 acres from which the 2.99 acre-feet per acre are transferred under this application.

#### VII.

Application 63802 was filed on January 30, 1998, by Kirk and Gina Johnson, c/o the United States of America, Fish and Wildlife Service to change the place of use of 36.72 acre-feet annually (12.28 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under TCID Serial No. 723, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>13</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1** - 6.11 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 32, T.19N., R.29E., M.D.B.&M.  
**Parcel 2** - 6.17 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 32, T.19N., R.29E., M.D.B.&M.

The proposed place of use is described as all Federally-owned or Federally-controlled lands within the approved boundary of Stillwater National Wildlife Refuge, as described in Exhibit A

<sup>13</sup> Exhibit No. 26.

attached to the application (and attached as Exhibit 2 to this ruling), and the supporting map attached to Application 63652. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 12.28 acres from which the 2.99 acre-feet per acre are transferred under this application.

#### VIII.

Application 63883 was filed on March 2, 1998, by the United States of America, Bureau of Indian Affairs to change the place of use of 221.56 acre-feet annually (74.10 acres at 2.99 acre-feet per acre) a portion of the water previously appropriated under TCID Serial No. 756, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>14</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

**Parcel 1** - 38.70 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 11, T.19N., R.30E., M.D.B.&M.

**Parcel 2** - 35.40 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 11, T.19N., R.30E., M.D.B.&M.

The proposed place of use is described as all lands within the boundary of the Fallon Indian Reservation, as described in Exhibit A attached to the application (and attached as Exhibit 3 to this ruling), and the supporting map attached thereto. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 74.10 acres from which the 2.99 acre-feet per acre are transferred under this

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<sup>14</sup> Exhibit No. 29.

application and 3.50 acre-feet per acre for each of the 5.90 water-righted acres remaining at the existing place of use.

**IX.**

Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802 and 63883 were timely protested by either Churchill County or the City of Fallon or both on many grounds as summarized below.<sup>15</sup> The protest issues are summarized and, after each issue, the State Engineer has indicated the application number to which the protest issue is applicable. The actual protests must be reviewed to determine which protestant protested which application on which ground.

1. The application is defective on its face and should be denied or in the alternate amended and republished. The application indicates that it was filed for a change in place of use, but is also requesting a change in the manner of use since the decreed use is for irrigation and the applied for use is for the maintenance of wetlands for recreation and wildlife/storage. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

2. The application is requesting more than one manner of use or purpose; therefore, it violates NRS § 533.330 which prohibits an application from being filed for more than one purpose. Applications 62314, 62315, 62492, 63883.

3. The attempted reservation of 0.51 acre-feet is precluded under the Alpine Decree since this is a change in manner of use. The State Engineer must determine the return flow requirement at the same time he rules on the consumptive use change. Applications 62314, 62315, 62492, 63464, 63546 (Churchill County also alleges that the reservation violates Nevada law which requires water be put to beneficial use), 63652, 63802, 63883.

4. The application, if granted, would violate Federal Reclamation Law, 43 U.S.C. § 389 by (a) having a detrimental effect on existing water rights in the Project, and (b) violating

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<sup>15</sup> Exhibit Nos. 3, 4, 7, 8, 11, 12, 13, 16, 19, 20, 23, 24, 27, 30.

the trust and contract obligations of the United States as to Newlands Reclamation Project water-right owners, including the City of Fallon. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

5. The application, if granted, would violate the Alpine and Orr Ditch Decrees and Nevada v. US, 468 U.S. 110 (1983). Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

6. The application, if granted, would threaten to prove detrimental to the public interest because it would remove water resources from lands within aquifer recharge areas and deplete the ground-water supply from which the City of Fallon's appropriated water rights are drawn. Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802, 63883.

7. The application, if granted, would conflict with and impair the City of Fallon's and/or Churchill County's existing water rights by depleting the ground-water reservoir. Applications 62314, 62315, 62492, 63546, 63652, 63802.

8. The application, if granted, would adversely affect the cost of charges for delivery of water and lessen efficiency in delivery to other Newlands Reclamation Project water right owners. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

9. The application, if granted, would have an adverse effect on the tax base and would thereby be detrimental to the public interest. Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802, 63883.

10. The application, if granted, would create a potential dust hazard and air pollution within the City of Fallon and would thereby be detrimental to the public interest. Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802, 63883.

11. The application, if granted, would present a hazard and danger to the health, safety and welfare of residents and the community because it would jeopardize many thousands of peoples' drinking-water supply. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

12. The application, if granted, would be contrary to and violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4300, because it would implement federal action prior to the required environmental analysis of the cumulative and systematic effects of said action to the human environment. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883. Protests to Applications 63652 and 63802 also allege that if the application is granted it would implement a major federal action prior to required environmental analysis of cumulative and synergistic effects by way of a programmatic EIS.

13. The application, if granted, would be contrary to and violate Title II, Public Law 101-618 because it would violate NEPA. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

14. The application, if granted, would violate Public Law 101-618 because it would violate the Alpine and Orr Ditch Decrees. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

15. The application, if granted, would violate Public Law 101-618 because it would impair existing water rights. Applications 62314, 62315, 62492, 63652, 63802, 63883.

16. The application, if granted, would violate Public Law 101-618 and would threaten to prove detrimental to the public interest because it is prior to mandated and prerequisite ground-water studies and mitigation agreements which must determine and mitigate effects to the domestic water supply of Churchill County. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

17. The application, if granted, would violate the Safe Drinking Water Act. Applications 62314, 62315, 62492, 63546, 63652 (because depletion of ground-water quantity would have corresponding negative impact on quality), 63802, 63883.

18. The application, if granted, would violate the Farmland Protection Policy Act, PL 97-98, 7 U.S.C. § 4200. Applications 62314, 62315, 62492, 63546, 63652, 63802, 63883.

19. The applications request 10 years to go to beneficial use and this is an unreasonable amount of time in which to put the water to beneficial use. Applications 62492, 63464, (violates NRS § §

533.060, 533.380, 533.395 and thereby is contrary to the public interest).

20. There is litigation pending concerning the validity of the studies which support these transfers; thus, the State Engineer may withhold action. Application 63546.

21. The application, if granted, would violate NRS § 533.368 because hydrologic and environmental studies are expressly required under Public Law 101-618 to determine and mitigate the effects of the proposed transfers to the City of Fallon's domestic drinking water supply. Applications 63652, 63802.

Therefore, the protestants requested that the applications be denied.

#### X.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on June 27-28, 2000, at Carson City, Nevada, before representatives of the office of the State Engineer regarding the protests to Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802 and 63883.<sup>16</sup>

#### FINDINGS OF FACT

#### I.

At the public administrative hearing, the Hearing Officer dismissed the protest claims as to Items 4, 5, 14 and 18 as identified above.

Item 4 alleged that the applications, if granted, would violate Federal Reclamation Law, 43 U.S.C. § 389 by (a) having a detrimental effect on existing water rights in the Project, and (b) violating the trust and contract obligations of the United States as to Newlands Reclamation Project water-right owners, including the City of Fallon. 43 U.S.C. § 389 addresses the relocation of highways, railroads, transmission lines, etc., and the exchange of water, water rights or electric energy. It provides that:

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<sup>16</sup> Exhibit No. 1, and Transcript, public administrative hearing before the State Engineer, June 27-28, 2000.

