

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

IN THE MATTER OF APPLICATIONS 73417, )  
73418, 73419, 73420, 73421, 73422 AND 73423 )  
FILED TO CHANGE POINT OF DIVERSION, )  
MANNER AND PLACE OF USE OF THE )  
WATERS OF THE CARSON RIVER, DAYTON )  
VALLEY HYDROGRAPHIC BASIN (103), )  
LYON COUNTY, NEVADA. )

**RULING**

**#5857**

**GENERAL**

**I.**

Application 73417 was filed on November 1, 2005, by the United States of America, Fish and Wildlife Service (USFWS) to change the place of use and manner of use of 270 acre-feet annually (afa) of water heretofore appropriated under Carson River Decree Claim 783 (*Alpine Decree*).<sup>1</sup> The existing place of use is described as being located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 35, N $\frac{1}{2}$  NW $\frac{1}{4}$ , S $\frac{1}{2}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T.17N., R.24E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The point of diversion is described as being located at Buckland Ditch from the left bank within the SE corner, NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M. and is to remain unchanged.<sup>2</sup>

**II.**

Application 73418 was filed on November 1, 2005, by the USFWS to change the point of diversion, place of use and manner of use of 745 afa, a portion of water heretofore appropriated under Carson River Decree Claim 784 (*Alpine Decree*). The existing place of use is described as being located within the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$ , of Section 6, T.16N., R.25E., M.D.B.&M. and the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , SW $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, SW $\frac{1}{4}$  NW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  SW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  SW $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$ ,

<sup>1</sup> Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) (*Alpine Decree*).

<sup>2</sup> Exhibit No. 4.

SW $\frac{1}{4}$  SE $\frac{1}{4}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 36, T.17N., R.24E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The existing point of diversion is described as being located at Buckland "A" Ditch from the south bank within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, T.17N., R.24E., M.D.B.&M. and the proposed point of diversion is described as being located at Buckland Ditch from the left bank within the SE corner, NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M.<sup>3</sup>

### III.

Application 73419 was filed on November 1, 2005, by the USFWS to change the point of diversion, place of use and manner of use of 163.65 afa, a portion of water heretofore appropriated under Carson River Decree Claim 788 (*Alpine Decree*). The existing place of use is described as being located within the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  SW $\frac{1}{4}$ , SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 28, T.17N., R.25E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The existing point of diversion is described as being located at Big Bend Ditch from the north bank in south side center within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 36, T.17N., R.24E., M.D.B.&M. and the proposed point of diversion is described as being located at Buckland Ditch from the left bank within the SE corner, NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M.<sup>4</sup>

### IV.

Application 73420 was filed on November 1, 2005, by the USFWS to change the place of use and manner of use of 100 afa, a portion of water heretofore appropriated under Permit 50317, Certificate 14537. The existing place of use is described as being located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 29, T.17N., R.25E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the

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<sup>3</sup> Exhibit No. 5.

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

maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The point of diversion is described as being located at Buckland Ditch within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M. and is to remain unchanged.<sup>5</sup>

**V.**

Application 73421 was filed on November 1, 2005, by the USFWS to change the place of use and manner of use of 202.5 afa, of water heretofore appropriated under Permit 50774, Certificate 13159. The existing place of use is described as being located within the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 32, T.17N., R.25E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The point of diversion is described as being located at Buckland Ditch within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M. and is to remain unchanged.<sup>6</sup>

**VI.**

Application 73422 was filed on November 1, 2005, by the USFWS to change the place of use and manner of use of 272.5 afa, of water heretofore appropriated under Permit 50775, Certificate 13160. The existing place of use is described as being located within the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , SW $\frac{1}{4}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  SE $\frac{1}{4}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, SW $\frac{1}{4}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 32, T.17N., R.25E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The point of diversion is described as being located at Buckland Ditch within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M. and is to remain unchanged.<sup>7</sup>

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<sup>5</sup> Exhibit No. 7.

<sup>6</sup> Exhibit No. 8.

<sup>7</sup> Exhibit No. 9.

