

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS 51006,)
51041, 51045, 51048, 51050, 51051, 51052,)
51054, 51055, 51056, 51057, 51058, 51059,)
51060, 51061, 51082, 51136, 51137, 51138,)
51139, 51217, 51225, 51226, 51227, 51228,)
51229, 51230, 51231, 51232, 51233, 51234,)
51235, 51236, 51237, 51238, 51368, 51369,)
51370, 51371, 51372, 51373, 51374, 51375,)
51376, 51377, 51378, 51379, 51380, 51381,)
51382, 51384, 51599, 51600, 51601, 51602,)
51604, 51605, 51606, 51607, 51645, 51732 AND)
51734 FILED TO CHANGE THE PLACE OF USE)
OF WATERS HERETOFORE DECREED AND)
SET FORTH IN THE TRUCKEE RIVER AND)
CARSON RIVER DECREES. )

RULING

GENERAL

I.

The sixty-two (62) applications to change the place of use of decreed rights under the Truckee River and Carson River Decrees<sup>1</sup> are the subject matter of this ruling and are set forth in the record.<sup>2</sup> The applications represent requests to change the place of use of decreed water on irrigated lands within the Newlands Reclamation Project under the provisions set forth in the Orr Ditch and Alpine Decrees.<sup>3</sup>

1 Final Decree in United States v. Orr Water Ditch Co., et al., Equity A-3 (D. Nev. 1944), hereinafter referred to as Orr Ditch; and Final Decree in United States v. Alpine Land & Reservoir co., et al., Equity No. D-183 BRT (D. Nev. 1980), hereinafter referred to as Alpine.

2 State of Nevada Exhibits No. 60 and 61, public administrative hearing before the State Engineer, February 16 and 22, 1989.

3 Orr Ditch Final Decree, p. 88. Alpine Final Decree, pp. 161-162.

II.

The applications were timely protested<sup>4</sup> by the Pyramid Lake Paiute Tribe of Indians on the following grounds:

"Comes now The Pyramid Lake Paiute Tribe of Indians whose post office address is P.O. Box 256, Nixon, Nevada 89424 whose occupation is a federally recognized Tribe of Indians, the governing body of the Pyramid Lake Indian Reservation, organized pursuant to the Indian Reorganization Act of 1934, with a Constitution and By-laws approved by the Secretary of the Interior, and protests the granting of Application Numbers 51041, 51045, 51048, 51050, 51051, 51052, 51054, 51055, 51056, 51057, 51058, 51059, 51060, 51061, 51082, 51136, 51137, 51138, 51139, 51217, 51225, 51226, 51227, 51228, 51229, 51230, 51231, 51232, 51233, 51234, 51235, 51236, 51237, 51238, 51368, 51369, 51370, 51371, 51372, 51373, 51374, 51375, 51376, 51377, 51378, 51379, 51380, 51381, 51382, 51384, 51599, 51600, 51601, 51602, 51604, 51605, 51606, 51607, 51645, 51732 and 51734 filed...to change the place of use of the waters of Carson and Truckee Rivers situated in Washoe, Storey, Lyon, Churchill and Humboldt Counties, State of Nevada for the following reasons and on the following grounds, to wit:

1. Pursuant to the federal reclamation law, 43 U.S.C. .389, said application requires the approval of the Secretary of the Interior which has not been obtained.

2. the approval of said application by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. 1531 et seq.; (ii) it would violate the

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<sup>4</sup> In both Orr Ditch and Alpine, the procedures are set forth for accomplishing changes in point of diversion, and place, means, manner or purpose of use. See Footnote 3. The applications and protests have been subject to provisions set forth under the Nevada Water Law, specifically those provisions of Nevada Revised Statutes, Chapter 533. The applications were published in a newspaper of general circulation in the Counties of Churchill, Lyon and Washoe as required by NRS 533.360. NRS 533.365 provides that an interested person may file verified protests to an application within 30 days from the date of last publication of the notice of application. See also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983): "We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer." (Emphasis added).

Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (III) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery; and (v) the Truckee-Carson Irrigation District, and, on information and belief, the applicant has not complied and are not in compliance with the rules and regulations of the Secretary of the Interior applicable to the Newlands Project and approval of said application would encourage further violations of those rules and regulations.

3. The approval of said application by the Secretary of the Interior would violate the Order, Judgement and Decree entered in the case of Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973), specifically Section D(4) of the Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project (OCAP), in that: (i) the Truckee-Carson Irrigation District is not in compliance with said OCAP; and (ii) on information and belief, the applicant who is seeking permission to change the use of water within the Newlands Reclamation Project is not in compliance with Sections C(1), C(3), and/or C(5) of said OCAP and/or with the provisions of the decrees in United State v. Orr Water Ditch Co., Equity No. A-3 (D. Nev. 1944), and United States v. Alpine Land & Reservoir Co., Equity No. D-183 BRT (D. Nev. 1980).

4. Granting or approving the above referenced application by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicant does not have a vested right to use the waters of the Truckee River on the proposed places of use described in this application.

5. Granting or approving the above referenced application by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat

trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

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

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

8. On information and belief, the applicant is not the true and proper owner of the alleged water rights that are the subject of the transfer application. The requested transfer should not be considered or granted unless and until the applicant provides satisfactory documentation of his, her, or their ownership of the land and water rights that are the subject of the application.

9. On information and belief, the water rights title records maintained by the Truckee-Carson Irrigation District are not accurate or reliable and those records do not provide a satisfactory basis for documenting or establishing the existence of Project water rights. The requested transfer should not be considered or granted unless and until the Truckee-Carson Irrigation District documents the existence, amount, location and ownership of all water rights within the Newlands Reclamation Project to the satisfaction of both the Nevada State Engineer and the Secretary of the Interior. Alternatively, the requested transfer should not be considered or granted unless and until the existence, amount, location and ownership of the water rights that are the subject of this application are established and documented to the satisfaction of both the Nevada State Engineer and the Secretary of the Interior.

10. On information and belief, said application should be denied because it would increase the consumptive use of water with the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.

11. On information and belief, said application involves the proposed transfer of alleged water rights from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

12. On information and belief, the applicant has been applying water to some or all of the lands that are the subject of this application in violation of both state and federal law. By using water on the subject lands before applying for or obtaining a transfer from the Nevada State Engineer, the applicant is in violation of Nevada law and cannot obtain an approved transfer from the State Engineer.

13. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced application is granted because: (i) it will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) it will prevent the adequate enforcement and encourage the continued violation of the OCAP; and (iii) it will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

THEREFORE the protestant requests that the application be Denied and that an order be entered for such relief as the State Engineer deems just and proper." (Emphasis in original).

### III.

The United States Department of the Interior petitioned the State Engineer to intervene as an unaligned party in interest.<sup>5</sup> Intervention was granted on the grounds that there were federal interests in these proceedings that justify standing as a party in interest.<sup>6</sup>

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<sup>5</sup> See Interior Exhibit 1, public administrative hearing before the State Engineer, November 26th through 29th, 1984.

<sup>6</sup> United States v. Alpine Land & Reservoir Co., *supra* at 858. See also transcript of public administrative hearing before the State Engineer, Vol. I., pp. 6-14, November 26th through 29th, 1984.

IV.

A public administrative hearing in the matter of the subject applications to change was held before the State Engineer on February 16 and 22, 1989, in Reno and Carson City, Nevada, at the request of Robert S. Peleyger, Counsel for the Protestants, and James Turner, Counsel for the Intervenor.<sup>7</sup> The applicants and protestants have previously made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties who had standing in this matter.<sup>8</sup> The parties stipulated to incorporating the record of previous administrative hearings held on November 26th through 29th, 1984, February 4th through 5th, 1985, and June 24, 1985, on other change applications into the record of evidence in this matter.<sup>9</sup> Exhibits, therefore, have been identified in consecutive order for the purpose of record continuity.

FINDINGS OF FACT

I.

In addressing change applications, both Orr Ditch and Alpine cases and decrees specifically set forth the procedure to accomplish changes in the point of diversion, manner, purpose and place of use.