The Secretary<sup>17</sup> is hereby authorized, in connection with the construction or operation and maintenance of any project, (a) to purchase or condemn suitable lands or interests in lands for relocation of highways, roadways, railroads, telegraph, telephone, or electric transmissions lines, or any other properties whatsoever, the relocation of which in the judgment of the Secretary is necessitated by said construction or operation and maintenance, and to perform any or all work involved in said relocations on said land or interests in land, other lands or interests in lands owned and held by the United States in connection with the construction or operation and maintenance of said project, or properties now owned by the United States; (b) to enter into contracts with the owners of said properties whereby they undertake to acquire any or all property needed for said relocation, or to perform any or all work involved in said relocations; and (c) for the purpose of effecting completely said relocations, to convey or exchange Government properties acquired or improved under (a) above, with or without improvements, or other properties owned and held by the United States in connection with the construction or operation and maintenance of said project, or to grant perpetual easements therein or thereover. Grants or conveyances hereunder shall be by instruments executed by the Secretary without regard to provisions of law governing the patenting of public lands.

The Secretary is further authorized, for the purpose of orderly and economical construction and operation and maintenance of any project, to enter into such contracts for exchange or replacement of water, water rights, or electric energy or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project.

The State Engineer finds that 43 U.S.C. § 389 does not present any issue relevant to the matter of the applications under consideration here. When counsel for the protestants was questioned by the Hearing Officer as to how the statute was applicable to the applications under consideration, he indicated that perhaps there was an error in citation to the code.<sup>18</sup> The State Engineer finds the protest claim set forth in Item 4 was

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<sup>17</sup> Secretary of the United States Department of Interior.

<sup>18</sup> Transcript, pp. 29-30.

properly dismissed.

Item 5 alleged that the applications, if granted, would violate the Alpine and Orr Ditch Decrees and Nevada v. US. Nevada Revised Statute § 533.365 provides that any interested person may file a written protest against the granting of an application by setting forth with reasonable certainty the grounds of such protest. The State Engineer finds he cannot adequately determine the issue raised by this protest claim as it does not set forth with reasonable certainty the grounds of the protest; therefore, the claim was properly dismissed.

Item 14 alleged that the applications, if granted, would violate Public Law 101-618 because they would violate the Alpine and Orr Ditch Decrees. As noted above, NRS § 533.365 requires the setting forth of protest claims with reasonable certainty. The State Engineer finds that he cannot adequately determine the issues raised by this protest claim as it does not set forth with reasonable certainty the grounds of the protest; therefore, the claim was properly dismissed.

Item 18 alleged that the applications, if granted, would violate the Farmland Protection Policy Act, PL 97-98, 7 U.S.C. § 4200. The purpose of the Farmland Protection Policy Act is to minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to non-agricultural uses, and to assure that Federal programs are administered in a manner that, to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland.<sup>19</sup> The Farmland Protection Policy Act further provides that the:

chapter shall not be deemed to provide a basis for any action, either legal or equitable, by any person or class of persons challenging a Federal project, program, or other activity that may affect farmland: Provided, that the Governor of an affected State where a State policy or program exists to protect farmland may bring an action in the Federal district court of

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<sup>19</sup> 7 U.S.C. § 4201(b).

the district where a Federal program is proposed to enforce the requirements of section 4202 of this title and regulations issued pursuant thereto.<sup>20</sup>

The State Engineer finds this protest issue presents no issue relevant to the matters before the State Engineer, and further finds that the protestants do not even have standing to raise the issue of the Farmland Protection Policy Act as that privilege is reserved to the Governor. Therefore, the protest claim was properly dismissed.

## II.

The applicants moved to strike the protestants' allegations as to the issues of dust (issue #10), taxes (issue #9), operation and maintenance charges (issue #8), project efficiency (issue #8) and violations of Public Law 101-618 (issue #\_\_\_)<sup>21</sup> on the grounds that they were not proven.<sup>22</sup> The State Engineer finds that the Hearing Officer took the motion under advisement and it will be addressed in the various sections that follow addressing specific protest issues.

## III.

The protestants alleged as to Applications 62314, 62315, 62492, 63546, 63652, 63802, and 63883 that the applications are defective on their face and should be denied or in the alternate amended and republished. The protestants allege that while the applications indicate they were filed for a change in place of use they are also requesting a change in the manner of use, because the decreed use is for irrigation and the applied for use is for the maintenance of wetlands for recreation and wildlife/storage.

The Alpine Decree provides that the net consumptive use of surface water for irrigation on the Newlands Project is 2.99 acre-

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<sup>20</sup> 7 U.S.C. § 4209.

<sup>21</sup> The grounds of the motion to strike were not clearly delineated as to this portion of the motion; therefore, the State Engineer is not sure which protest claim the applicants actually moved to strike.

<sup>22</sup> Transcript, p. 178.

feet per acre<sup>23</sup> and that changes in manner of use from irrigation to any other use and changes in place of use applications shall be allowed only for the net consumptive use of the water right as determined by the Decree.<sup>24</sup> A witness for the applicants testified that these applications were filed based on a strategy developed in cooperation with the Nevada Division of Water Resources, Nevada Division of State Lands and the Nevada Division of Wildlife as to the complex issue of what was the appropriate duty of water to be used in transfer applications of this type, that is, from irrigation to wetlands.<sup>25</sup> The witness indicated that the problem arose from the fact that the Alpine Decree was issued in 1980, but the authorization to expand the purposes of the Newlands Reclamation Project to include wildlife purposes and wetlands did not come until 1990.<sup>26</sup> Therefore, there was a consensus that the Alpine Decree did not contemplate an appropriate duty for wetlands because at the time of the decree there was no authorization to create wetlands within the Newlands Project.<sup>27</sup>

The witness testified that at the discussions mentioned, there were two camps: one that says the Alpine Decree provides that for any uses other than irrigation only the 2.99 acre-feet per acre consumptive use can be moved, and the other camp arguing that it is not really a change in manner of use in that whether one irrigates alfalfa for cows and horses or irrigates grasses for wildlife it is not a change in manner of use that triggers a reduction which only allows changing the 2.99 acre-feet per acre consumptive use.<sup>28</sup>

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<sup>23</sup> Alpine Decree at 3.

<sup>24</sup> Alpine Decree at 161-162.

<sup>25</sup> Transcript, p. 331.

<sup>26</sup> The State Engineer assumes the witness was referring the enactment of Public Law 101-618.

<sup>27</sup> Transcript, pp. 332-333.

<sup>28</sup> Transcript, p. 333.

The applications themselves have left room for interpretation. The applications indicate that they are only filed for a change in place of use. However, they also indicate that the existing manner of use is as decreed, which is irrigation, but then indicate that the proposed use of the water is for the "maintenance of wetlands for recreation and wildlife/storage." On their face, this appears to be a change in manner of use. However, in the remarks section of the application, the applicants indicate that from the 3.50 acre-feet per acre duty as to these irrigation water rights, it is only requesting to transfer 2.99 acre-feet per acre, and is reserving the right to transfer the remaining 0.51 of an acre-foot per acre in a later proceeding. This appears to indicate that the applicants do not believe these applications are requesting a change in manner of use.

