

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

IN THE MATTER OF APPLICATIONS)
47809, 48465, 48466, 48669, 48670,))
49109, 49110, 49111, 49114, 49116,))
49117, 49119, 49120, 49122, 49282,))
49283, 49285, 49287, 49288, 49563,))
49564, 49567, 49568, 49998, 50001,))
50008, 50010, 50012, 50333, 51038,))
51040, 51043, 51048, 51082, 51137,))
51138, 51139, 51237, 51738, 52669,))
53661)

RULING ON REMAND

4798

GENERAL INTRODUCTION

I.

FILING OF APPLICATIONS AND PROTESTS

Applications 47809, 48465, 48466, 48669 (Group 3 - 4 of those transfer applications otherwise known as the "Original 25")¹; 48670, 49109, 49110, 49111, 49114, 49117, 49119, 49120, 49122, 49282, 49283, 49285, 49287, 49288 (Group 4); 49116, 49563, 49564, 49567, 49568, 49998, 50001, 50008, 50010, 50012, 50333, 51038, 51040, 51043 (Group 5); 51048, 51082, 51137, 51138, 51139, 51237 (Group 6); 51738, 52669, 53661 (Group 7) were filed to change the place of use of water decreed under the Truckee and Carson River Decrees, the decrees which adjudicated the waters of those rivers.²

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

² 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").

The applications represent requests to change the place of use of portions of the water rights decreed and contracted for use within the Newlands Reclamation Project ("Project").

The applications (also identified herein as the portions of the Groups 3, 4, 5, 6, and 7 transfer applications) were timely protested by the Pyramid Lake Paiute Tribe of Indians ("PLPT") on various grounds, including the following:

* * *

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

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

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

II.

UNITED STATES INTERVENTION

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

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

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

III.

**PREVIOUS HEARINGS ON GROUP 3, 4, 5, 6, AND 7
TRANSFER APPLICATIONS**

A public administrative hearing in the matter of the Group 3 transfer applications was first held before the State Engineer on June 24, 1985, in Fallon, Nevada. Public administrative hearings in the matters of Groups 4, 5, 6, and 7 were respectively held on January 16, 1986, February 21, 1986, January 28, 1988, February 16 and 22, 1989, and April 1, 1991. The applicants and protestants made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties.⁵ As the hearings progressed, the parties stipulated to incorporating the record of the previous administrative hearings on other transfer applications into the evidentiary record of the administrative hearings on Groups 3 through 5, inclusive.⁶ While the transcripts from the February 16 and 22, 1989, administrative hearing on Group 6, and the April 9, 1991, administrative hearing on Group 7 do not have specific references to incorporating the previous administrative hearing records, by the fact that the protestant examined applicant's witness Doris Morin, without objection, on testimony presented in those earlier hearings, the State Engineer believes everyone was operating under the assumption that the stipulation to incorporation of the previous administrative hearing records into those hearings was in effect.

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

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

On September 30, 1985, the State Engineer issued his ruling with regard to 27 transfer applications overruling the PLPT's protests to the Group 3 transfer applications and approving all the subject applications.⁷ On February 12, 1987, the State Engineer issued his ruling with regard to the Group 4 transfer applications overruling the PLPT's protests and approving all the subject applications.⁸ On June 2, 1988, the State Engineer issued his ruling with regard to the Group 5 transfer applications overruling the PLPT's protests and approving all the subject applications.⁹ On April 14, 1989, the State Engineer issued his ruling with regard to the Group 6 transfer applications overruling the PLPT's protests and approving all the subject applications.¹⁰

On July 25, 1990, the United States District Court remanded to the State Engineer those transfer applications which were decided by rulings of the State Engineer dated February 12, 1987 (Group 4 - 24 applications), June 2, 1988 (Group 5 - 52 applications), and April 14, 1989 (Group 6 - 62 applications) (total of 138 applications). An administrative hearing was set to begin on November 7, 1990, however, the applicants requested a pre-hearing conference. The State Engineer granted that request with the administrative hearing to begin immediately thereafter on November 7, 1990. At the pre-hearing conference, administrative notice was taken of all testimony and exhibits from the past administrative hearings as they pertain to the issues of perfection, forfeiture

⁷ State Engineer's Ruling No. 3241, dated September 30, 1985.

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

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

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

and abandonment.¹¹ No new evidence was presented at the November 7, 1990, administrative hearing and the State Engineer proceeded to rule on remand from the evidence already contained in the record of the proceedings.¹²

On January 30, 1992, the State Engineer issued his ruling with regard to the 52 transfer applications in Group 7 overruling the PLPT's protests and approving all the subject applications.¹³

The State Engineer's rulings approving those 190 transfer applications in Groups 4, 5, 6, and 7 (commonly known as the "subsequent 190" transfer applications) were appealed to the Federal District Court, however, on April 20, 1992, the District Court issued a Minute Order granting a joint motion filed by the United States, the PLPT, the State Engineer and the Truckee-Carson Irrigation District to defer appellate proceedings on those rulings. The Record on Review was never filed in these cases nor have these applications ever received an initial review by the Federal District Court.

IV.

ALPINE II

An appeal of the State Engineer's Ruling No. 3241 on the Group 3 transfer applications was taken to the United States District Court and the Ninth Circuit Court of Appeals resulting in what is commonly known as the Alpine II decision.¹⁴ The Alpine II Court held that:

1. Nevada water law applied to the dispute arising from the State Engineer's approval of the transfer applications;

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

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

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

¹⁴ U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217 (9th Cir. 1989) ("Alpine II").

2. the finding of the State Engineer that the transfers did not threaten to prove detrimental to the public interest was supported by substantial evidence;
3. the decrees did not determine whether particular Newlands Project properties are entitled to receive Project water, that right being based on contracts and certificates issued by the Secretary of the Interior or the Truckee-Carson Irrigation District ("TCID");
4. the State Engineer's finding that the Alpine Decree disposed of the fact that the farmers were not using water on the exact acreage for which they had contracted was not supported by that decision;
5. it was appropriate for the State Engineer to adjudicate the issues of perfection, abandonment and forfeiture;
6. the State Engineer cannot transfer water rights that have not been put to beneficial use;
7. questions regarding the would-be transferors alleged forfeiture or abandonment of the water rights they proposed to transfer could no longer be raised as an objection to the State Engineer's approval of transfer applications where the objector failed to raise forfeiture or abandonment issues in proceedings before the State Engineer.

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

V.

FEDERAL DISTRICT COURT DECISION ON REMAND

On remand, the U.S. District Court affirmed the State Engineer's approval of the Group 3 transfer applications and held with respect to the issues of perfection, abandonment and forfeiture that the State Engineer was correct. That decision was

appealed to the Ninth Circuit Court of Appeals resulting in the "Alpine III" decision.¹⁵

VI.

ALPINE III

In Alpine III, the Ninth Circuit Court of Appeals rejected the District Court's validation of the State Engineer's ruling. The Court reiterated its holding that water rights that have not been put to beneficial use are not available for transfer and instructed the fact finder on remand to determine whether the specific water rights sought to be transferred are rights to "water already appropriated" as the Court had construed that phrase. The Court held that the proper inquiry as to intent to abandon was not the Project water users as a whole, but rather, the intent of the transferor property owners. As to forfeiture, the Court held that under Nevada law the forfeiture statute does not apply to water rights that vested before March 22, 1913, or were initiated in accordance with the law in effect prior to that date.

The Ninth Circuit Court of Appeals remanded the matter to the U.S. District Court to determine: (1) whether the water rights appurtenant to the transferor properties at issue had been perfected; (2) whether the holders of the water rights sought to be transferred had abandoned their water rights; and (3) whether the specific water rights sought to be transferred, if said water rights vested after March 22, 1913, had been forfeited. If said rights vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to March 22, 1913, then the water rights are not subject to forfeiture under the provision of NRS § 533.060.¹⁶

¹⁵ U.S. v. Alpine Land and Reservoir Co., 983 F.2d 1487 (9th Cir. 1992) ("Alpine III").