## VII.

Application 73423 was filed on November 1, 2005, by the USFWS to change the place of use and manner of use of 642.5 afa, of water heretofore appropriated under Permit 50776, Certificate 13161. The existing place of use is described as being located within the SE $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$ , of Section 29, SW $\frac{1}{4}$  NE $\frac{1}{4}$ , NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 32, NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 33, T.17N., R.25E., M.D.B.&M. The proposed place of use is described as all lands within the approved boundary of the Stillwater National Wildlife Refuge. The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife with the existing manner of use being identified "as decreed." The point of diversion is described as being located at Buckland Ditch within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.17N., R.24E., M.D.B.&M. and is to remain unchanged.<sup>8</sup>

## VIII.

Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 were timely protested by Edwin L. Depaoli and Clarice M. Depaoli as Trustees of the Depaoli O Lazy L Trust on the following grounds:<sup>9</sup>

1. The proposed change conflicts with existing rights;
2. The proposed change threatens to prove detrimental to the public interest;
3. On its face, the application cannot be granted because it violates the provisions of N.R.S. § 533.045 in that it proposes to divert water from the Carson River at the Buckland Ditch, and to return the water back to the Carson River at the terminus of the Buckland Ditch, with no beneficial use of the water diverted into the Buckland Ditch at a place of use that is served from the Buckland Ditch;
4. On its face, the application states that water with either an allowed point of diversion at, or requested change of point of diversion to, the Buckland Ditch in fact will be diverted from the Carson River at a different point of diversion (the map indicates the S Line Canal) without the approval of the State Engineer for the change in point of diversion at the downstream point or points of diversion;
5. The Alpine Decree requires that the historic practices and customs recognized in the Decree be followed. The Alpine Decree, in Finding of Fact IX, divides the Carson River into eight segments. The Alpine Decree, in Finding of Fact X.1(e), provides that it is the historic

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<sup>8</sup> Exhibit No. 10.

<sup>9</sup> Exhibit No. 12

practice that when the Carson River is on regulation, each segment of the river is treated autonomously. On its face, this application seeks to circumvent that historic practice and custom by establishing a fictional and unlawful point of diversion in Carson River Segment 7(e), not involving any beneficial use of water from that point of diversion, with the actual beneficial use occurring from a point of diversion in Carson River Segment 8;

6. The change proposes to divert relatively small quantities of water at the head of the Buckland Ditch, to then have that water flow through the Buckland Ditch with undetermined losses (which at times can be 100%), return to the Carson River to flow to Lahontan Reservoir with undetermined losses (which at times can be 100%), to then flow through Lahontan Reservoir with undetermined losses, to then flow down the Carson River downstream of Lahontan Reservoir with undetermined losses, and to then be diverted from the Carson River and delivered to its new place of use. The change as proposed cannot be administered and, therefore, will conflict with existing rights and threatens to prove detrimental to the public interest;
7. Because the Remarks section is not clear and could be interpreted as proposing that the water being changed has a point of "non-diversion" at the Buckland Ditch, to then flow down the Carson River, it either violates N.R.S. § 533.045 because it has no beneficial use at that "point of diversion", or it is in violation of N.R.S. 533.330 because it in effect is an application for two different beneficial purposes, instream flows from the Buckland Ditch to the point where it is diverted for "maintenance of wetlands"; and
8. The water rights proposed to be changed under Application No. 73419 have been abandoned.

#### IX.

Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 were timely protested by Albert Mussi on the following grounds:<sup>10</sup>

- Adversely effect lower Carson River water users in Segment 8
- Transfer, as written, is contrary to the provisions of Alpine Decree & would set precedence to make entire river system unmanageable.
- Application has incorrect proposed place of diversion & was not published in proper newspaper to give adequate public notice.
- reasons for protest

#### Attachment "A"

- United States of America, Fish & Wildlife Service (USFWS) is trying to change place of use of water from Segment 7 to Segment 8 . of Carson River. As stated in Alpine Decree, each segment of river is autonomous. State Engineer has long held that when water is moved from one segment of river to another the priority date of water is lost. In the past, the State Engineer has

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<sup>10</sup> Exhibit No. 13.

adjusted the priority to the date of change application. This is the only way to maintain fairness to all. U.S.F.W.S is attempting to circumvent this process by claiming the same Segment 7 point of diversion. In reality they are trying to change the point of diversion from Segment 7 to Segment 8 (approximately 30 miles downstream)