The notices published as to Applications 62314 and 62315 indicate that the existing manner of use was as decreed and that the proposed manner of use will be as decreed (maintenance of wetlands for recreation and wildlife/storage).<sup>29</sup> The notices which were published as to Applications 62492 and 63546 indicate that the proposed manner of use will be as decreed.<sup>30</sup> The notice which was published as to Application 63464 indicates that the water will be used for the maintenance of wetlands for recreation and wildlife storage purposes as decreed.<sup>31</sup> The notices which were published as to Applications 63652 and 63802 indicate that the proposed manner of use is for the maintenance of wetlands for recreation and wildlife/storage purposes.<sup>32</sup> The notice which was

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<sup>29</sup> File Nos. 62314 and 62315, official records in the office of the State Engineer.

<sup>30</sup> File Nos. 62492 and 63546, official records in the office of the State Engineer.

<sup>31</sup> File No. 63464, official records in the office of the State Engineer.

<sup>32</sup> File Nos. 63652 and 63802, official records in the office of the State Engineer.

published as to Application 63883 indicates that the proposed manner of use will be as decreed.<sup>33</sup> The notices published reflect the applicants' filings and indicate these applications were not viewed as being a change in manner of use.

In the original Alpine Decree, issued by the Federal District Court which adjudicated the waters of the Carson River,<sup>34</sup> the Court discussed the water use at Carson Pasture and Stillwater areas in a section of the decision dealing with vested water rights acquired by purchase by the United States. The Court noted that the

United States owns lands within the Newlands Project. Referred to in this case generally as the Carson Pasture area and the Stillwater area, these lands comprise some 17,000 to 20,000 acres. Testimony indicated that these areas receive water largely from drainage or seepage from Project farms and very occasionally from direct flows. The amount of land actually irrigated varies greatly from year to year depending on the available water. (Emphasis added.)<sup>35</sup>

Thus, at the time of the original decree, it appears that the decree Court and the parties believed that use of water on the Carson Pasture and Stillwater areas was a form of irrigation, but no water rights were decreed for wetlands, so one does not know if the court would have ultimately decided that providing water for wetlands is a form of irrigation.

Nevada Revised Statute § 533.023 (enacted in 1989) provides that as used in chapter 533, "'wildlife purposes' includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." However, this statute was actually enacted in conjunction with the establishment of certain fees for the issuance of a water right permit for

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<sup>33</sup> File No. 63883, official records in the office of the State Engineer.

<sup>34</sup> U.S. v. Alpine Land and Reservoir Co., 503 F.Supp. 877 (1980).

<sup>35</sup> Id. at 882.

wildlife purposes and did not contemplate the issue before the State Engineer today.<sup>36</sup> By the way these change applications were filed, the State Engineer is confronted with the issue of whether or not these applications are actually requesting a change in manner of use, and is confronted with recognizing that the Alpine Decree did not address a duty for the use of water for wetlands.

The protestants' witness, Claire Mahannah, testified that he was involved in the Carson River adjudication, which resulted in the Alpine Decree, regarding the consumptive use issue.<sup>37</sup> Mr. Mahannah indicated the intent of the Alpine Decree allowing the transfer of only the 2.99 acre-feet per acre consumptive use portion of an irrigation water right to another manner and place of use was that the 0.51 of an acre-foot per acre be left in the system for the downstream users on the Carson River.

The State Engineer does not believe that the intent of the applications should be constrained by the use of the words "maintenance of wetlands" when in other instances a beneficial use could fall under several different categories. For example, use of water for a golf course could come under the description of irrigation, recreation or municipal water use. Is use for a factory a commercial, industrial or municipal use? While these are words used to describe what the water is to be used for they can fall under several categories. Just because a definition exists which provides that the maintenance of wetlands can fall under the definition of wildlife purposes does not mean that lands irrigated for wildlife purposes could not fall under the definition of irrigation.

In South Dakota, the irrigation/wetlands issue seen here was addressed from a slightly different perspective. The USFWS had filed applications to obtain a vested right permit, an amendment to an existing permit, and a new permit.<sup>38</sup> The use of water under

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<sup>36</sup> Act of July 5, 1989, ch. 741 § 1 (1989).

<sup>37</sup> Transcript, pp. 107-111.

<sup>38</sup> In the Matter of Application of the United States Fish and

the application was to provide a refuge and breeding grounds for migratory birds and wildlife, and one of the applications requested a change in point of diversion and place of use from some irrigated land.<sup>39</sup>

The South Dakota Water Board found that the use in question was an "irrigation use" under statute and regulation,<sup>40</sup> and that the proposed use of water for the provision of habitat for migratory birds and wildlife, and in particular to create marshes, sloughs, wet meadows and small patches of open water was a beneficial use of water.<sup>41</sup> On appeal, the South Dakota Supreme Court<sup>42</sup> indicated that South Dakota has a statute which provides that all streams in South Dakota are assigned the beneficial uses of irrigation and wildlife propagation and stock watering. It was argued that no beneficial use existed because the water used for a wildlife refuge was not irrigation. The Board found and the court agreed that a beneficial use existed even though crops are not harvested by human beings but by migratory birds and wildlife. The court held that a beneficial use from irrigation is not limited to raising traditional cash crops. Under ARSD 74:02:01:01(4), irrigation is providing moisture for any plant growth. The court concluded that even if it were not an

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Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application of No. 1921-2 to Change the Location of Land and Diversion Point Authorized Under Water Permit No. 265-2; and Water Right Application No. 2191-2.

<sup>39</sup> See, Findings of Fact, Conclusions of Law and Final Decisions, dated January 7, 1993, In the Matter of Application of the United States Fish and Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application of No. 1921-2 to Change the Location of Land and Diversion Point Authorized Under Water Permit No. 265-2; and Water Right Application No. 2191-2, South Dakota Water Management Board.

<sup>40</sup> Id. at Finding of Fact XLVII.

<sup>41</sup> Id. at Finding of Fact LXI.

<sup>42</sup> DeKay v. U.S. Fish and Wildlife Service, 524 N.W.2d 855 (SD 1994).

irrigation use, it was a beneficial use. The court held that under ARSD 74:03:04:01, the use of water for aquatic plant growth for wildlife propagation is a beneficial use of water whether or not it constitutes irrigation.

Since the USFWS only filed to change the 2.99 acre-feet per acre consumptive use, it is really a moot point whether or not it is a change in manner of use. Because the USFWS has not asked to change the remaining 0.51 of an acre-foot per acre, the State Engineer need not rule on that issue as it is not ripe for decision. Whether one is flooding land to irrigate alfalfa for cows and horses or flooding land to grow forage for wildlife, both uses are for the irrigation of land to grow a "crop" for some purpose and there is probably no real difference in the consumptive use of the water.

There is no indication, as alleged by the protestants, of any intent or attempt by the USFWS to transfer the 0.51 of an acre-foot per acre to Pyramid Lake. In fact, the amount of water from the Truckee River needed to supply any water rights on the Carson Division is determined each year dependent on hydrologic conditions. Many years no Truckee River water is needed to supply the rights and in those years no additional water would flow to Pyramid Lake even if an attempt were made to change it. If this is not a change in manner of use, more water would be moved through the canals to the wetlands accomplishing the recharge the protestants desire.