¹⁶ Alpine III, 983 F.2d at 1496.

VII.

ORDER OF REMAND TO STATE ENGINEER

On October 4, 1995, the U.S. District Court issued an order remanding the transfer application cases¹⁷ to the Nevada State Engineer for consideration of the issues of perfection, abandonment and forfeiture. The U.S. District Court did not require the State Engineer to re-open the evidentiary hearings, but rather ordered if the State Engineer decided additional evidence was required he should provide the parties the opportunity to present such evidence.

VIII.

1996 STATUS CONFERENCE AND HEARING NOTICES

By notice dated January 10, 1996, the State Engineer informed the Group 3 applicants of a status conference to be held on February 5, 1996.¹⁸ The State Engineer had determined a status conference was warranted to discuss procedure in the resolution of the matter remanded by the Federal District Court. At the conference, the parties expressed their desire to re-open the evidentiary hearings and further agreed upon a process for the exchange of evidence and settlement conferences to be held between the applicants and the protestant.¹⁹ At the status conference, applicants from Groups 4 through 7 also requested they be included in the pre-hearing briefing process so as not to be prejudiced when their cases came up for hearing by the early resolution of legal issues without their input.

¹⁷ *Order Remanding Transfer Application Cases to Nevada State Engineer Pursuant to Minutes of the Court of Status Conference Held 4/13/95, U.S. v. Alpine*, D-184-HDM, dated October 9, 1995.

¹⁸ January 10, 1996, Notice of Status Conference.

¹⁹ Transcript, Status Conference, public administrative hearing before the State Engineer, February 5, 1996.

IX.

EXCHANGE OF INFORMATION AND LEGAL BRIEFS

By notices dated February 12, 1996,²⁰ and March 6, 1996,²¹ the State Engineer established timetables for Groups 3 through 7 for the filing of pre-hearing briefs on the legal issues of lack of perfection, abandonment and forfeiture, and for the service by the protestant PLPT on the applicants of a more definitive statement of its protest claims. In the more definitive statement, the PLPT was to specifically identify parcel by parcel the particular components of its protests as they relate to its claims of lack of perfection, abandonment and forfeiture, along with copies of any documentary evidence which supported its contentions. The notices further established a date by which the applicants were to provide the PLPT with any rebuttal²² evidence they had to refute the PLPT's claims of lack of perfection, abandonment or forfeiture. Finally, the notice established a timetable for holding conferences wherein the parties were to attempt to stipulate to any facts not in dispute, to attempt settlement of the protests, if possible, and to inform the State Engineer as to any recommendation any party had for the grouping of any of the referenced transfer applications for hearing.²³

²⁰ February 12, 1996, Notice of Group 3 discovery schedule.

²¹ March 6, 1996, Notices of Groups 4-7 discovery schedule.

²² The State Engineer notes that the use of the word rebuttal evidence in the February 12, 1996, and the March 6, 1996, notices presented confusion in these proceedings. The use of the word rebuttal evidence was intended to mean any evidence to rebut/refute the PLPT's claims of lack of perfection, abandonment or forfeiture.

²³ Several water right owners in the Newlands Reclamation Project had applications in more than one group. They requested the State Engineer to hold hearings on their multiple applications at one time.

X.

STATE ENGINEER'S INTERIM RULING NO. 4411

On August 30, 1996, the State Engineer issued Interim Ruling No. 4411²⁴ regarding some of the issues of law that had been addressed in the pre-hearing legal briefs and which pertained to matters the State Engineer determined could be ruled on as a matter of law at that time. Those issues included the following:

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

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

²⁴ State Engineer's Interim Ruling No. 4411, dated August 30, 1996.

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

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

Finally, pursuant to Interim Ruling No. 4411, the State Engineer concluded that Nevada law does not shift the burden of going forward to the applicants upon the protestant's showing of an extended period of non-use. The State Engineer concluded, based on the Nevada Supreme Court case of Town of Eureka v. Office of the State Engineer²⁵, that the PLPT has the burden of proving its case of abandonment by clear and convincing evidence of acts of abandonment and intent to abandon.

²⁵ Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948 (1992).

XI.

MOTION FOR PARTIAL RECONSIDERATION OF INTERIM RULING NO. 4411

On September 23, 1996, the PLPT filed a Motion for Partial Reconsideration of State Engineer's Interim Ruling No. 4411. The PLPT moved the State Engineer to reverse that part of Interim Ruling No. 4411 which concluded that NRS § 533.324 precluded the need for perfection of the water rights that are the subject of the transfer applications prior to the transfer of said rights. The PLPT's motion for reconsideration will be considered below.

XII.

1996-1998 HEARINGS

After all parties of interest were duly noticed by certified mail, the public administrative hearings regarding certain transfer applications from Groups 3 through 7 were re-opened and hearings were continued on October 15-18, 1996,²⁶ November 12-15, 1996,²⁷ January 23-24, 1997,²⁸ and March 4, 1997,²⁹ April 14-16, 1997,³⁰ August 25-26, 1997,³¹ September 22-24, 1997,³² October 7-8, 1997,³³ October 20-23, 1997,³⁴ November 17, 1997,³⁵ and February

²⁶ Transcript, public administrative hearing before the State Engineer, October 15-18, 1996.

²⁷ Transcript, public administrative hearing before the State Engineer, November 12-15, 1996.

²⁸ Transcript, public administrative hearing before the State Engineer, January 23-24, 1997.

²⁹ Transcript, public administrative hearing before the State Engineer, March 4, 1997.

³⁰ Transcript, public administrative hearing before the State Engineer, April 14-16, 1997.

³¹ Transcript, public administrative hearing before the State Engineer, August 25-26, 1997.

³² Transcript, public administrative hearing before the State Engineer, September 22-24, 1997.

³³ Transcript, public administrative hearing before the State Engineer, October 7-8, 1997.

2-3, 1998,³⁶ at Carson City, Nevada, before representatives of the office of the State Engineer. At the pre-hearing status conference, the parties agreed that a "clean record" would be easier to follow. A clean record meant that the exhibit numbers would begin again at Number 1, and that if any party wanted specific parts of the earlier proceedings to be highlighted they would identify that evidence or testimony and have it remarked for this record. While certain applicants argued this was a brand new hearing the State Engineer does not agree. It is a hearing on remand which means it is a continuation of the previous hearing, and the State Engineer cannot and will not ignore all that has taken place to date. Therefore, the State Engineer also took administrative notice of the records in the office of the State Engineer, including, the prior hearings and rulings in this matter and the various rulings of the Federal District Court and the Ninth Circuit Court of Appeals relevant to these cases.³⁷

XIII.

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

On December 22, 1997, the State Engineer issued State Engineer's Ruling on Remand No. 4591 regarding change applications filed to move water rights within the Truckee-Carson Irrigation District ("TCID"), specifically, transfer Applications 47840, 48423, 48467, 48468, 48647, 48666, 48667, 48668, 48672, among others. These applications are part of what are known as the "Original 25" TCID transfer applications. An appeal of State

³⁴ Transcript, public administrative hearing before the State Engineer, October 20-23, 1997.

³⁵ Transcript, public administrative hearing before the State Engineer, November 7, 1997.

³⁶ Transcript, public administrative hearing before the State Engineer, February 2-3, 1998.

³⁷ Transcript p. 7, public administrative hearing before the State Engineer, October 15-18, 1996.

Engineer's Ruling on Remand No. 4591 was filed in the United States District Court by the protestant Pyramid Lake Paiute Tribe, and another appeal was filed by the intervenor the United States of America.