- This change application, if granted, would have a chaotic effect on the customary use of the lower Carson River. Return flows, conveyance losses, conflicting priorities in different segments, monitoring usage, & water deliveries are all problems.
  - There is a substantial amount of return flow water in Segment 8 regardless of the flow in Segment 7. USFWS should have no claim to this water on a Segment 7 water right.
  - There would be an enormous loss of water through evaporation & seepage by transporting the water an additional 30 miles downstream. This loss should be charged to U.S.F.W.S. How would this loss be calculated & charged to USFWS so as to not adversely effect other water users? Moving water such a great distance downstream is terribly inefficient.
  - Since each segment of the river is autonomous, moving senior water rights from one segment into another will only create conflict & turmoil. As the owner of claim numbers 795 & 796 in Segment 8, I will directly be adversely affected by the proposed change. USFWS currently holds excess water rights in Segment 8 with a priority date of approximately 1950. They are the most junior water rights in Segment 8. I often have problems with water being diverted to USFWS ahead of my senior 1898 & 1908 priorities.
  - If approved, U.S.F.W.S would be using water rights from Segment 7 in both Segment 7 & Segment 8. Adequate safeguards are not in place to insure that no excess diversions are made by using water in both places.
- With point of diversion & place of use effectively being moved into Segment 8, application should have been advertised in Segment 8 newspaper, Lahontan Valley News, to provide proper public notice
- Wildlife would be better served by using water in place
- Moving water from one segment to another without losing priority would set dangerous precedence & allow segmentation system of river in Alpine Decree to be eroded. Since each segment has unique characteristics, practices, customs, agreements, & decrees the consequences are unknown & could be very serious.
- Water not available for transfer due to forfeiture, abandonment, or lack of perfection

The protest also indicates that the applications should be denied, but if the applications are approved the priority date should be changed to November 1, 2005.

**X.**

After all parties were duly noticed by certified mail, a public administrative hearing was held on July 25, 2007, regarding Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 in Carson City, Nevada, before representatives of the Office of the State Engineer.<sup>11</sup>

**FINDINGS OF FACT**

**I.**

The surface waters sought for change by the Applicant are from the Carson River. The waters of the Carson River were adjudicated in the *Alpine* Decree and the Carson River and its tributaries are fully appropriated under said decree. The *Alpine* Decree is a federal decree and the distribution of the decree waters is made by the Federal Water Master. The *Alpine* Decree specifies that changes to the waters covered by the decree must be made through the Office of the State Engineer.

Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 are seeking to change the point of diversion, place of use or manner of use of water that is identified under Carson River Decree claim numbers or water that is identified by Nevada Division of Water Resources permit numbers. For those rights identified by permit number, the water traces back to Carson River Decree claim numbers. For example, Application 73421 was filed to change the place of use and manner of use of water heretofore appropriated under Permit 50774, Certificate 13159. Permit 50744 previously changed the point of diversion of Carson River Decree Claim Number 785.

Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 also indicate a change in manner of use from 'as decreed' (irrigation) to maintenance of wetlands for recreation and wildlife. The *Alpine* Decree provides that, "Change of manner of use applications from use for irrigation to any other use . . . shall be allowed only for the net consumptive use of the water right as determined by this decree." Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 were filed for the consumptive use portion of the water only, as specified by the decree when a change in manner of use occurs. However, it was implied that the Applicant chose to change only the

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<sup>11</sup> Exhibits and Transcripts, public administrative hearing before the State Engineer, July 25, 2007, official records in the Office of the State Engineer (Hereafter, "Transcript" and "Exhibits").

consumptive use portion to address potential adverse effect to any downstream users or Lahontan Reservoir storage and not due to a change in manner of use.<sup>12</sup>

In change applications similar to these, the USFWS did not file them as a change in manner of use and the matter of whether they were a change in manner of use was a protest issue.<sup>13</sup> This issue was also squarely addressed in State Engineer's Ruling No. 5759. The State Engineer found in Ruling No. 5078 that it appears that the decree court and the parties believed that use of water on Carson Pasture and Stillwater areas was a form of irrigation. In Ruling No. 5078, the State Engineer found that he did not believe the intent of the applications should be constrained by the use of the words "maintenance of wetlands" when in other instances a beneficial use can 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. The use for a factory could be considered a commercial, industrial or municipal use. The State Engineer found that just because a definition exists, which provides that the maintenance of wetlands can fall under the definition of wildlife purposes does not preclude that lands irrigated for wildlife purposes could not fall under the definition of irrigation. The growth of grass on a golf course is often considered irrigation, but the grass is not sold as a commodity. It is the recreational use on top of the grass that is the result sought. The growth of wetlands vegetation in this instance is akin to a rice patch, which is the growth of a cereal grass grown in standing water for its seed.