The State Engineer finds in light of the Alpine Court's description of the use of water on the Carson Lake Pasture and Stillwater areas as a form of irrigation, and the fact that the use is for the plant growth of meadows and marshes, the use is similar enough to the irrigation of crops that these applications are not requesting a change in manner of use.

#### IV.

The protestants allege that the applications are requesting changes to more than one manner of use or purpose, i.e., maintenance of wetlands for recreation and wildlife/storage;

therefore, the applications violate NRS § 533.330 which prohibits an application from being filed for more than one purpose. The State Engineer does not agree and finds that the terms recreation and wildlife/storage merely further clarify the use and is no different than an application that describes irrigation (golf course). The use of the term golf course merely further identifies what the type of irrigation is to take place. If the applicants had put the terms recreation and wildlife/storage in parenthesis the State Engineer doubts this protest issue would have been raised. The State Engineer finds the applications are not requesting more than one manner of use.

V.

The protestants allege that the attempted reservation of 0.51 of an acre-foot per acre is precluded under the Alpine Decree since this is a change in manner of use, and that the State Engineer must determine the return flow requirement at the same time he rules on the consumptive use change. Churchill County also alleges that the reservation violates Nevada law which requires water be put to beneficial use. The State Engineer has already found these applications are not requesting a change in manner of use. As to Churchill County's allegation that the reservation violates Nevada law since water is required to be put to beneficial use, the State Engineer is aware of the concepts of forfeiture and/or abandonment, and if those concepts come into issue at the time the 0.51 acre-foot per acre is requested to be transferred, he will address it at that time.

VI.

The protestants allege that the application(s), if granted, would threaten to prove detrimental to the public interest because they would remove water resources from lands within aquifer recharge areas and deplete the ground-water supply from which the City of Fallon's appropriated water rights are drawn.

Nevada Revised Statute § 533.370 provides that if the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, the State Engineer shall

reject the application. Further, Nevada Revised Statute § 533.040 provides that if at any time it is impracticable to use water beneficially or economically at the place to which it is appurtenant, the right may be severed from the place of use and simultaneously transferred and become appurtenant to another place of use. These two statutes read together indicate the irrigators at issue here had the right to sell the water and file for the transfer of the water use to another place.

In this case, neither the City of Fallon nor Churchill County specifically identified which water rights they were in fact concerned about in relation to these change applications, but it is safe to assume they are junior in priority to the surface-water rights decreed for the Newlands Project, which have a 1902 priority date,<sup>43</sup> even without addressing the question that one is a surface-water source and the other a ground-water source. In Nevada, surface water and ground water sources are regulated independently, a fact which was admitted to by the protestants' witness.<sup>44</sup> But note that in the United States Supreme Court case of Cappaert v. U.S.<sup>45</sup>, a junior ground-water right was restricted from pumping in order to protect a senior surface-water right being impacted by said pumping. It was the senior surface-water right which restricted the junior ground-water right. In this case we have the opposite. It is a junior ground-water right which attempts to restrict the change in use of a senior surface-water right. These protestants are arguing that a senior surface-water appropriator must continue to irrigate his land because a junior ground-water appropriator has come to rely on that senior

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<sup>43</sup> The City of Fallon holds municipal water right Permits 19859 and 19860, which have a priority date of 1961, and Permit 26168, which has a priority date of 1971.

<sup>44</sup> See, Nevada Revised Statutes chapters 533 and 534; Transcript, p. 162. See also, Transcript, p. 382, testimony of applicants' witness.

<sup>45</sup> 426 U.S. 128, 48 L.Ed.2d 523, 96 S.Ct. 2062 (1976).

surface-water irrigator applying water to his land which in some fashion may recharge the ground-water source. If this were true, this argument could be extended so far so as to say that a farmer may never abandon his surface-water right and give up farming because someone else drilled a ground-water well which depends on the farmer applying water to his land. The State Engineer does not believe this position can be supported in law.

The State Engineer in Order No. 1116 recognized the fact that the recharge experienced from surface-water irrigation was declining in the Carson Desert Ground-water Basin and that existing ground-water permits and certificates exceeded the perennial yield of the ground-water basin, and he thereby restricted further ground-water development in the area.<sup>46</sup> Ground-water development was restricted based on the fact that application of surface water was disappearing, but the order did not restrict the surface water use.

Surface-water irrigation in the Newlands Project has changed the depth to water over large areas of the valley floor since the turn of the century....In 1904, the depth to water increased with distance from the natural channels of the Carson River. Depth to water was less than 10 ft below land surface within 1 to 2 mi of the channels and generally increased to at least 25 ft in areas more than 2 mi from the channels north of Fallon and ranged from 10-25 ft more than 2 mi from the channels south of Fallon. In 1992, the water table had risen more than 15 ft over large areas northeast of Fallon and, near Soda Lake, 25 to 40 ft. Also, a few areas had water levels less than 5 ft below land surface in 1992. The distribution of surface water over irrigated areas of the valley floor has decreased the depth to water in large areas, and installation of drains has increased the depth to water near old channels of the Carson River. Both processes made the depth to water more uniform, ranging from 5 ft to 10 ft below land surface over much of the valley floor.<sup>47</sup>

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<sup>46</sup> State Engineer's Order No. 1116, dated August 22, 1995, official records in the office of the State Engineer.

<sup>47</sup> Exhibit No. 44, p. 32.

The publication just quoted, Hydrogeology and Potential Effects of Changes in Water Use, Carson Desert Agricultural Area, Churchill County, Nevada<sup>48</sup> described the various ground-water aquifers in the relevant area, including: the shallow aquifer, which is generally less than 10 feet below land surface to a depth of 50 feet; the intermediate aquifer, which is from 50 feet to somewhere between 500-1,000 feet;<sup>49</sup> the deep aquifer, which is somewhere between 500-1,000 feet to bedrock, and the basalt aquifer, which is the main source of water for municipal wells in Fallon and wells for the Fallon Naval Air Station.<sup>50</sup> The description of the various aquifers in Exhibit No. 44 is too lengthy to repeat here, but notes how specialized aquifer characteristics are based on the region where they are located, and how the shallow aquifer is characterized by abrupt changes in lithology and water quality, both horizontally and vertically.<sup>51</sup> "However, detailed studies have shown that directions of shallow ground-water flow vary greatly and are controlled locally by the presence of canals and drains and by irrigation practices on individual fields."<sup>52</sup> "Water-level fluctuations show that the shallow aquifer is recharged by surface-water seepage during the irrigation season...[and] even near areas of ground-water discharge, canals and drains recharge the shallow aquifer. Water-level fluctuations in the shallow aquifer closely match the seasonal fluctuation in surface-water flow for irrigation, but decrease in amplitude and lag behind fluctuations in surface-water

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<sup>48</sup> Exhibit No. 44, D.K. Maurer, A.K. Johnson, A.H. Welch, Hydrogeology and Potential Effects of Changes in Water Use, Carson Desert Agricultural Area, Churchill County, Nevada, U.S.G.S. Open-File Report 93-463, pp. 33-47 (1994).

<sup>49</sup> Transcript, p. 186.

<sup>50</sup> Exhibit No. 44, p. 45.