Orr Ditch provides that:<sup>10</sup>

"Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so

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<sup>7</sup> By stipulation, extensive testimony and evidence on prior change applications was agreed by all parties to be incorporated into the record of later proceedings. (See State of Nevada Exhibit No. 15; see also footnote 9). The stipulation allows for any party to request a hearing before the State engineer if more testimony and evidence is needed.

<sup>8</sup> Transcript of the public administrative hearings on November 26th through 29th, 1984, February 4th and 5th, 1985, and June 24, 1985, available as public record in the Office of the State Engineer, Carson City, Nevada.

<sup>9</sup> Transcript of public administrative hearing before the State Engineer, February 4th, 1985, Vol. I., p. 12, and June 24, 1985, Vol. I, P. 11, and January 16, 1986, p. 13, and January 29, 1988, p.4.

<sup>10</sup> Orr Ditch Final Decree, p. 88.

without injury to the rights of other persons whose rights are fixed by this decree." (Emphasis added).<sup>11</sup>

Similarly, Alpine provides:<sup>12</sup>

"Applications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer. Any person feeling himself aggrieved by any order or decision of the State Engineer on these matters may appeal that decision or order to this court." (Emphasis added).

The State Engineer finds that the change applications that are the subject matter herein are properly before him for consideration and decision.

## II.

It is clear upon review of Alpine and Orr Ditch that the State Engineer, in considering applications to change, is guided by whether the applications would "tend to impair the value of existing rights or be otherwise detrimental to the public welfare".<sup>13</sup> The question of availability of unappropriated water is not at issue. In accordance with the position affirmed by the 9th Circuit,<sup>14</sup> the applications seek only to change water already appropriated under determined rights.

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<sup>11</sup> Recently the Court interpreted this controlling provision: "This Court has interpreted 'in manner provided by law' to mean in accordance with Nevada state procedures for allowing changes.: Final Order Granting the State of Nevada's Motion for Summary Judgment on the Issue of the United States' Application for Changes in Use and Changes in Purpose dated February 28, 1984, United States v. Orr Ditch Water Co. et al., Equity A-3-2-WEC (D. Nev.). In accord, Memorandum Decision and Order dated June 26, 1940, United States v. Orr Ditch Water Co. et al., Equity A-3 (D. Nev.) (Rafetto Decision).

<sup>12</sup> United States v. Alpine Land & Reservoir Co., supra at 857-858. Alpine Final Decree, pp. 161-162.

<sup>13</sup> United States v. Alpine Land & Reservoir Co., supra at 858; NRS 533.370(3).

<sup>14</sup> United States v. Alpine Land & Reservoir Co., supra at 857.

III.

Water duty was addressed at length in Alpine.<sup>15</sup> The Court rejected the contention that contracts executed by Interior and the land owners within Newlands were binding as to duty of water. The Court, 697 F.2d at 853, further found that:

"The right to the use of water acquired under the provisions of this act Reclamation Act of 1902, 43 U.S.C. .372 (1976) shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (Emphasis added).

The Court's additional findings are significant and binding on these proceedings since, in general, it is undisputed by the record that beneficial use under the majority of the change applications has historically occurred on lands described and set forth under the proposed places of use within the project boundaries.<sup>16</sup> The remaining proposed places of use are either extensions of existing irrigated fields, for lands that have previously had the water rights removed or for new lands.<sup>17</sup> There is, however, one notable exception. Applicants' Exhibit NNN describes the proposed place of use under Application 51061 as being "transferring water right within ownership to maintain existing wildlife habitat."<sup>18</sup> At the conclusion of the administrative hearing on February 22, 1989, the State Engineer scheduled a field investigation for March 14, 1989, and invited all parties to attend.

The field inspection revealed that the proposed place of use under Application 51061 has not changed significantly for many years and is used primarily for agricultural

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<sup>15</sup> United States v. Alpine Land & Reservoir Co., *supra* at 853-857.