The State Engineer finds he is the proper authority to make the decision on Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423. The State Engineer finds the applications are not in fact requesting a change in manner of use, despite the contrary indications on the application forms. The State Engineer finds the changes are being limited by the Applicant to the consumptive use portion in an effort to address impacts to downstream users and Lahontan Reservoir storage.

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<sup>12</sup> Transcript of Proceedings, Pre-Hearing Conference, April 30, 2007, p. 11.

<sup>13</sup> State Engineer Ruling No. 4979, dated Oct. 18, 2000, State Engineer Ruling No. 5078, dated September 26, 2001, official records in the Office of the State Engineer.

## II.

The *Alpine* Decree dictates that the Carson River and its tributaries are divided into eight segments as follows:

- Segment 1: The East Fork of the Carson River from the California/Nevada state line up to the headwaters of the East Fork in the mountains.
- Segment 2: The East Fork of the Carson River from the California/Nevada state line to the confluence of the East and West Forks of the Carson River.
- Segment 3: The West Fork of the Carson River from the gauge at Woodfords, California upstream to the headwaters in the mountains.
- Segment 4: The West Fork of the Carson River from the gauge at Woodfords to the California/Nevada state line.
- Segment 5: The West Fork of the Carson river (and Brockliss Slough) between the California/Nevada state line and the confluence of the East and West Forks of the Carson River.
- Segment 6: The main stream of the Carson River from the confluence of the East Fork, West Fork and Brockliss Slough to the gauge at Carson City.
- Segment 7: The main stream of the Carson from the Carson City gauge to Lahontan reservoir. This segment is further subdivided for administration into autonomous subsegments:
  - (a) Mexican Ditch, Dayton and the reach between Rose Ditch and Cardelli Ditch, inclusive;
  - (b) Gee Ditch;
  - (c) Koch Ditch;
  - (d) Houghman and Howard Ditches;
  - (e) Buckland Ditch.
- Segment 8: The area below the Lahontan Dam.

When the river is on regulation each segment of the river is treated autonomously.<sup>14</sup> Accordingly, the priority date of each claim is enforced within each segment, with such exceptions as pointed out in the decree and in accordance with

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<sup>14</sup> *Alpine* Decree.

established practices, customs, agreements and decrees. In their closing briefs, both the Applicant and Protestant note that when the Alpine Decree was entered in 1980, it was accompanied by a separate decision that explains the purpose of the segmentation of the Carson River. The Opinion states:

Each of these 8 segments shall be treated autonomously once the river is on regulation. For example, the Water Master shall distribute water for Segment 3 in accordance with the priorities in the limits of Segment 3. The Water Master shall not enforce a senior priority in one segment of the river against a junior priority in another segment of the river. The Court finds that this arrangement provides for by far the most economical and beneficial use of the available water and the most practical rule for administration by the Federal Water Master.<sup>15,16</sup>

The Applicant indicates that it does not believe this requires a loss in priority when moving from one segment to another. Also, because the Applicant intends to call for its water under the 40/40/20 rule under the *Alpine* Decree, its call for water would generally occur before the river ordinarily goes on regulation. The 40/40/20 rule is where the water is taken at the maximum rate of 40% in the first month, 40% in the next month and the remaining 20% in the next month, typically within the first three months of the irrigation season.<sup>17</sup> The Applicant also claims that losing priority would be contrary to Nevada water law, as NRS 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 be simultaneously transferred and become appurtenant to another place of use, in the manner provided in this chapter without losing priority of right,” and that absent a showing of harm, the priority dates should remain unchanged.<sup>18</sup>

The Protestant believes, “The result of the autonomous regulation provision is that a water right in one segment which is moved to another segment loses its priority vis-a-vis all other water rights in its new segment.”<sup>19</sup> The point of diversion and place of use of the existing water rights, to be changed under Applications 73417, 73418, 73419,

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<sup>15</sup> United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 892 (D. Nev. 1980).

<sup>16</sup> Exhibit Nos. 73 and 77, p. 14 and p. 10, respectively.

<sup>17</sup> Transcript, p. 101.

<sup>18</sup> Exhibit No. 73, p. 14.

<sup>19</sup> Exhibit No. 77, p. 11.