<sup>51</sup> Exhibit No. 44, p. 37.

<sup>52</sup> Ibid.

flow with increasing distance from distribution channels and irrigated lands."<sup>53</sup>

It has been demonstrated that there is a potential for downward ground-water flow from the shallow to the intermediate aquifer in the western part of the basin, and the potential for upward ground-water flow from the intermediate aquifer to the shallow aquifer in the remainder of the basin.<sup>54</sup> Areas which have the potential for upward and downward flow between the shallow and intermediate aquifers are shown on Figure 12 in Exhibit No. 44.

As to Applications 62315, 62492, 63464, 63546, 63652 and 63883, the existing places of use are presently located very close to the wetlands areas where they will be used, that is, just southwest of the wetlands.<sup>55</sup> As demonstrated by Figure 8 in Exhibit No. 44, in this region the depth to ground water is approximately less than 5 feet to 25 feet. The ground-water gradient of the shallow and intermediate aquifers in this area flows from west to northeast towards the Stillwater wetlands area<sup>56</sup> and the existing places of use under Applications 62315, 62492, 63464, 63546, 63652 and 63883 are located in a region known to be more of a discharge zone than a recharge zone.<sup>57</sup> The USFWS' witness indicated that in the discharge zone where there is an upward gradient the land use could affect the shallow aquifer, but would have no effect on the intermediate or basalt aquifer.<sup>58</sup> The protestants' witness indicated that 26 domestic wells are located within 1 mile of the existing places of use under Applications

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<sup>53</sup> Id. at 39.

<sup>54</sup> Exhibit No. 44, p. 41.

<sup>55</sup> Exhibit Nos. 6, 10, 15, 18, 22, 29, 47.

<sup>56</sup> Exhibit No. 44, Figure 10; Transcript, pp. 185-186.

<sup>57</sup> Exhibit No. 44, Figures 10 and 15.

<sup>58</sup> Transcript, p. 192.

62315, 62492, 63464, 63546, 63652 and 63883,<sup>59</sup> but did not provide any concrete evidence in support of its allegations that water use in those wells would be unreasonably affected. Exhibit No. 44 Figure 11 does not indicate any wells tapping the intermediate aquifer in the area of these applications. Nevada Revised Statute § 534.110(4) provides that a condition of each appropriation of ground water acquired pursuant to NRS chapter 534 must allow for a reasonable lowering of the static water level. If another ground-water appropriator were allowed to come into the area, he would not be precluded by the fact that the static water level may drop somewhat. The domestic well owner must expect that there could be a reasonable lowering of the ground-water table based on other uses of the water whether they be new ground-water uses or a change in a surface water use.

Administrative notice was taken of a U.S. Geological Survey Water-Resources Investigation Report 99-4191<sup>60</sup> which examined the responses of shallow ground-water flow within the sedimentary aquifer to possible changes in irrigation practices.<sup>61</sup> Two representative areas were chosen to be modeled each containing about 5,760 acres. The second area chosen for study is near Stillwater where vertical gradients indicate upward flow through the sedimentary aquifers.<sup>62</sup> This second area is nearly the same area from which Applications 62315, 62492, 63464, 63546, 63652 and 63883 seek to move water.<sup>63</sup> The report concludes that in this area

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<sup>59</sup> Transcript, pp. 122-123.

<sup>60</sup> N.B. Herrera, R.L. Seiler, D.E. Prudic, Conceptual Evaluation of Ground-Water Flow and Simulated Effects of Changing Irrigation Practices on the Shallow Aquifer in the Fallon and Stillwater Areas, Churchill County, Nevada, Water-Resources Investigation Report 99-4191, U.S.G.S. 2000.

<sup>61</sup> Id. at 4.

<sup>62</sup> Ibid.

<sup>63</sup> See, Exhibit No. 47 and Figure 2 in U.S. Geological Survey Water-Resources Investigation Report 99-4191 at p. 5.

water-level declines would average 1.40 feet or less, up to a maximum of 4 feet in the Stillwater area. The greatest water-level declines up to 10 feet were simulated near canals.<sup>64</sup>

As to Application 63802, the protestants' witness admitted he has never been on the property, he was not sure if it was within the city limits and was not aware of the present land use on that property, but testified that there are 158 domestic wells, 3-4 city wells (tapping the basalt aquifer), and 3 U.S. Department of Navy wells within 1 mile of the existing place of use.<sup>65</sup> The witness opined that if the change application was granted recharge in the area would be affected, but provided no evidence as to how.<sup>66</sup> Testimony was provided which indicates that the existing place of use as to Application 63802 is now covered by a subdivision<sup>67</sup> and is in part covered by roads and that the seller had already begun development before he approached the USFWS to buy the water rights.<sup>68</sup> Therefore, even if the application were denied there would be no irrigation taking place on this existing place of use as the land is not capable of being irrigated. A fact which defeats the argument that denial of the application will support continued recharge.

As to Application 62314, the protestants' witness also admitted he has never been on the property and was not aware of the present land use on that property (even though he first testified the property was being irrigated),<sup>69</sup> but testified that there are 42 domestic wells within 1 mile of the existing place of

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<sup>64</sup> Id. at 68.

<sup>65</sup> Transcript, pp. 111-112, 121-122, 157-158.

<sup>66</sup> Transcript, p. 122.

<sup>67</sup> Transcript, p. 284.

<sup>68</sup> Transcript, p. 313.

<sup>69</sup> Transcript, p. 157.

use.<sup>70</sup> The witness opined that if the change application was granted existing water rights would be impacted because the United States Geological Survey indicates that the existing place of use is within a recharge zone.<sup>71</sup> Testimony was provided which indicates that the existing place of use as to Application 62314 is occupied by a road<sup>72</sup> and was covered by a road at the time the seller approached the USFWS to buy the water rights.<sup>73</sup> Therefore, even if the application were denied there would be no irrigation taking place on this existing place of use. A fact which defeats the argument that denial of the application will support continued recharge.

The State Engineer finds as to Applications 62314 and 63802 the protestants' allegations are without merit as the existing places of use are not capable at this time of being irrigated, precluding any recharge, and this was prior to the acquisition of the water rights by the USFWS. The State Engineer finds as to Applications 62315, 62492, 63464, 63546, 63652 and 63883 that the area is not an important recharge area for any of the aquifers and the potential drop in water level in the shallow aquifer in response to the removal of irrigation within the area is reasonable. The State Engineer finds the protestants did not provide any evidence to demonstrate that these change applications will affect water rights held by the City of Fallon.

#### VII.

The protestants allege that if the applications are granted they will conflict with and impair the City of Fallon's and/or Churchill County's existing water rights by depleting the ground-water reservoir. The analysis here is nearly identical to that found in Section VI above. Neither Churchill County nor the City

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<sup>70</sup> Transcript, pp. 111-112, 119, 157-158.

<sup>71</sup> Transcript, p. 120.

<sup>72</sup> Transcript, pp. 282, 310.

<sup>73</sup> Transcript, pp. 310-311.

of Fallon specifically identified what water rights they believe they hold which would be impaired by these change applications. Neither protestant provided any evidence of interference with existing water rights and the protestants' witness admitted surface water and ground water are managed as separate systems.