On September 3, 1998, the Honorable Howard McKibben of the United States District Court issued an Order in the matter of those appeals. Judge McKibben held that under the constraints of Alpine III the State Engineer's conclusion that all of the individual landowners' water rights were initiated in accordance with the law in effect in 1902 was erroneous, and as to the protest claims of forfeiture that in the absence of any evidence of individual steps taken to appropriate the water before March 22, 1913, the State Engineer must use the contract date as the date the water right was initiated. The Court observed that it and the State Engineer are bound by the holdings in Alpine III, but noted that it agrees with the State Engineer that there is only one set of water rights for the Project, not two, that every water right which derives from the Project was initiated by the actions of the United States beginning in 1902, and that all water rights in the Project should have the 1902 priority date controlling on the issue of forfeiture. The Court respectfully urged the Ninth Circuit Court of Appeals to revisit this issue.

If there is any evidence that the individual landowner took any step to appropriate the water in accordance with the law in effect prior to March 22, 1913, the Court stated it would apply the doctrine of relation back and the water right would not be subject to forfeiture. In the absence of any evidence of an individual step taken to appropriate the water prior to March 22, 1913, the Court instructed the State Engineer that he must use the date of the water right contract as the date the water right was initiated and make a determination as to when the individual landowner took the first step to appropriate the water appurtenant to his land.

As to abandonment, the Court affirmed the State Engineer's determination that a rebuttable presumption of abandonment does not

apply under Nevada law, and held that non-use of water is only some evidence of an intent to abandon the water right. The Court further found that the payment of assessments and taxes is a circumstance the State Engineer should take into consideration in determining whether there is an intent to abandon the water right. The Court also held based on equitable principles that intrafarm transfers within the Newlands Reclamation Project should be upheld as a matter of equity and should not be subject to the doctrines of abandonment or forfeiture. The Court held that where there is evidence of both a substantial period of non-use, combined with evidence of an improvement which is inconsistent with irrigation, such as highways, roads, residential housing, canals and drains, that the payment of taxes or assessments, alone, will not defeat a claim of abandonment. If, however, there is only evidence of non-use, combined with a finding of a payment of taxes or assessments, the Court concluded the PLPT failed to provide clear and convincing evidence of abandonment.

XIV.

RE-OPENED EVIDENTIARY HEARINGS 1998-1999

On November 5, 1998, the State Engineer re-opened the administrative hearing as to those applications remanded to the State Engineer pursuant to Judge McKibben's Order of September 3, 1998. On July 21, 1999, the State Engineer issued Supplemental Ruling on Remand No. 4750 which addressed Applications 47840, 48468, 48647, 48666, 48667, 48668, 48672. Additionally, Applications 48423 and 48467 were remanded, but withdrawals of all or portions of the applications made remand moot as no protest issues remained.

Beginning on January 11, 1999, the State Engineer re-opened the administrative hearing as to Applications 47809, 48465, 48466, 48669 (Group 3), 48670, 49108, 49109, 49110, 49111, 49112, 49114, 49115, 49117, 49118, 49119, 49120, 49121, 49122, 49282, 49283, 49285, 49286, 49287, 49288 (Group 4), 49116, 49563, 49564, 49567, 49568, 49998, 50001, 50008, 50010, 50012, 50333, 51038, 51040,

51043 (Group 5), 51048, 51082, 51137, 51138, 51139, 51237 (Group 6), 51738, 52669, 53661 (Group 7) in order to provide the applicants the same final chance to provide evidence as set forth in Judge McKibben's Order of September 3, 1998, for those applicants which were before him at that time. It is most of these applications which are under consideration in this ruling.

XV.

**GROUPS 3, 4, 5, 6 AND 7 PERMITS CANCELLED,
PROTESTS OR PERMITS WITHDRAWN**

GROUP 3 - Of the original applications in Group 3, Permit 48422 was cancelled by the State Engineer and no appeal was timely taken from that cancellation. The PLPT withdrew its protests to Applications 48767 and 48866. Permits 48467, 48470, 48471, 48665 and 48827 were withdrawn by the applicants.

GROUP 4 - Of the original applications in Group 4, Permits 47861, 48826 and 49113 were withdrawn by the applicants and the PLPT withdrew its protest to Application 49224.

GROUP 5 - Of the original applications in Group 5, Permits 49565, 49570, 50000 and 51042 were withdrawn by the applicants. Permits 49566 and 51044 were cancelled by the State Engineer for failure to comply with the permit terms and no appeal was timely taken from that cancellation. The PLPT withdrew its protests to Applications 49284, 49393, 49397, 49398, 49638, 49742, 50002, 50013, and 50029.

GROUP 6 - Of the original applications in Group 6, Permits 51056, 51370 and 51375 were withdrawn by the applicants. Permit 51055 was cancelled by the State Engineer for failure to comply with the permit terms and no appeal was timely taken from that cancellation. The PLPT withdrew its protests to Applications 51006, 51059, 51061, 51217, 51232, and 51372.

GROUP 7 - Of the original applications in Group 7, Permits 51997, 52670, and 54594 were withdrawn by the applicants. The PLPT withdrew its protest to Application 52555.

The remaining applications remanded by the U.S. District Court to the State Engineer for further consideration and not addressed in this ruling will be addressed in subsequent rulings.

**GENERAL FINDINGS OF FACT APPLICABLE TO ALL APPLICATIONS
UNDER CONSIDERATION IN THIS RULING**

I.

BURDEN OF PROOF

The Nevada Supreme Court has held that because the "law disfavors a forfeiture the State bears the burden of proving by clear and convincing evidence a statutory period of non-use."³⁸ It is the policy of the Division of Water Resources, affirmed by the Nevada Supreme Court's decision in the Town of Eureka case, that whenever a private person files a protest claim or a petition alleging forfeiture or abandonment of a water right it is the protestant's or petitioner's burden to produce the evidence and prove said claims. It is not the applicant's job to disprove the protestant's claims. The State Engineer finds that the burden of producing evidence and proving the protest claims of abandonment and forfeiture lie squarely on the protestant PLPT.

The State Engineer finds that if he were to allege a decreed water right was not perfected the State would have the burden of proving that lack of perfection. There is no reason to treat the private petitioner or protestant any differently. The State Engineer finds the protestant has the burden of proving lack of perfection. It is not the applicant's burden to prove perfection of an adjudicated and decreed water right certified by the TCID to be a valid water right available for transfer just because a protestant alleges a lack of perfection claim.

II.

AGREED UPON EXCHANGE PROCESS - PROTESTANT

At the February 1996 status conference, the parties to the Group 3 hearings agreed upon a process for moving forward with

³⁸ Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 826 P.2d 948, 952 (1992).

these cases, said process being set forth in the February 12, 1996, notice for those applications in Group 3.³⁹ Since it is impossible for the protestant to sustain all three of its protest claims of lack of perfection, forfeiture and abandonment as to each parcel, the State Engineer ordered the protestant to provide the applicants by May 21, 1996, a more definitive statement in which the protestant was to identify parcel by parcel whether it was ultimately pursuing a claim of lack of perfection, forfeiture or abandonment as to each parcel, and to provide its documentary evidence to support said claim(s). In response, by July 22, 1996, the applicants agreed to supply the protestant with any evidence they had to refute the protestant's claims.

As to Groups 4 through 7, the State Engineer followed the same process agreed upon with regard to Group 3 and ordered the protestant to provide the applicants by July 31, 1996, a more definitive statement in which the protestant was to identify parcel by parcel whether it was ultimately pursuing a claim of lack of perfection, forfeiture or abandonment as to each parcel, and to provide its documentary evidence to support said claim(s). In response, by November 29, 1996, the applicants were ordered to supply the protestant with any evidence they had to refute the protestant's claims. While the parties agreed upon this process, all appeared in some way to disregard said agreement.