73420, 73421, 73422 and 73423, are contained within Segment 7(e). As filed, the change applications would retain a point of diversion within Segment 7(e), by utilizing the Buckland Ditch as the proposed point of diversion. The proposed place of use, the Stillwater Wildlife Refuge, would be within Segment 8. The Protestants contend that since the Applicant is not diverting any water into Buckland Ditch the actual point of diversion should be the point at which the water is diverted from the main stem of the Carson River, which according to the Applicant would most likely occur at Carson Dam or other diversion structure downstream of Lahontan Reservoir. This is a significant issue as the Carson Dam and the other diversion structures are below Lahontan Reservoir and therefore, within Segment 8.

The Applicant has indicated that one reason for using the Buckland Ditch as the proposed point of diversion is to prevent a loss in priority of its Carson River water rights.<sup>20</sup> Also, the Applicant intends to exercise its Segment 7(e) priorities within Segment 8 of the Carson River, if necessary.<sup>21</sup>

The position of the Office of the State Engineer has historically been that a change in point of diversion from one segment to another must result in a corresponding change of the priority date to the current filing date of the change application. At a recent *Alpine* Decree Workshop, the Federal Water Master explained that he and a former State Engineer determined that it is inherent in the language of the *Alpine* Decree and the accompanying Opinion of Judge Thompson that the priority must be lost when water is moved from one segment of the river to another. A review of records on file in the Office of the State Engineer shows that the Division has consistently followed the provisions of the *Alpine* Decree and Opinion, in this regard.<sup>22</sup>

The State Engineer finds that the provisions of the *Alpine* Decree and Opinion require that a change in point of diversion from one segment to another must result in a corresponding change of the priority date to the current filing date of the change application. The State Engineer further finds that NRS § 533.040 does not supersede the *Alpine* Decree in this matter.

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<sup>20</sup> Transcript, pp. 83 and 84.

<sup>21</sup> Transcript, pp. 91 and 92.

<sup>22</sup> Exhibit Nos. 58, 59, 60, 61, 62, 63, 64 and 65.

### III.

An examination of the change applications show that the proposed points of diversion are being changed to, or are remaining at, the Buckland Ditch. A large portion of the protest issues concern the use of Buckland Ditch as the proposed point of diversion. The concerns of the Protestants became more apparent when testimony from the Applicant indicated that its intent is not to divert water into the Buckland Ditch.<sup>23</sup> Rather, the Applicant proposes to call for the water at Buckland Ditch under its existing priority dates and leave the water in the Carson River. The water will then flow down the Carson River to Lahontan Reservoir, but it will not be stored in Lahontan Reservoir. An equal amount of water will be released from the reservoir and continue down the Carson River where it will eventually be diverted from the Carson River at the Carson Dam, the Coleman Dam, and/or the Sagouspe Dam and thence into the Newlands irrigation project. The water would be conveyed generally through the V line/S Line canals or through other alternative routes to the Stillwater Point Reservoir for ultimate use within the Stillwater National Wildlife Refuge.<sup>24</sup>

The Protestant alleges that the real point of diversion occurs where the water is actually diverted from the Carson River and refers to the proposed point of diversion at Buckland Ditch as a “fictional point of diversion,” since no water will actually be diverted from the river at this point and the ditch will **not** be utilized to convey the water to the proposed place of use. In response, the Applicant cites several cases where the courts have found that a physical diversion of water is not required to appropriate water.<sup>25</sup> The State Engineer agrees that in Nevada water can be appropriated and placed to beneficial use without a physical diversion from the stream. These appropriations generally involve an in-situ use of the water such as maintaining in-stream flows for fish habitat, for recreational use at a reservoir, or some other use that does not require a physical diversion of the water from the stream course for beneficial use to occur. However, in this case, the proposed place of use does not include the Carson River channel, there is no in-stream use proposed and the proposed place of use is located off the main stem of the Carson River, i.e., the water must be diverted from the Carson River

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<sup>23</sup> Transcript, p. 75.

<sup>24</sup> Transcript, pp. 77, 140-141 and Exhibit No. 74, p. 2.

<sup>25</sup> Exhibit 73, p. 9.

in order to reach the Stillwater National Wildlife Refuge. The proposed place of use is far removed from the proposed point of diversion and the water will have to travel at least 36 miles, and possibly as far as 53 miles, from Buckland Ditch before it is actually diverted from the Carson River.<sup>26</sup> The water then must flow through the Newlands irrigation project to Stillwater Point Reservoir before it makes it to the proposed place of beneficial use within the Stillwater National Wildlife Refuge.