Application 63802 proposes to move water off 12.28 acres of land 1¼ miles east of the center of Fallon and as previously noted the land is not capable of being irrigated; therefore, the protestants' recharge argument is moot as to this application. Application 62314 proposes to move water off 3.22 acres of land south of Fallon and as previously noted the land is not capable of being irrigated; therefore, the protestants' recharge argument is also moot as to this application. Even if both applications were denied there would be no use of water for irrigation purposes at these locations.

As to Applications 62315, 62492, 63464, 63546, 63652 and 63883 the protestants did not prove conflicts with their existing water rights as they did not even indicate which water rights held by the City of Fallon or Churchill County would be impacted. The State Engineer finds the protestants did not prove any interference with existing water rights held by either protestant and did not prove any unreasonable lowering of the ground-water levels impacting domestic well owners. The State Engineer understands that as land goes out of agricultural production ground-water recharge may decline, but he does not believe he has the authority to require farming to continue to support said recharge.

#### VIII.

The protestants alleged that if the applications are granted they would adversely effect the cost of charges for delivery of water and lessen efficiency in the delivery of water to other Newlands Reclamation Project water right owners. The applicants moved to strike this protest claim on the grounds that it was not proven by the protestants. The protestants did not provide any testimony or evidence in support of this protest claim. The

applicants provided evidence that the USFWS has agreed to pay the operation and maintenance charges for the water rights being sought to be transferred to the wetlands for the next 40 years.<sup>74</sup> The applicants further provided evidence that the transfer of water rights to the wetlands would have a negligible effect on project efficiencies and in some cases may increase the efficiency.<sup>75</sup>

The State Engineer finds a motion to strike was not a properly made motion at this phase of the proceeding, and therefore, is denied. The State Engineer finds the protestants allegations that these change applications will adversely affect the cost of charges for the delivery of water and lessen efficiency were not proven.

**IX.**

The protestants alleged that if the applications are granted they would have an adverse effect on the tax base and would thereby be detrimental to the public interest. The applicants moved to strike this protest claim on the grounds that it was not proven by the protestants. The State Engineer finds a motion to strike was not a properly made motion at this phase of the proceeding, and therefore, is denied. The protestants did not provide any testimony or evidence in support of this protest claim; therefore, the State Engineer finds that the claim was not proven.

**X.**

The protestants alleged that if the applications are granted they would create a potential dust hazard and air pollution within the City of Fallon and would thereby be detrimental to the public interest. The applicants moved to strike this protest claim on the grounds that it was not proven by the protestants. The protestants did not provide any testimony or evidence in support

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<sup>74</sup> Transcript, p. 322; Exhibit No. 53.

<sup>75</sup> Transcript, pp. 278-285.

of this protest claim other than referring to notations in the wetlands environmental impact statement.<sup>76</sup> Therefore, the State Engineer finds that the claim was not proven as to these applications. Furthermore, the applicants provided evidence that as to Application 63802 there are streets, houses, and yards already in place and provided evidence that the remainder of the site is revegetating itself.<sup>77</sup>

As to Application 62314, the applicants provided evidence demonstrating the existing place of use is covered by a paved road, preventing dust, and the right-of-way has revegetated itself.<sup>78</sup> The applicants' witness opined that as to air quality, the issue is moot as to Applications 63802 and 62314 because of the other uses to which the lands have already been put.<sup>79</sup>

As to Application 62492, the applicants provided evidence that the soil is made up of silts and heavy clays that are heavily bound together and testified that the soil binds itself as it dries out making the propensity for air contamination slim and indicated that the remaining roots will help bind the soil.<sup>80</sup> As to Application 62315, the applicants provided evidence that the land is still being used for grazing even though irrigation ceased some time ago and the land is covered by some reestablished vegetation.<sup>81</sup> As to Application 63464, the applicants provided evidence that the soil is hard and has a tendency to bind, thus, the propensity for air contamination is low and some vegetation

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<sup>76</sup> Final Environmental Impact Statement Water Rights Acquisition for Lahontan Valley Wetlands, Churchill County, Nevada, U.S. Dept. of Interior, Fish and Wildlife Service, September 1996.

<sup>77</sup> Transcript, pp. 362-363; Exhibit Nos. 56, 57, 58.

<sup>78</sup> Transcript, p. 364, Exhibit Nos. 59, 60.

<sup>79</sup> Transcript, pp. 369-370.

<sup>80</sup> Transcript, pp. 365-366; Exhibit Nos. 61, 62, 63.

<sup>81</sup> Transcript, pp. 366-367; Exhibit Nos. 64, 65, 66.

has reestablished itself.<sup>82</sup> As to Application 63883, the applicants provided evidence that the soil will bind itself, thus, the propensity for air contamination is low and opined vegetation will reestablish itself naturally.<sup>83</sup> As to Application 63546, the applicants provided evidence that the area is covered by an irrigated field, pasture and native vegetation and that once the irrigation is removed the native vegetation is likely to reestablish itself.<sup>84</sup> As to Application 63652, the applicants provided evidence that there is already natural vegetation reestablishing itself.<sup>85</sup>

The State Engineer finds that the protestants did not provide sufficient testimony or evidence in support of this protest claim, and the applicants provided evidence to rebut the claim; therefore, the protest claim was not proven. The State Engineer finds a motion to strike was not a properly made motion at this phase of the proceeding, and therefore, is denied.

#### XI.

The protestants alleged that if the applications are granted they would present a hazard and danger to the health, safety and welfare of residents and the community because they would jeopardize many thousands of peoples' drinking water supply. These claims have already been addressed in other parts of this ruling, and the State Engineer finds the protestants did not provide any evidence that these applications would in fact cause the allegations alleged.

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<sup>82</sup> Transcript, pp. 367-368; Exhibit Nos. 67, 68.

<sup>83</sup> Transcript, pp. 367-368; Exhibit No. 69.

<sup>84</sup> Transcript, p. 368; Exhibit Nos. 70, 71, 72, 73, 74.

<sup>85</sup> Transcript, p. 368-369; Exhibit Nos. 75, 76, 77, 78.

**XII.**

The protestants alleged that approval of the applications would be contrary to and violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4300, because it would implement federal action prior to the required environmental analysis of the cumulative and systematic effects of said action to the human environment. The protestants argue that they are not asking the State Engineer to address violations of NEPA, but rather that if there is a violation of NEPA, such violation would threaten to prove detrimental to the public interest which is a statutory criteria the State Engineer addresses under NRS § 533.370. The State Engineer finds that he is not the person who is to address violations of the NEPA, and that in order to determine the question as framed by the protestants he would have to determine if there is a violation of NEPA. The State Engineer finds the forum for addressing this issue is not the State Engineer of the State of Nevada, and he will not turn the water appropriation process into a forum for addressing whether the United States has violated NEPA. The jurisdiction of the State Engineer is provided for in the Nevada water law, and related state statutes.

**XIII.**

The protestants alleged that approval of the applications would be contrary to and violate Title II, Public Law 101-618 because it would violate NEPA. The State Engineer finds as in Section XII above that violations of NEPA are for a forum other than an administrative hearing before the State Engineer on a water right application. The State Engineer finds these protestants are attempting to stretch the criterion found in NRS § 533.370 of whether an application "threatens to prove detrimental to the public interest" far broader than the State Engineer believes the legislature intended.