The protestant argues it can allege alternative theories as to means by which an applicant can lose their water rights and repeatedly argued that the State Engineer had put the protestant under an onerous burden for producing the evidence in its more definitive statement. The State Engineer finds that the protestant did not comply with the spirit of the order for a more definitive statement and further finds that the protestant's cries of onerous burden are disingenuous. These protest claims were first part of the proceedings held in 1985, 1986, 1988, 1989 and 1991. The

³⁹ February 12, 1996, Notice of Group 3 discovery schedule.

protestant provided little evidence to support its claims of lack of perfection, forfeiture and abandonment at the early administrative hearings and has had sufficient time since the remand order in 1995 to garner any additional evidence to support its contentions. The protestant has been given another opportunity to present its case, but now, over 11 years later, the protestant claims it was under an onerous burden to produce the evidence or any additional evidence to support its claims. The State Engineer does not agree. The State Engineer further finds it was reasonable at this juncture, particularly since it is impossible to sustain all three claims of lack of perfection, forfeiture and abandonment, to require the protestant to refine its generalized/alternating theory claims making these claims specific based on evidence that can sustain them. A water right that is not perfected can not be subject to the doctrines of loss through forfeiture or abandonment.

III.

AGREED UPON EXCHANGE PROCESS - APPLICANTS

Some of the applicants either did not provide the protestant with any rebuttal/refuting evidence at all or in other cases new evidence was presented at the administrative hearings. The applicants that did not provide any evidence to refute the protestant's claims took the position that if the protestant cannot prove its claims there is no reason for the applicant to provide any evidence. These applicants took a tactical position not contemplated by the agreed upon process.

Some of the applicants (as well as the protestant) presented evidence for the first time at the administrative hearing that had not been exchanged in advance. The State Engineer finds that the process before him is that of an administrative hearing, not a civil trial, and that when presented with relevant evidence he must consider it if the other party is not unjustly prejudiced by the late presentation of said evidence. The State Engineer finds that no party was prejudiced by the consideration of said evidence since when certain evidence was presented late and the applicants alleged

prejudice the hearing officer adjourned the hearing in order to give the applicants adequate time to review said newly presented evidence.⁴⁰

IV.
EQUITY

Testimony was presented that at different times during the life of the Project transfers in places of use on the same farm were processed by the U.S., but that for the greater portion of time transfers were not allowed on either the same farm or to different farms. In the early 1900's, transfers were not approved, but rather, people filed for new water rights.⁴¹ However, in 1947, the U.S. Department of Interior approved a transfer on the same farm unit/contract area through the application for a permanent water right process, but, in the mid-1960's transfers were again prohibited.⁴² Yet, farmers (with apparent acquiescence by the United States) continued to transfer water within a farm unit or contract area as farm technology changed and they leveled fields and filled in sloughs.

After the Alpine Decree in 1980, and after the United States Supreme Court's 1983 decision in Nevada v. U.S.,⁴³ the Court for the first time affirmed ownership of the water rights in the name of the Project water right holders. Subsequently, the users were instructed by the United States to file these transfer applications to put water rights on those lands being irrigated for which no water contracts had been issued. By following those instructions

⁴⁰ Transcript, pp. 2294-2319, public administrative hearing before the State Engineer, April 16, 1997.

⁴¹ Transcript, p. 1795, public administrative hearing before the State Engineer, March 4, 1997. See also, Exhibit No. 49 (Exhibit 1 attached to Exhibit No. 49), public administrative hearing before the State Engineer, October 15-18, 1996.

⁴² Transcript, pp. 1789-1795, public administrative hearing before the State Engineer, March 4, 1997.

⁴³ Nevada v. U.S., 463 U.S.110, 77 L.Ed.2d 509, 103 S.Ct. 2906 (1983).

there now exists the possibility of the users losing their water rights. Judge Noonan in a concurring opinion in Alpine II⁴⁴ stated that "[t]raditional equitable principles govern whether the strict requirements of Nevada water law are to be relaxed with regard to a present application." The Judge indicated that on remand (to the Federal District Court) it may be that a determination must be made whether each individual transfer application can be upheld in equity.

Judge McKibben in his Order of September 3, 1998, relevant to transfer applications from Group 3, recognized that in some situations equity should act and held that intrafarm transfers of water rights within the Newlands Project should be upheld as a matter of equity, and the principles of forfeiture and abandonment would not apply.⁴⁵ However, a transfer of a water right for value, from one property owner to another, who does not have any contractual right to Project water, does not warrant the same equitable considerations and the principles of forfeiture and abandonment will apply to those interfarm transfers.

V.

LANDS TO WHICH WATER RIGHTS ARE APPURTENANT

Water rights on particular parcels of land within the Newlands Project are governed by underlying documents identified as agreements, contracts and certificates.⁴⁶ Certain applicants argue that the water right is appurtenant to the entire parcel of land

⁴⁴ Alpine II, 878 F.2d at 1229.

⁴⁵ Given the Nevada Supreme Court's holding that abandonment requires a union of acts and intent and is a question of fact to be determined from all the surrounding circumstances Revert v. Ray, 95 Nev. 782, 786 (1979), any reasonable person could not find an "intent to abandon" or loss by non-use from simply eliminating irrigation from one part of a farm in favor of irrigation on another parcel in the same farm.

⁴⁶ Alpine II, 878 F.2d at 1221. Agreements, contracts and certificates relevant to particular applications will be identified in the section of this ruling that deals with that application.

described in a contract.⁴⁷

Some of the "Agreements" submitted into evidence were grants by private persons of their pre-Project vested water rights to the United States in exchange for Project water rights for lands then presently under cultivation and irrigation.⁴⁸ Other "Agreements" described obtaining a water right for the **total irrigable** area of the entire ownership susceptible of being served water.⁴⁹

A "Certificate of Filing Water Right Application" provided that the person had filed for a certain number of **irrigable** acres and the supply furnished was limited to the amount of water beneficially used on said **irrigable** land.⁵⁰ In an "Application For Permanent Water Right - For all lands except entries under the reclamation law" the applicant applied for a permanent water right for the irrigation of and to be appurtenant to all of the **irrigable** area **now or hereafter developed** within the tract of land described. The description of the tract of land identified a total number of acres of which a certain portion were then classed as **irrigable**.⁵¹

In a "Water-right Application - Homesteads Under The Reclamation Act" and in a "Water-right Application For Lands in

⁴⁷ It should be noted that the State Engineer in this ruling uses the term "contract" to generically describe the various different kinds of documents that were introduced into evidence to demonstrate the dates water rights were obtained for the various parcels of land. It should also be noted that there have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by the owner's name and later issued serial numbers to the contract owner's Homestead Entries. The State Engineer does not believe a serial number can be used to relate any contract to the date which the contract was obtained.

⁴⁸ Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

⁴⁹ Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997.

⁵⁰ Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

⁵¹ Exhibit No. 44, public administrative hearing before the State Engineer, October 1996 through March 1997.

Private Ownership And Lands Other Than Homesteads Under The Reclamation Act" the applicant applied for a permanent water right for the irrigation of and to be appurtenant to a certain number of **irrigable** acres as shown on plats approved by the Secretary of the Interior within the tract of land described. The description of the land identified a total number of acres of which a certain portion were then classed as **irrigable**.⁵²

Testimony provided at the 1985 hearings and the evidence provided in the contracts indicate that just by reference to the contracts a person cannot identify the location of either the **irrigable** or **non-irrigable** acres within any particular section of land. Rather, other information available in the TCID engineering department would further locate those lands, i.e., the TCID water right maps would generally reveal areas designated as not having water rights.⁵³ Further evidence and testimony provides that there were hand drawn colored maps prepared over the decades by the Reclamation Service (now known as the U.S. Bureau of Reclamation) and/or the TCID showing the location of the **irrigable** acreage within the Project.⁵⁴ These maps were produced about 1913, 1925⁵⁵, 1960⁵⁶ and 1981 with colors on the maps indicating the

⁵² Exhibit Nos. 45 and 59, public administrative hearing before the State Engineer, October 1996 through March 1997.