<sup>16</sup> Interior's Exhibit 29, Applicants' Exhibit NNN, transcript of public administrative hearing June 24, 1985, testimony of Barry Alan Fitzpatrick, Vol. I, p.82; other references throughout the hearing transcript of November 26th through 29th, 1984, and February 4th through 5th, 1985, June 24, 1985, January 16, 1986, and January 28, 1988, testimony of Doris Morin, transcript of public administrative hearing February 16, 1989, provides uncontradicted evidence that establishes the beneficial use of water on the majority of the proposed places of use.

<sup>17</sup> Applicants' Exhibits NNN public administrative hearing February 16 and 22, 1989. The protestants or intervenors submitted no evidence as to the irrigability of the proposed places of use, only the duty that might be delivered.

<sup>18</sup> See Applicants' Exhibit NNN, public administrative hearing February 16 and 22, 1989.

use, although waterfowl benefit from the land if the fields are flooded during the later part of the irrigation season.<sup>19</sup>

Additionally, the record indicates that some or most of the existing places of use include canals, ditches, laterals, drains, yards, roads<sup>20</sup> and areas to be subdivided to provide community growth which have been rezoned to residential development.<sup>21</sup> The record indicates, however, the drains were not in existence until after 1926<sup>22</sup> and many of the ditches, laterals and roads were changed or added after the project was begun and after the contracts were consummated.<sup>23</sup>

The proposed places of use of a portion of the applications include areas of interspersed land within irrigated areas where hills or mounds have been leveled and gullies filled in or otherwise irrigated by utilizing modern irrigation equipment.<sup>24</sup> The Court was more concerned with present day irrigation practices and specifically stated in Alpine, 697 F.2d at 853:

"The issue we review is whether the District Court reached a correct determination of beneficial use as of 1980." (Emphasis added).

697 F.2d at 856:

"In the circumstances, it is clear the District Court did not err in giving the contracts and the Nevada statute relied on by the United States little evidentiary significance."

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<sup>19</sup> See State of Nevada Exhibit 62, Report of Field Investigation in the matter of Application 51061, public administrative hearing February 16 and 22, 1989.

<sup>20</sup> Protestants' Exhibits 141, 142, and 143; Applicants' Exhibit OOO; and testimony of Ali Shahroody, public administrative hearing, June 24th, 1985, Vol. II, p. 48.

<sup>21</sup> Applicants' Exhibits PPP, public administrative hearing, February 16 and 22, 1989.

<sup>22</sup> Testimony of Doris Morin, public administrative hearing, February 4th and 5th, 1985, Vol. I., pp. 67-83; testimony of Barry Allan Fitzpatrick, Vol. II., p. 337.

<sup>23</sup> Testimony of Doris Morin, public administrative hearing February 4th and 5th, 1985, Vol. I., p. 85.

<sup>24</sup> Testimony of Barry Allan Fitzpatrick, public administrative hearing, June 24, 1985, Vol. I., p. 82. See also Applicants' Exhibit WW and BBB.

Although these findings were in the context of addressing water duty, they are significant in influencing the State Engineer's determination as to the validity of the historical beneficial use on the land represented in the record.

Notwithstanding the foregoing, the protestant seeks to disqualify the change applications on the basis of noncompliance with Nevada Water Law. The record, however, demonstrates that the United States was fully aware of the irrigation practices of the Newlands farmers and, until recently if not encouraged, allowed continued irrigation of lands described under the proposed places of use.<sup>25</sup> The record provides no evidence that enforcement of the contracts has ever been consistently maintained.

#### IV.

The record documents the historic and actual beneficial use as of 1980. Beneficial use for a number of years has been accomplished by application of water to lands described under the proposed places of use for the majority of the applications. As the Court noted in Alpine,<sup>26</sup> there was no evidence of enforcement of the contracts and historically no distinction was made between land owners with and without the limiting contracts. Both Orr Ditch<sup>27</sup> and Alpine<sup>28</sup> set forth the limit and extent to which the project is entitled to water and the finality of these decrees has been confirmed by the United States Supreme Court.<sup>29</sup> The lands under the proposed places of use are entitled to a duty of water consistent with a determination as to their appropriate classification

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<sup>25</sup> Protestants' Exhibits 2, 3, 4; Interior's Exhibit 3, 4 and 8 and Applicants' Exhibits B, F, G, W, DD, HH, PP, VV, AAA and MMM, public administrative hearing before the State Engineer, November 26th through 29th, 1984, February 4th through 5th, 1985, June 24, 1985, January 16, 1986, January 28, 1988, and February 16 and 22, 1989. Testimony of Gordon Lyford indicates that the majority of the lands under the proposed places of use have been classified as irrigable, transcript of public administrative hearing, February 16 and 22, 1989, p. 195.