**XIV.**

The protestants alleged that approval of the applications would violate Public Law 101-618 because they would impair

existing water rights. The State Engineer finds the protestants did not prove impairment of existing water rights.

**XV.**

The protestants alleged that approval of the applications would violate Public Law 101-618 and would threaten to prove detrimental to the public interest because it is prior to mandated and prerequisite ground-water studies and mitigation agreements which must determine and mitigate effects to domestic water supply of Churchill County. The State Engineer finds that the issue of adequate ground-water studies and mitigation agreements as set forth in Public Law 101-618 in relation to the domestic water supply is to be enforced in a forum other than the administrative hearing before the State Engineer on these water right applications.

**XVI.**

The protestants alleged that approval of the applications would violate the Safe Drinking Water Act because depletion of ground-water quantity would have corresponding negative impact on quality. The only evidence the protestants provided in support of this protest claim was to cite to p. 88 in Exhibit No. 44 which indicates that irrigation has resulted in decreased concentrations of sulfate, chloride and dissolved solids beneath irrigated lands and removing land from irrigation could cause a change in the concentration of these constituents.<sup>86</sup> The State Engineer finds this is not substantial evidence to prove that these change applications threaten to prove detrimental to the public interest. The State Engineer further finds he does not believe he can force a farmer to continue to irrigate lands with a surface-water source in order to protect the water quality of a junior ground-water user.

**XVII.**

The protestants alleged that the applications request 10 years to go to beneficial use and this is an unreasonable amount

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<sup>86</sup> Transcript, pp. 72-73.

of time in which to put water to beneficial use, and as to Applications 62492, and 63464 that they violate NRS § § 533.380, 533.395, and 533.060 and thereby are contrary to the public interest.

Nevada Revised Statute § 533.365 provides that any interested person may file a written protest against the granting of an application by setting forth with reasonable certainty the grounds of such protest. The State Engineer finds that he cannot adequately determine how NRS § 533.060, as it existed at the time these protests were filed, is violated; therefore, the claim was not set forth with reasonable certainty and should be dismissed.

Nevada Revised Statute § 533.380 provides that the State Engineer shall upon approval of an application set a time before which the complete application of water to beneficial use must be made, which must not exceed 10 years after the date of approval and that the State Engineer may limit the applicant to a shorter amount of time for perfecting the application than is named in the application. The State Engineer finds the applicants did not apply for anything other than what is provided for in law, and therefore, is not a reason to deny the applications.

Nevada Revised Statute § 533.395 addresses the issue of good faith and due diligence after a permit is granted on an application to appropriate water. The State Engineer finds the statute raises no issue to be addressed at this stage of the proceedings and this part of the protest claim is without merit.

#### XVIII.

The protestants allege that there is litigation pending concerning the validity of the studies which support these transfers; thus, the State Engineer may withhold action. Nevada Revised Statute § 533.370(2) provides that the State Engineer may withhold action on an application where court actions are pending. The Hearing Officer took administrative notice of a Federal Court decision which indicates that the protestants' challenge to the NEPA process pursuant to Public Law 101-618 was denied by the

Federal District Court.<sup>87</sup> The State Engineer finds that even though the protestants have appealed the decision to the Ninth Circuit Court of Appeals, it is discretionary with the State Engineer whether to postpone action on the pending applications and he chooses not to do so.

**XIX.**

The protestants alleged that the applications, if granted, would violate NRS § 533.368 because hydrologic and environmental studies are expressly required under Public Law 101-618 to determine and mitigate the effects of the proposed transfers to the City of Fallon's domestic drinking water supply. Nevada Revised Statute § 533.368 provides the State Engineer with the discretionary authority to determine whether a study is required, but does not mandate one be conducted under NRS § 533.368 when a protestant perceives studies have not been conducted as required under other federal laws. The State Engineer finds there is no violation of NRS § 533.368 and the protest claim is without merit.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>88</sup>

**II.**

The State Engineer is prohibited by law from granting a permit under an application to change the public waters where<sup>89</sup>:

- a. the proposed use conflicts with existing rights; or
- b. the proposed use threatens to prove detrimental to the public interest.

**III.**

The State Engineer concludes that protest items identified above as Items 4, 5, 14 and 18 were properly dismissed as either

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<sup>87</sup> Transcript, p. 317.

<sup>88</sup> NRS chapters 533 and 534.

<sup>89</sup> NRS 533.370(3).

being irrelevant to any issues before the State Engineer or as not being plead with reasonable certainty in order for the State Engineer to be able to adequately determine the issues raised by them.

**IV.**

The State Engineer concludes the applications are not defective in that they are not requesting a change in manner of use.

**V.**

The State Engineer concludes the applications are not requesting more than one manner of use.

**VI.**

The State Engineer concludes the issue of the attempted reservation of 0.51 of an acre-foot per acre is not ripe for decision and is moot upon the State Engineer's decision that these applications are not requesting a change in manner of use.

**VII.**

The State Engineer concludes the protestants did not prove their claim that these change applications would threaten to prove detrimental to the public interest by removing water resources from lands within aquifer recharge areas. The State Engineer concludes the applicants proved that the lands at the existing places of use as to Applications 63802 and 62314 were not capable of being irrigated prior to acquisition by the USFWS precluding any recharge even if the applications were denied. The State Engineer concludes as to Applications 62315, 62492, 63464, 63546, 63652 and 63883 the evidence does not support that these existing places of use are within a significant area of recharge particularly as to water rights held by the City of Fallon, and Churchill County did not adequately make a case as to what water rights it holds that would be impacted.

**VIII.**

The State Engineer concludes the protestants did not adequately prove their claims that the granting of these applications would conflict and impair their water rights.

**IX.**

The State Engineer concludes the protestants did not prove their claim that the applications if granted would adversely affect costs of charges for delivery of water or lessen the efficiency in delivery of water to other Newlands Reclamation Project water right holders, and the applicants rebutted these contentions.

**X.**

The State Engineer concludes the protestants did not prove their claim that the applications if granted would adversely affect the tax base.

**XI.**

The State Engineer concludes the protestants did not prove the applications if granted would create a potential dust hazard and air pollution, and the applicants rebutted these contentions.

**XII.**

The State Engineer concludes the protestants did not prove their claim that the applications if granted would jeopardize many thousands of peoples' drinking water.

**XIII.**

The State Engineer concludes violations of the National Environmental Policy Act are not within his review under Nevada water law.

**XIV.**

The State Engineer concludes that the protestants did not prove these change applications will impair existing rights.

**XV.**

The State Engineer concludes whether the provisions of Public Law 101-618 are violated, because the mandated and prerequisite ground-water studies and mitigation agreements have not been done, is for another forum.

**XVI.**

The State Engineer concludes the protestants did not prove that these change applications will violate the Safe Drinking Water Act.

**XVII.**

The State Engineer concludes, while he may or may not grant the applicants the 10 years requested to go to beneficial use under these applications, it was not an unreasonable amount of time to request as it is a time frame found in Nevada water law. The State Engineer concludes the protest allegation that the applications if granted would violate NRS § 533.060 was not plead with reasonable certainty and should be dismissed. The State Engineer concludes the protest claim that the applications if granted would violate NRS § 533.395 is without merit as that section of the statute addresses issues that arise after a permit is granted on an application.