⁵³ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 76, public administrative hearing before the State Engineer, February 4, 1985.

⁵⁴ Transcript, pp. 1797-1817, 1845-1847, public administrative hearing before the State Engineer, March 4, 1997.

⁵⁵ Transcript, pp. 1804-1806, public administrative hearing before the State Engineer, March 4, 1997.

⁵⁶ "The colored water right maps were developed in the mid-1960's utilizing the Property and Structure Maps (P & S Maps) as base maps and compiling information from BOR irrigable acreage maps, topographic maps, farm unit survey maps, soil reclassification maps, seeped and alkaline area maps, etc. Colors were employed to illustrate the location of water right acreages within each ¼ section. These Colored Water Right Maps have been continually updated as ownership changes, water right transfers, new water right contracts, etc. affected water right locations." Exhibit No. 66, Report on Milestone 2,

various kinds of water rights and water righted lands, e.g., green depicts areas having vested water rights (areas in irrigation prior to the inception of the Project in 1902).

A recent opinion from the Supreme Court of Washington held in the context of a water rights adjudication that an irrigation district's water right is not appurtenant to **irrigated** acreage, but rather the **irrigable** acreage.⁵⁷ The State Engineer finds that the water rights contracted for in the Project are not appurtenant to the entire parcel of land described in any particular contract.

VI.

LOCATION OF LANDS COVERED BY WATER RIGHTS

A substantial portion of the controversy in this matter appears to revolve around the PLPT's complaint that it cannot tell from the water right agreements/contracts/certificates issued by the Reclamation Service, the Bureau of Reclamation or the TCID the specific location of the areas with water rights within an identified section of land. Testimony was provided in the 1984-1985 hearings that the water righted area of an existing place of use can be found on the water rights maps found in the TCID offices, and that the State⁵⁸ and the Bureau of Reclamation also have copies of those maps.⁵⁹ It was indicated that those maps were

Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, second p. 2 in exhibit. A $\frac{1}{4}$ $\frac{1}{4}$ section refers to a 40 acre subdivision of a complete section of land containing approximately 640 acres. A full section is divided into quarters (NW $\frac{1}{4}$) and further divided into quarter quarters (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of said section.

⁵⁷ In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin; State of Washington, Dept. of Ecology v. Acquavella, et al., 1997 WL 197268 (Wash.). The Court further held that although an irrigation district's water right is legally appurtenant to the land on which the water is applied, the right can be shifted to any land in the district on which the water can be beneficially used, on any irrigable acreage.

⁵⁸ The State Engineer assumes the witness was referring to the State Engineer's office.

⁵⁹ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 314, public administrative hearing before the State Engineer, November 28, 1984.

prepared by starting with the original contracts on a particular piece of property and then the old land classifications and soil classifications were reviewed, since a person could only apply for water rights on irrigable land. Further, testimony indicated that the Bureau of Reclamation was planning to hire an independent contracting firm to confirm the TCID's water right records and maps.⁶⁰

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

A February 1980 report, known as the "Criddle Report", prepared by Clyde-Criddle-Woodward, Inc. for the Bureau of Indian Affairs was intended to be a determination of the water righted acreage on the Newlands Project using aerial photos and various water right documents made available by the TCID.⁶¹ In September 1984, Intermountain Professional Services, Inc. entered into a contract with the Bureau of Reclamation for a review of the Criddle Report.⁶² The review was to include the production of a set of accurate maps on mylar showing the locations and amount of water righted land as identified in the Criddle Report.⁶³ Intermountain was to analyze the source documents (copies of the contracts and certificates and the Property and Structure Maps) as provided to Mr. Criddle by the TCID, and was to then derive an independent number of water righted acres from the contracts and certificates,

⁶⁰ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, pp. 314-318, public administrative hearing before the State Engineer, November 28, 1984.

⁶¹ "Criddle Report" Review, prepared by Intermountain Professional Services, Inc., dated January 31, 1985, p. 2, official records in the office of the State Engineer.

⁶² Id. at 3.

⁶³ Ibid.

and from the Property and Structure Maps.⁶⁴

During the course of its analysis, Intermountain reviewed 1,721 water right contracts and applications covering 2,584 land divisions. Since Intermountain's analysis was limited to the documents Mr. Criddle used in his report, Intermountain did not reach definitive conclusions about the actual water righted acres in the Newlands Project.⁶⁵ Intermountain concluded its review by proposing suggestions for further research, including further research for all water right contracts and applications and updating maps.⁶⁶

By letter dated October 31, 1984, the United States Department of Interior, Bureau of Reclamation, wrote to then State Engineer Peter G. Morros and requested that he review the water rights maps of the TCID and advise whether they accurately and correctly depicted the status under Nevada law of water rights on the Newlands Project.⁶⁷ However, subsequently, in recognition of the difficulty of responding to that request the Bureau of Reclamation contracted with Chilton Engineering, Chartered ("Chilton") to perform a water rights investigation.⁶⁸

On August 22, 1984, Chilton entered into a contract with the United States Bureau of Reclamation to study the water rights on the Newlands Project. The original scope of the work included a complete review and compilation of all water righted acreages,

⁶⁴ Ibid.

⁶⁵ "Criddle Report" Review at 21.

⁶⁶ "Criddle Report" Review at 25-30.

⁶⁷ Official records in the office of the State Engineer.

⁶⁸ Letter from Douglas Olson, Project Manager to Peter G. Morros, State Engineer, dated December 31, 1986, official records in the office of the State Engineer.

ownerships, and locations within the Newlands Project.⁶⁹ In Milestone 1, Chilton was to tabulate by ¼ ¼ sections the water righted acreage according to the TCID colored water right maps⁷⁰ and the Intermountain Study, and to tabulate by ¼ ¼ sections the discrepancies between the sources, and to prepare an estimate of costs to investigate and analyze all discrepancies.

In May 1985, the Bureau of Reclamation directed Chilton to proceed with Milestone 2 to investigate all discrepancies found by Milestone 1 to the point where the differences between the TCID colored water right maps and the Intermountain Study source document column were resolved or no resolution was found.⁷¹ In Milestone 2, Chilton resolved all but 110.4 acres of the discrepancies. Chilton found through its research that the records on file at the TCID office in Fallon together with the Bureau of Reclamation ledgers covering the period from 1903 to 1928 were complete and comprehensive enough to document the reasons for all but a fraction of the discrepancies.⁷²

Chilton also reached the conclusion that the TCID colored water right maps are the **best evidence** of the documented location of water rights within the Newlands Project.⁷³ Milestone 4 would have produced a map showing the physical location of water rights within the ¼ ¼ sections⁷⁴ according to the records available at the

⁶⁹ Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, second p. 1 in exhibit. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996.

⁷⁰ Id. at 1-2.

⁷¹ Report on Milestone 2. at 3.

⁷² Report on Milestone 2. at 5.

⁷³ Report on Milestone 2 at 6.

⁷⁴ Historically, the location of water rights within the Newlands Project had been defined by the irrigable areas inside ownership parcels or farm units. Report on Milestone 2 at 28.

TCID. However, it was Chilton's conclusion that a great deal of time and effort went into the preparation of the maps and that the **TCID colored water right maps substantially conform to the original areas documented to have water rights.**⁷⁵

Based on Chilton's work, the United States Bureau of Reclamation concluded that the TCID water right records **are the most accurate available, and should be used to determine water righted acreage on the Newlands Project,** and the United States Bureau of Reclamation agreed with Chilton that further investigations were not warranted.⁷⁶

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

The State Engineer finds that the TCID maps are the best evidence that exists as to the location of water righted lands within the Project and at some point the parties must accept the evidence as it stands. The evidence is not of the quality one would hope, but to the State Engineer's knowledge it is the best evidence that exists. The Newlands Reclamation Project was the first reclamation project in the United States and the sophisticated mapping techniques of today did not exist.