The Applicant has clearly indicated that the water sought for transfer under Applications 73417 through 73423 would not be diverted from the Carson River at Buckland Ditch, the beneficial use is not for instream flows in the Carson River but will be diverted downstream of Lahontan Dam, most likely at the Carson Dam diversion structure and taken to the Stillwater National Wildlife Refuge.<sup>27</sup> The Applicant's witness indicated that the reason for retaining the Buckland Ditch as the point of diversion was to help protect the priority of the water right and to distinguish the water rights from flows reaching Lahontan Reservoir, which would otherwise be considered Newlands Project water supply.<sup>28</sup>

The State Engineer finds that the Applicant does not intend to divert water from the Carson River into the Buckland Ditch. The State Engineer finds that the Applicant's proposed place of use is far removed from the Carson River and therefore, requires the diversion of water from the Carson River for beneficial use to occur. The State Engineer finds that the Applicant intends to divert this water from the Carson River at points downstream of Lahontan Reservoir, most likely at the Carson Dam diversion structure, within Segment 8 of the *Alpine* Decree. The State Engineer finds that the Applicant's reasons for retaining the proposed points of diversion at Buckland Ditch, without actually diverting water at this point, are unsupported by the *Alpine* Decree or Nevada water law.

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<sup>26</sup> Exhibit No. 77, p. 4.

<sup>27</sup> Transcript, p. 77.

<sup>28</sup> Transcript, pp. 83-84.

**IV.**

The State Engineer finds that neither substantial testimony nor evidence was received regarding the protest issue that the water rights proposed for change had been abandoned; therefore, that protest issue is overruled.

**V.**

If water is to be diverted from or used in a different county than that in which it is currently being diverted or used, then the State Engineer shall give notice of the receipt of the request for the permit to the Board of County Commissioners of the county in which the water will be diverted or used. Also, the people that request such a permit shall submit a copy of their application and any relevant information to the appropriate Board of County Commissioners.<sup>29</sup> A review of the application files indicates that the applications meet the criteria of the statute; however, a review of the files show the notice to the Board of County Commissioners was not sent by the Division, as required by statute. The Applicant indicated that it has consulted extensively with local governments, including Churchill County and Lyon County, but the Applicant also stated "The State Engineer did not require us or send a notice to any of the affected local governments."<sup>30</sup>

The State Engineer finds that prior to any possible approval of the applications the noticing requirements of NRS § 533.363 must be satisfied, but if the applications are denied the issue is moot.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>31</sup>

**II.**

The State Engineer is prohibited by law from granting an application to appropriate or change the public waters where:<sup>32</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;

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<sup>29</sup> NRS § 533.363.

<sup>30</sup> Transcript, p. 72.

<sup>31</sup> NRS chapter 533.

<sup>32</sup> NRS § 533.370(5).

- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

### III.

The State Engineer concludes that to establish an imaginary or made-up point of diversion for the purposes of retaining priority would violate the *Alpine* Decree and Nevada water law and therefore, would threaten to prove detrimental to the public interest.

### IV.

Every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to gain a full understanding of the proposed change.<sup>33</sup> The applications must also be accompanied by a map illustrating the proposed point of diversion, place of use and other relevant information.<sup>34</sup> A review of the applications and map shows the Buckland Ditch as the proposed point of diversion. It has been found, through the testimony and evidence provided at the administrative hearing, that the actual point of diversion is most likely the Carson Dam diversion structure, which is located downstream of Lahontan Dam and some 36 miles downstream of Buckland Ditch.

The State Engineer concludes the proposed point of diversion on the applications and as illustrated on the supporting map do not reflect the Applicant's intended point of diversion of water from the Carson River; therefore, the applications are flawed and are subject to denial.

### V.

The Protestants have existing water rights under the *Alpine* Decree within Segment 8 of the Carson River. As filed, the granting of the applications could allow for a senior priority in one segment of the river (Segment 7(e)) to be enforced against a junior priority in another segment of the river (Segment 8), at times when the Carson River is on regulation. Therefore, the State Engineer concludes that granting the applications could potentially conflict with the existing water rights of the Protestants.

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<sup>33</sup> NRS § 533.345.

<sup>34</sup> NRS § 533.350.

RULING

The protests are upheld, in part, and Applications 73417, 73418, 73419, 73420, 73421, 73422 and 73423 are hereby denied on the grounds their issuance would conflict with existing rights and threaten to prove detrimental to the public interest.

Respectfully submitted,



TRACY TAYLOR, P.E.  
State Engineer

TT/TW/jm

Dated this 30th day of  
May, 2008.