**XVIII.**

The State Engineer concludes that even though an appeal is pending on the protestants challenge to the NEPA process pursuant to Public Law 101-618, the State Engineer has the discretion under NRS § 533.370(2) to proceed with the water right applications and was within his authority to do so.

**XIX.**

The State Engineer concludes there is no violation of NRS § 533.368 by the fact that the protestants believe the provisions of Public Law 101-618 have not been complied with by the United States. The two statutes are completely separate and independent, one being state law and the other being federal law.

**XX.**

The State Engineer concludes that granting these change applications would not interfere with existing rights or threaten to prove detrimental to the public interest.

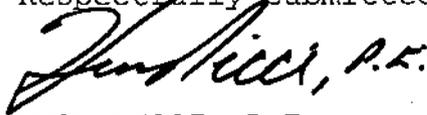
**RULING**

The protests to Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802 and 63883 are hereby overruled and the applications are granted for the 2.99 acre-feet per acre requested for transfer and subject to:

1. the payment of statutory permit fees;
2. existing water rights.

No ruling is made on the attempted reservation of the 0.51 acre-feet per acre since no attempt has been made to move that water; therefore, it is not ripe for decision.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT/cl

Dated this 18th day of  
October, 2000.

**EXHIBIT No. 1**

Exhibit A to the application describes the proposed place of use as the following:

In T.21N., R.32E., M.D.B.& M. - all of Sections 2 through 11, 14 through 22, 27 through 34.

In T.21N., R.31E., M.D.B.& M. - all of Sections 1 through 6, Lots 1 and 2 and the E $\frac{1}{2}$  NW $\frac{1}{4}$  and the N $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 7, all of Section 8, the E $\frac{1}{2}$  and the N $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 9, all of Sections 10 through 16, the S $\frac{1}{2}$  of Section 17, all of Section 18, Lots 3 and 4, the E $\frac{1}{2}$  SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of Section 19, all of Sections 20 through 36.

In T.20N., R.32E., M.D.B.& M. - all of Sections 3 through 10, Sections 16 through 21, 29 and 30.

In T.20N., R.31E., M.D.B.& M. - all of Section 1, 3, 4, 6, 9, 12, 13, 14, 23, 24, 25, 26, 34, 35 and 36, Lots 1, 2, 3, and 4, the S $\frac{1}{2}$  NW $\frac{1}{4}$ , the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , the E $\frac{1}{2}$  SE $\frac{1}{4}$ , and the SW $\frac{1}{4}$  of Section 2, Lots 1, 2 and 4, the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , the S $\frac{1}{2}$  NE $\frac{1}{4}$ , the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , the SE $\frac{1}{4}$  SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of Section 5, Lots 1, 2, 3 and 4, the E $\frac{1}{2}$  NW $\frac{1}{4}$ , the W $\frac{1}{2}$  NE $\frac{1}{4}$ , the NE $\frac{1}{4}$  SW $\frac{1}{4}$  and the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 7, the S $\frac{1}{2}$ , NE $\frac{1}{4}$ , the S $\frac{1}{2}$  NW $\frac{1}{4}$ , and the NE $\frac{1}{4}$ , and the NW $\frac{1}{4}$  of Section 8, the N $\frac{1}{2}$ , the SW $\frac{1}{4}$  of Section 10, the E $\frac{1}{2}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , S $\frac{1}{2}$  SW $\frac{1}{4}$  and the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 11, Lots 1, 2, 3, and 4 of Section 18, Lots 1, 2, 3 and 4 of Section 19, the E $\frac{1}{2}$  of Section 22, the E $\frac{1}{2}$ , the SW $\frac{1}{4}$ , the E $\frac{1}{2}$  NW $\frac{1}{4}$ , and the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 27, the E $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 28, Lots 1, 2, 3 and 4 of Section 30, the E $\frac{1}{2}$ , the E $\frac{1}{2}$  SW $\frac{1}{4}$ , and the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 33.

In T.19N., R.31E., M.D.B.& M. - all of Sections 2, 3, 9, 10, 11, 14, 15, 16, 20, 21, 22, 27 through 33, Lots 1, 2 and 3, the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , the S $\frac{1}{2}$  NE $\frac{1}{4}$ , the E $\frac{1}{2}$  SW $\frac{1}{4}$ , the SW $\frac{1}{4}$  SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of Section 4, Lot 4 east of Stillwater Slough in Parcel 1 of Section 7, the E $\frac{1}{2}$ , the SW $\frac{1}{4}$ , and the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 17, Lot 1 east of Stillwater Slough in Parcel 1, Lot 2 in Parcel 1, Lot 3 in Parcel 1, Lot 4 in Parcel 1, the SE $\frac{1}{4}$  NW $\frac{1}{4}$  in Parcel 1, E $\frac{1}{2}$  SW $\frac{1}{4}$  in Parcel 1 and the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 18, and Lot 1 in Parcel 1, Lot 2 in Parcel 1, Lots 3 and 4, the E $\frac{1}{2}$  NW $\frac{1}{4}$ , the E $\frac{1}{2}$  SW $\frac{1}{4}$ , the SE $\frac{1}{4}$  and the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 19.

In T.19N., R.30E., M.D.B.& M. - the E $\frac{1}{2}$  E $\frac{1}{2}$ , east of Stillwater Slough in Parcel 1 of Section 13, and the NE $\frac{1}{4}$  NE $\frac{1}{4}$  in Parcels 1 and 3, the W $\frac{1}{2}$  NE $\frac{1}{4}$  in Parcel 3, and the E $\frac{1}{2}$  NW $\frac{1}{4}$  in Parcel 3 of Section 24.

**Exhibit No. 2**

Exhibit A to the application describes the proposed place of use as the following:

In T.21N., R.32E., M.D.B. & M. - all of Sections 2 through 11, 14 through 22, 27 through 34.

In T.21N., R.31E., M.D.B. & M. - all Sections.

In T.20N., R.32E., M.D.B. & M. - all of Sections 3 through 10, Sections 16 through 21, 29 and 30.

In T.20N., R.31E., M.D.B. & M. - all Sections.

In T.19N., R.31E., M.D.B. & M. - all of Sections 2 through 11, 14 through 22, and 27 through 33.

In T.19N., R.30E., M.D.B. & M. - in Section 13, all those portions of the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , and the SE $\frac{1}{4}$  SE $\frac{1}{4}$  lying east of Stillwater Slough, and in Section 24 the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , the SE $\frac{1}{4}$  NW $\frac{1}{4}$  and the SW $\frac{1}{4}$  NE $\frac{1}{4}$ .

**Exhibit No. 3**

Exhibit A to the application describes the proposed place of use as the following:

In T.19N., R.30E., M.D.B.& M. - all of Sections 3, 4, 8, 9, 10, 15, 16, 17, 20, 21 and 22, the NW $\frac{1}{4}$  of Section 2, the NW $\frac{1}{4}$  of Section 11, and the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 23.

In T.20N., R.30E., M.D.B.& M. - the S $\frac{1}{2}$  of Section 33, the S $\frac{1}{2}$  of Section 34, the SW $\frac{1}{4}$  and the W $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 35.