⁷⁵ Report on Milestone 2 at 28-29.

⁷⁶ Letter from Douglas Olson, Project Manager, to Peter G. Morros, State Engineer, dated December 31, 1986, official records of the office of the State Engineer.

Another issue as to the location of land covered by water right contracts arises in the context of the aerial photography used by the protestant's witnesses for making land use determinations on the existing places of use from 1948 through the date of filing of the applications. The protestant's witnesses reviewed aerial photographs of the Project for the years 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 (no photographs were introduced into evidence) at various scales as summarized below:

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

Except for the 1948 and 1977 photographs, which utilized a much better scale, use of only these aerial photographs by witnesses to make land use determinations, particularly with respect to some of the very small parcels of land (e.g. 0.1 of an acre) was often a guess as to what was actually taking place on the ground. The first problem was that in many instances there was no clear determination as to where the legal description of the existing place of use on the transfer application map actually fell on the aerial photographs.

For example, the protestant's witnesses who used the photographs to make land use determinations did not definitively pinpoint where the section line fell. They could not determine whether it was located on the north side of a highway, in the middle of a highway, along a fence line or the shoulder of the road. Such distinctions in attempting to make land use

⁷⁷ Exhibit No. 15, public administrative hearing before the State Engineer, October 15-18, 1996.

determinations for some parcels of land as small as 0.1 of an acre are critical.

Furthermore, just attempting to accurately locate a parcel of land as small as some of those at issue here on aerial photographs of the scale of some of those used by the protestant's witnesses pointed out the difficulty of using those photographs to make land use determinations as critical as those being made in these cases. For example, assume an aerial photograph of a scale of 1:20,000, which means that 1 foot on the photograph equals 20,000 feet (or approximately 3.78 miles) on the ground, or 1 inch on the photograph equals 20,000 inches on the ground. Also assume that the parcel of land you are looking for is 0.15 acres square. Taking that 0.15 acres and multiplying it by the 43,560 ft² found in an acre equals 6,534 ft² or 80.83 feet on a single side of the 0.15 acre parcel. Measuring the 80.83 feet on an aerial photograph of the scale of 1:20,000 means we are looking to specifically locate a piece of land that is 0.00404 of a foot or 0.05 inches long on the photograph. This means we are looking for a parcel of land the size of a dot made from the lead of a mechanical pencil.

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

The State Engineer finds, in light of the fact that there is a significant margin of error in the aerial photographs, that the exact location of the existing place of use under any transfer application on an aerial photograph was not sufficiently demonstrated to the satisfaction of the State Engineer to be accurate, and that the scale of many of the photographs is far too small for making land use determinations as critical as those being

made here, the protestant's evidence as to land use descriptions from those aerial photographs will be given weight which recognizes the possibility of a fairly significant margin of error. Therefore, the State Engineer finds that the greatest weight as to land use determinations will be given to those descriptions provided by the applicants at the original administrative hearings.

VII.

EXISTENCE OF UNDERLYING CONTRACT

The issues remanded to the State Engineer were lack of perfection, forfeiture or abandonment and those remanded issues did not include whether or not an underlying contract existed. In fact, in many of the hearings at issue here a process was gone through whereby the legal counsel for the United States Bureau of Reclamation, Mr. Turner, in each instance informed the applicants when he was not convinced that title to the water rights requested for transfer had been supplied. Upon such notification, the applicants performed further research until Mr. Turner had been satisfied that the title was documented to each of the water rights at issue. The State Engineer finds it interesting that during the remand hearings Mr. Macfarlane, present legal counsel for the United States, presented new documents regarding title to the underlying water rights being requested for transfer, but now took the position that he could not certify whether the appropriate title documents had been found. The State Engineer finds that the issue of whether or not an underlying contract exists is barred as it was not an issue raised on appeal to the Federal District Court and was not included as an issue remanded to the State Engineer by the Federal District Court, particularly as part of the role the United States played in these proceedings was to assure that an underlying water right contract existed for each parcel of land. Furthermore, even if a contract was not specifically introduced into evidence, which at the time of the original administrative hearings everyone was under the belief that said documentation had been provided, the TCID contract file is readily identifiable from

serial numbers found on either the transfer application or its accompanying map, and the TCID certification as to each transfer application provides the contract serial number for the relevant contract.⁷⁸

VIII.

CONTRACT DATES

At the first administrative hearings regarding these transfer applications, the TCID introduced what it believed to be documents which contained all the original contracts and agreements for all the existing places of use under these transfer applications.⁷⁹ A review of Exhibit CC from the 1985 administrative hearings during the 1996-98 hearings revealed that the contract document exhibits did not in fact contain contracts covering every single parcel of land under the transfer applications.

During the 1996-98 hearings, evidence was introduced by the United States and by applicants of other contracts with different contract dates covering some of the same parcels of land as described by contracts found in the exhibits filed at the original administrative hearings.

The State Engineer finds that if the original contract document filed at the original administrative hearing contains a contract for the relevant parcel of land he will use that contract as the best evidence as to the date of an underlying contract unless evidence convinces him to use another contract date. In recognition that perhaps some of the early contract exhibits appear

⁷⁸ There have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by owner's names. They also used serial numbers issued to the contract owner's Homestead Entries. Report on Milestone 2, Resolution of Differences Newlands Project Water Rights, Chilton Engineering, Chartered, August 30, 1985, p. 40. Exhibit No. 66, public administrative hearing before the State Engineer, November 12-15, 1996.

⁷⁹ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 80, public administrative hearing before the State Engineer, June 24, 1985. See also, transcripts, public administrative hearings before the State Engineer, January 16, 1986, February 21, 1986, January 28, 1988, February 16 and 23, 1989 and April 9, 1991.

to be incomplete, if the original exhibit does not contain a contract for a particular parcel, the supplemental contracts provided by the Bureau of Reclamation will be taken as the best evidence of a particular contract date unless evidence convinces him to use another contract date. If a conflict arises between a date provided in the exhibit at the original administrative hearing and a contract provided by the Bureau of Reclamation during the 1996-98 hearings, the State Engineer will accept the contract date in the exhibit at the original administrative hearing as the appropriate contract date, as that was the contract provided by the TCID at those hearings, unless evidence is provided otherwise by any party proving a different and apparently correct contract date. While the United States provided the additional contract documents at some of the hearings on remand it took no position as to which document would be the correct underlying contract.

The State Engineer further finds that if an applicant can provide convincing evidence that neither the original contract or any contract provided by the United States is the correct contract and the applicant has evidence of the relevant contract relating to a specific parcel of land the State Engineer will find that documentation to be the best evidence of the contract date. If no copy of an underlying water right contract is provided, the State Engineer finds that the serial number provided for in the application, its supporting map, or the TCID certification will indicate the TCID contract file, but nothing will be in the evidentiary record to indicate the contract date or for the State Engineer to rule on the protest issues.

IX.

FILLING IN AND LEVELING WITHIN SAME FARM UNIT

During the administrative hearings, testimony and evidence indicated that in some cases the proposed places of use included swales that were filled in or sand dunes that were leveled. The existing places of use from which water is being transferred includes highways, roads, drains and farmsteads. During the 1996-

98 hearings, the PLPT used a series of aerial photographs and satellite images to illustrate the nature of the land use at the existing places of use for each parcel of land involved in each transfer application. The PLPT focused all of its testimony and evidence on the existing place of use and provided nothing as to the proposed place of use. However, it was clear to the State Engineer upon review of the images⁸⁰ that in some cases the proposed places of use were being irrigated at the time the aerial photographs were taken.

The State Engineer finds that if the lands being stripped of water rights were simultaneously replaced by irrigated lands where swales were filled in or sand dunes were leveled within the irrigable area of the same farm unit or contract area then neither forfeiture nor abandonment applies.

X.