<sup>26</sup> United States v. Alpine Land & Reservoir Co., supra at 856.

<sup>27</sup> Orr Ditch Final Decree Claim #3 and #4, pp. 10 and 11.

<sup>28</sup> Alpine Final Decree, pp. 151, 152.

<sup>29</sup> Nevada vs. United States, 103 S. Ct. 2906 (1984); United States v. Alpine Land & Reservoir Co., supra, cert. denied 104 S. Ct. 193 (1983).

as bench or bottom lands and nothing more.<sup>30</sup> This group of applications includes 9 applications wherein the proposed places of use include 13 parcels or fields which were not classified either bench land or bottom land by the Final Order of the U.S. District Court for the District of Nevada. Evidence introduced by the applicants classified the parcels, however, the intervenor (U.S. Department of Interior) takes exception to the classification on four of the parcels.<sup>31</sup>

For the purposes of this ruling the State Engineer makes no finding as to the particular classification of the four contested parcels nor the final bench land/bottom land classification on any of the subject applications or previous applications.<sup>32</sup> The State Engineer reserves the right to amend any permit to conform to the final bench land/bottom land determination.

V.

The protestants documented the record with substantial evidence and testimony as to the precarious nature of the habitat of the Lahontan cutthroat trout and cui-ui sucker, classified respectively as threatened and endangered species in the lower reaches of the Truckee River.<sup>33</sup> The record also reflects that man's activities in the lower reaches has resulted in additional impediments to the natural spawning habits of these species.<sup>34</sup>

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<sup>30</sup> The intervenor (Department of Interior) has urged the State Engineer to evaluate the previous change applications based on the bench or bottom land classification made by the U.S. Bureau of Reclamation data claiming that its classification is "supported by substantial investigation and scientific analysis". When the State Engineer ruled on previous change applications, the investigation was preliminary in nature. This is the subject of separate continuing litigation before the U.S. District Court for Nevada (D-185 BRT). The Court has ruled in the matter but at least two of the parties have filed a notice of intent to appeal.

<sup>31</sup> See Applicants' Exhibit QQQ for listing of 9 applications containing 13 parcels of previously unclassified lands. Applicants classified them according to soils testing done by Water Resources Development. U.S. Department of Interior takes exception to the classification on 51058, 51232 and 2 parcels on 51373 (see transcript of administrative hearing p. 188) based on the so called USBR "remand" map.

<sup>32</sup> The final bench land/bottom land classification is a matter to be determined by the U.S. District Court and Federal Water Master.

<sup>33</sup> Protestant's Exhibits 6, 7 and transcript of public administrative hearing before the State Engineer, November 26th through 29th, 1984, testimony of Chester Buchanan, Vol. II., pp. 101-208, and testimony of Alan Ruger, Vol. II., pp. 193-223.

<sup>34</sup> Testimony of Chester Buchanan, Vol. II., pp. 136-139, transcript of public administrative hearing before the State Engineer, November 26th through 29th, 1984.

The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species, however, there is no evidence that the Newland's right set forth under Orr Ditch has ever been or would be exceeded if the change applications were approved. Orr Ditch is binding on all parties thereto and the Truckee-Carson Irrigation District is entitled to a diversion of Truckee River waters through the Truckee Canal, storage and comingling with the waters of the Carson River in Lahontan Reservoir for the irrigation of lands within the Newlands Project.<sup>35</sup> Upon careful review of the record, the State Engineer can find no evidence that approval of the change applications would constitute an injury to the existing rights of the protestant or any other existing rights set forth in the subject decrees. To the contrary, the record can be relied on as providing substantial evidence that the subject changes will not detrimentally effect or impair protestant's existing rights and is further supported by historical beneficial use.