PERFECTION OF PRE-STATUTORY VESTED WATER RIGHTS

"Irrigation development had been proceeding for decades in Nevada before the legislature provided any method by which an appropriative right could be acquired. The greater portion of the water rights in the State had been acquired prior to that time ... and such rights were uniformly recognized by the courts as vested rights."⁸¹ "Such nonstatutory appropriations were made by actually diverting the water from the source of supply, with intent to apply the water to a beneficial use, followed by application to such beneficial use within a reasonable time."⁸²

⁸⁰ All parties viewed the aerial photographs and satellite images while the PLPT's witnesses explained how they oriented themselves from the transfer application map to the aerial photographs and interpreted the nature and culture of the particular parcel. However, the PLPT did not offer the photographs into evidence in the Record on Review on Remand.

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

⁸² *Ibid.*

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

The Alpine Decree, in a tabulation of vested rights acquired by contract, identifies 30,482 "former **irrigated**" acres with priority dates ranging from 1865 to 1902.⁸⁶ Testimony was provided that at the time the Project was turned over to the TCID in 1926⁸⁷ for operation and maintenance there were 20,145 acres of vested water rights on land within the Project and those lands had been **put to use and irrigated** back in the 1800's.⁸⁸ Based on the fact that the Alpine Decree identifies and tabulates vested water right acreage as "former irrigated acreage", the State Engineer finds that challenges to lack of perfection of said vested water rights could have and should have been raised in the decree courts. Many of the PLPT's protest claims of lack of perfection as to pre-Project vested water rights were dropped during the pendency of

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

⁸⁴ Alpine, 503 F.Supp. at 881.

⁸⁵ Ibid.

⁸⁶ Alpine Decree at 151-152.

⁸⁷ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. TCID actually took over operation of the Project in 1927, but pursuant to a contract dated December 18, 1926. Transcript, p. 368, public administrative hearing before the State Engineer, November 28, 1984.

⁸⁸ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 69, public administrative hearing before the State Engineer, February 4, 1985.

these proceedings, and if they were not dropped, the State Engineer finds that those pre-statutory vested water rights exchanged for Project water rights were perfected as a matter of fact and law pursuant to the Orr Ditch and Alpine decrees.

XI.

CANALS, DRAINS, DITCHES, ROADS, ETC.

Testimony was provided that according to the Reclamation Service's regulations irrigable acreage within a contract area was determined by taking the total acreage and reducing this total acreage by the areas taken up by railroads, canals, laterals, drains, waste ditches, rights-of-way, along with reductions for various reasons, such as steepness of the land, type of soil, seep or waterlogged areas or lands which were too high in elevation to be served water from the existing Project facilities.⁸⁹ For example, evidence indicated that an oversight was made and no deduction taken in accordance with the uniform practice from the defined irrigable acreage for the right of way for the G-line canal when the plats showing the irrigable area were approved on a particular farm unit.⁹⁰ The G-line canal should have been excluded from the defined irrigable acreage of the farm unit which confirms that the practice was to exclude those areas.

The State Engineer finds that if all or a portion of the existing place of use is covered by a railroad, road, canal, drain, lateral, waste ditch, house, other structure or right-of-way and the TCID by its certification indicates that area is within the irrigable area of the parcel, the irrigable area must include the area covered by the structure. Since the Reclamation Service regulations excluded such structures from the irrigable area, the structure must not have existed at the time of the contract. If

⁸⁹ Transcript, pp. 69-70, public administrative hearing before the State Engineer, February 4, 1985. See TCID Exhibit Y in Vol. II, previous Record on Review filed with the Court in November 1985.

⁹⁰ Exhibit No. 203, public administrative hearing before the State Engineer, March 4, 1997.

the colored water right maps include the area now encompassing the lands taken up by said canal, drain, etc. those structures must have come into existence after the date of the contract. The State Engineer further finds that if a dirt-lined supply ditch is within the irrigable area of an existing place of use, water was beneficially used on the parcel of land covered by the dirt-lined ditch. Dirt-lined ditches within a farm were not excluded from the irrigable area under the Reclamation Service regulations and it is the State Engineer's understanding that the Bureau of Reclamation required these areas to be water righted.

**GENERAL CONCLUSIONS OF LAW APPLICABLE TO ALL APPLICATIONS
UNDER CONSIDERATION IN THIS RULING**

I.

**PERFECTION AS A MATTER OF LAW OF THE SPECIFIC QUANTITY
OF WATER DECREED FOR THE NEWLANDS PROJECT
IN THE ORR DITCH DECREE**

An argument was raised in the pre-hearing briefs that the issuance of the Orr Ditch Decree is as a matter of law a determination that the water rights of the Project have been perfected; thus, any challenges to the lack of perfection of said rights are barred by the doctrine of *res judicata*. In most instances, a decree is a determination of perfection as a matter of fact and as a matter of law; however, the history of the Orr Ditch Decree, as refined by the Ninth Circuit Court of Appeals decisions in these transfer cases, and the United States Supreme Court decision in Nevada v. U.S., has injected great uncertainty as to what was actually accomplished by the Orr Ditch Decree. While the Orr Ditch Decree itself appears to have determined that the water right was perfected as a matter of law, later court decisions have brought that determination into question.

The Special Master in the Orr Ditch Court treated the United States' water right for the Project as a type of implied federal reserved water right when he indicated that the withdrawal of lands for reclamation carried with it by implication the reservation of

unappropriated water required for irrigation.⁹¹ As such, perfection was not an issue. When the United States withdraws land from the public domain and reserves it for a federal purpose it impliedly reserved unappropriated water to the extent necessary to accomplish the reservation and the water right **vests** on the date of the reservation.⁹²

The Special Master noted that the United States was not constrained by the doctrine of due diligence in placing the water to beneficial use, but also noted that the Government proceeded with due diligence to construct the Derby Dam, Truckee Canal and Lahontan Reservoir, and that if the enterprise had been a private one the right to the water diverted for storage and irrigation would have been complete,⁹³ i.e., the water right was perfected. Under these conditions the State Engineer would find that the water right for the entire Project was perfected as a matter of law pursuant to the decree even though the decree only established an agreed upon maximum aggregate amount of water to which the United States (now Project farmers) was entitled for the development of the Project.⁹⁴

But then, the Ninth Circuit Court of Appeals in the Alpine III decision proclaimed there are two sets of water rights on the Project, a concept with which the State Engineer and the Federal District Court strongly disagree. One set, the amalgamation of water rights obtained by the United States for the entire Project and, the other set, those rights appurtenant to the particular

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

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

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

⁹⁴ Alpine II, 878 F.2d at 1224.

tracts of land.⁹⁵ This decision of the Ninth Circuit Court of Appeals is internally inconsistent and illogical as the decision also indicates there is no appropriation of water until water is actually put to beneficial use, but fails to consider how the United States could have perfected water rights under Nevada law absent the United States itself having a place to put that water to beneficial use. All water rights associated with the Project had to either be established under Nevada law or they are the implied reserved water rights noted by the Special Master.⁹⁶ However, even though the Special Master treated the United States' water right for the Project as a federal reserved right, the Reclamation Act itself provides that water for reclamation projects is appropriated pursuant to state law.

In Prosole v. Steamboat Canal Co.,⁹⁷ the Nevada Supreme Court considered the issue of who was the appropriator and owner of the water as between a diverter and a conveyor of the water and the owner of the reclaimed lands upon which the water was applied to beneficial use. The Court held that no water right was created by the mere diversion of water from a public watercourse. An appropriation was only accomplished by the act of diversion coupled with the act of application to a beneficial use.⁹⁸ It necessarily follows from the principle established by Prosole that no water right was created by the mere diversion and storage of water by the United States and that under Nevada law the appropriation is not accomplished until the water is put to beneficial use. Since the United States Supreme Court in Nevada v. U.S. has now said that the water rights belong to the farmers and not the United States, it appears to have disregarded the Orr Ditch Decree Court's

⁹⁵ Alpine III, 983 F.2d at 1495.