VI.

One application has been filed to transfer water rights from the Truckee division to the Carson division. More specifically, Application 51230 seeks the right to change 45.72 acre-feet from what the Bureau classifies as a mixture of Carson division bench land (5.35 acres) and Truckee division bench land (4.81 acres) to Carson division bench land (10.16 acres).<sup>36</sup>

Addressing the question of inter-division transfers, there is no evidence in the record that such a change will have an adverse impact on the districts overall efficiency or that it will increase the demand on the system. To the contrary, previous evidence and testimony with regard to Application 47831, a similar proposal, shows that over the 80 year period of record, there would be less demand on project water if the application were approved.<sup>37</sup> Additionally, the evidence shows the proposed places of use are

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<sup>35</sup> Nevada vs. United States, supra at 2920-2925.

<sup>36</sup> Interior's Exhibit 30, public administrative hearing before the State Engineer, February 16 and 22, 1989.

<sup>37</sup> Interior's Exhibit 7, public administrative hearing before the State Engineer, February 4th and 5th, 1985, and testimony of Robert Whitney, Vol. I., pp. 142-144.

presently irrigated.<sup>38</sup> Presumably this is interspersed lands and it would be less efficient to ditch the water around them.

Protestants attempt to demonstrate an additional burden on the TCID Truckee River diversions based on information contained in a flow chart from a 1971 report.<sup>39</sup> Applicants effectively discredit the validity of this evidence on the basis of the absence of hard data and reliance on assumption, the reasonableness of which is questionable.<sup>40</sup> The State Engineer finds that the evidence of protestant does not sufficiently and accurately reflect current irrigation practices within the project.

## VII.

The protests to all of the applications included a claim that the water rights were never perfected in accordance with federal and state law, or have been abandoned or forfeited. The existing Newlands water rights that are the subject of the change applications were vested in the name of the United States when Congress authorized the Newlands Project in 1902. No state law governed how the water was to be used nor was there any statutory provision for loss of water by abandonment or forfeiture.<sup>41</sup> Both the Alpine and Orr Ditch Decrees recognize the Newlands rights as having a priority of 1902 and Alpine specifically recognized existing uses as late as 1980 and that these rights did exist in their entirety.<sup>42</sup>

The record of evidence indicates that the water has been used continuously by project farmers. The fact that individual project farmers were not using the water on the exact acreage for which they contracted on an acre-for-acre accounting was

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<sup>38</sup> Applicants' Exhibit NNN, public administrative hearing before the State Engineer, February 16 and 22, 1989.

<sup>39</sup> Protestant's Exhibits 9, 10, public administrative hearing before the State Engineer. Testimony of Ali Shahroody, November 26th through 29th, 1984, Vol. II., pp. 236-244.

<sup>40</sup> Transcript Vol. II., November 26th through 29th, 1984, pp. 242-244; pp. 250-266 testimony of Ali Shahroody, public administrative hearing before the State Engineer.

<sup>41</sup> NRS Chapter 533 was adopted in 1913 and, as it pertains to forfeiture and abandonment, NRS 533.060 in 1913 with amendments in 1917, 1949, and later.

<sup>42</sup> Orr Ditch and Alpine, *supra*, (See Footnote 1); Nevada v. United States, 463 U.S. 110 (1983).

addressed and disposed of in Alpine.<sup>43</sup>

The issue of abandonment and forfeiture now becomes moot in view of the direction by the U.S. District Court. The order states that "issues of beneficial use, abandonment and forfeiture were improperly raised before the State Engineer... such disputes in the Alpine case should be brought before the Water Master".<sup>44</sup>

#### VIII.

During the hearing there was some discussion about the lack of Government contracts to substantiate water rights on some of the acreage listed as the existing places of use on many of the applications to change.<sup>45</sup> After the exchange of several sets of documents between the Applicants and Interior, the basis for each change application was substantiated.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction of the parties and subject matter of this action.<sup>46</sup>

#### II.

The Orr Ditch and Alpine Decrees set forth the procedure and authority in the matter of applications to change the point of diversion, manner, purpose or place of use of decreed waters of the Carson and Truckee Rivers.

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<sup>43</sup> United States v. Alpine Land & Reservoir Co., *supra* at 853, 856. Testimony of Doris Morin, public administrative hearing before the State Engineer, June 24, 1985, pp. 71-73. Testimony of Barry Alan Fitzpatrick, public administrative hearing before the State Engineer, June 24, 1985, pp. 91-98; Interior's Exhibit 29; and Applicants' Exhibit NNN public administrative hearing before the State Engineer February 16 and 22, 1989.

<sup>44</sup> Order on Appeals from Decisions of the State Engineer on Transfer Applications, U.S. District Court for Nevada, United States of America v. Alpine Land & Reservoir Co., Civil No. D-184 BRT, p. 12.

<sup>45</sup> Transcript of public administrative hearing February 16 and 22, 1989, pp. 13-19 and 22-27 and State of Nevada Exhibit 50.

<sup>46</sup> NRS Chapter 533; See Footnote 3.

III.

The record of evidence is substantial as to the historical uses of the water under the subject applications to change.

IV.

The record of evidence establishes the duty of water to which the lands under the proposed changes are entitled.

V.

There is no evidence that the approval of the applications to change in this matter will effect or impair the value of other existing rights set forth under the subject decrees.

VI.

There is no evidence that the approval of the applications to change in this matter will be detrimental to the public interest or welfare.

VII.

The State Engineer concludes that the Truckee Carson Irrigation District's records have been sufficiently scrutinized and found to be substantially correct.<sup>47</sup>

VIII.

The State Engineer concludes that Application 51061 seeks only to change the place of use of decreed water rights and that the proposed places of use appear to have been used for decreed purposes for many years. No ruling as to any change in the manner of use is made since the application does not seek a change in manner of use.

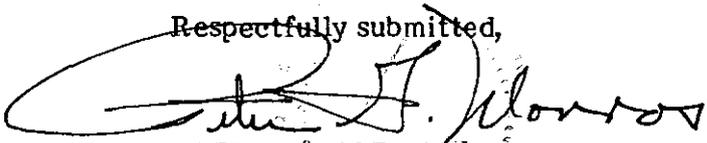
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<sup>47</sup> Applicants' Exhibit Z introduced in a prior public administrative hearing February 4-5, 1988.

RULING

The protests to the granting of Applications to Change 51006, 51041, 51045, 51048, 51050, 51051, 51052, 51054, 51055, 51056, 51057, 51058, 51059, 51060, 51061, 51082, 51136, 51137, 51138, 51139, 51217, 51225, 51226, 51227, 51228, 51229, 51230, 51231, 51232, 51233, 51234, 51235, 51236, 51237, 51238, 51368, 51369, 51370, 51371, 51372, 51373, 51374, 51375, 51376, 51377, 51378, 51379, 51380, 51381, 51382, 51384, 51599, 51600, 51601, 51602, 51604, 51605, 51606, 51607, 51645, 51732 and 51734 are herewith overruled and Applications 51006, 51041, 51045, 51048, 51050, 51051, 51052, 51054, 51055, 51056, 51057, 51058, 51059, 51060, 51061, 51082, 51136, 51137, 51138, 51139, 51217, 51225, 51226, 51227, 51228, 51229, 51230, 51231, 51232, 51233, 51234, 51235, 51236, 51237, 51238, 51368, 51369, 51370, 51371, 51372, 51373, 51374, 51375, 51376, 51377, 51378, 51379, 51380, 51381, 51382, 51384, 51599, 51600, 51601, 51602, 51604, 51605, 51606, 51607, 51645, 51732 and 51734 will be approved subject to existing rights on the sources and subject to water duties affirmed or modified by the Federal Water Master or by the United States District Court.

Respectfully submitted,



PETER G. MORROS  
State Engineer

PGM/RMT/bk

Dated this 14th day of  
April, 1989.