⁹⁶ California v. U.S., 438 U.S. 645, 665 (1978).

⁹⁷ Prosole v. Steamboat Canal Co., 37 Nev. 154 (1914).

⁹⁸ Id. at 159-60.

determination that the water rights for the Project are implied reserved rights which means that nearly 40 years after the fact the Court changed the rules of the game and perfection was made an issue.

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

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

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

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

From the historical records it appears that the 1,500 cfs water right from the Truckee River for the Project was a quantity set aside for the Project to be fully developed in the future. The Ninth Circuit Court of Appeals has already rejected the State Engineer's determination that water rights within the Project had vested in the United States upon the creation of the Project in 1902 prior to the passage of Nevada's forfeiture statute, and concluded that the water rights in the Project did not vest in the year 1902.¹⁰¹ Rather, the Court held as a matter of Nevada law "the rights could become vested in the individual landowners only upon becoming appurtenant to a particular tract of land,"¹⁰² i.e., that the right vests only upon beneficial use of the water on the land. Therefore, the State Engineer concludes that the water rights for the Project were not perfected as a matter of law in the Orr Ditch Decree.

II.

PERFECTION AS MATTER OF LAW UPON OBTAINING A CONTRACT

Another argument presented was that the water rights were perfected once a person obtained a contract. Testimony was provided that the last new water right contract in the Project was approved by the United States in the 1960's. Prior to that, if someone sought a new water right, the Bureau of Reclamation instructed them to develop the land, put it into production, then the Bureau of Reclamation determined irrigability and productivity constituting Bureau approval of the irrigation of the water righted land.¹⁰³ Based on the Bureau of Reclamation regulations, which the State Engineer must assume the Bureau followed while it

¹⁰¹ Alpine III, at 1495-96.

¹⁰² Id. at 1496.

¹⁰³ Transcript Vol. III, pp. 458-459, public administrative hearing before the State Engineer, November 28, 1984. Transcript, pp. 133-135, public administrative hearing before the State Engineer, April 9, 1991. Transcript, p. 1857, public administrative hearing before the State Engineer, March 4, 1997.

operated the Project through 1926, the Bureau required that in order to obtain a water right a person was to perfect the water right before the Bureau determined irrigability and productivity. Therefore, the State Engineer concludes the evidence supports the conclusion that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

PLPT'S MOTION FOR RECONSIDERATION OF A PORTION OF
INTERIM RULING NO. 4411

In the pre-hearing legal briefs, the State Engineer was presented with the argument that after the Ninth Circuit Court of Appeals' decision in Alpine II¹⁰⁴ (that the State Engineer may not grant an application to transfer a water right that has not been put to beneficial use) the Nevada Legislature re-affirmed that Nevada law does allow for the transfer of a water right before perfection on the transferor place of use, indicating that the Ninth Circuit was mistaken in its interpretation of Nevada law.¹⁰⁵ After the Court's decision in Alpine II, the Nevada Legislature added NRS § 533.324 to clarify that as used in NRS § 533.325¹⁰⁶ "water already appropriated" **includes** water for whose appropriation the State Engineer has issued a permit but which has not been applied to the intended beneficial use before an application to change the point of diversion, place or manner of use is made. In other words, an unperfected water right can be changed under Nevada law.

The State Engineer in Interim Ruling No. 4411 concluded that

¹⁰⁴ Alpine II, 878 F.2d at 1226.

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

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

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

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

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

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

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

The Nevada legislature specifically addressed, and in its addition of NRS § 533.324, clarified the court's decision in Alpine II as to Nevada law. The State Engineer's Interim Ruling No. 4411 merely stated that the Alpine II Court was mistaken as to Nevada law. This, however, does not provide that all unperfected pre-statutory water rights can be the subject of a change application. There is still another step in the analysis which incorporates the concepts of due diligence and relation back in the perfection of a pre-statutory water right.

In any analysis of a change in place of use of a pre-statutory (pre-1905) surface water right the issue does arise of whether or not the right has been perfected. As to water rights decreed by a court in an adjudication, the State Engineer generally presumes that right has been perfected. However, in this case the protestant raised the issue that all of these rights (which were

¹⁰⁷ Assembly Committee on Government Affairs, March 24, 1993.

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

¹⁰⁹ Assembly Committee on Government Affairs, March 24, 1993.

contracted for out of the United States' decreed right) may not have been perfected. In cases where the protestant can prove the water right was not perfected the concepts of good faith, due diligence and relation back will be considered.

The doctrine of relation back and its related concept of due diligence are common law doctrines applicable to pre-statutory water rights in Nevada. The doctrine of relation back provides that:

[w]hen any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it, and although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it. If, however, the work be not prosecuted with reasonable diligence, the right does not so relate...¹¹⁰

Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the work a *bona fide* intention to complete it within a reasonable time.¹¹¹

As reflected in the Nevada statutes, when a project or integrated system is comprised of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.¹¹² If these waters had

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

¹¹¹ Id. at 546.

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

been appropriated under the Nevada statutory scheme for appropriating water, NRS § 533.380(1)(a) requires that the construction of the work must be completed within five years after the date of approval of the permit, and NRS § 533.380(1)(b) requires that the application of the water to its intended beneficial use must be made within ten years after the date of approval of the permit. The statute provides that for good cause shown the State Engineer may extend the time in which the construction work must be completed or the water applied to its intended beneficial use.¹¹³

The State Engineer concludes that the Alpine II Court misinterpreted Nevada law when it stated that all water rights in Nevada must be perfected prior to transfer; however, the State Engineer further concludes that all unperfected water rights are not available to be transferred. If the protestant proves a water right was not perfected prior to the filing of one of the transfer applications, the issue becomes whether that particular water right is still within the diligence phase of development. If it is within the diligence phase, the unperfected water right can be moved. If it is not within the diligence phase, the unperfected water right is not available for transfer as it does not comport with the common law concepts of due diligence and relation back. The State Engineer further finds this is an area where equity perhaps should act. Everyone had operated for years under the belief, as set forth by the Special Master, that the concept of due diligence was not applicable to the "United States" water right for the Project. If there was no requirement of diligence placed on the United States, no farmer even had an inkling that he or she would be subject to a due diligence requirement.

¹¹³ NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

**SPECIFIC APPLICATIONS UNDER CONSIDERATION
IN THESE REMAND HEARINGS**

APPLICATION 47809

GENERAL

I.

Application 47809 was filed on March 15, 1984, by William A. Card¹¹⁴ to change the place of use of 75.15 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 694, 538, and 538-51, Claim No. 3 Orr Ditch Decree, and Alpine Decree.¹¹⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 2.90 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 35, T.19N., R.29E., M.D.B.&M.

Parcel 2 - 0.20 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 35, T.19N., R.29E., M.D.B.&M.

Parcel 3 - 7.24 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.

Parcel 4 - 4.29 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 5 - 0.90 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 6 - 1.17 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described in the application as being 2.90 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and 13.80 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ both in Section 35, T.19N., R.29E., M.D.B. & M.

By letter dated July 12, 1999, as amended by letter dated August 19, 1999, the applicant requested that the following portions of Application 47809 be withdrawn: Parcel 3 in total; Parcel 4 - excepting out 0.81 acres that the applicant alleges the PLPT withdrew its protest; Parcel 5 - excepting out 0.72 acres that the applicant alleges the PLPT withdrew its protest; and Parcel 6 in total.

¹¹⁴ Application 47809 was assigned in the records of the State Engineer to Louia A. Guazzini, Jr. and Lila Lou Guazzini, Samuel R. Guazzini and Theodore L. Guazzini. File No. 47809, official records in the office of the State Engineer.

¹¹⁵ Exhibit No. 537, public administrative hearing before the State Engineer, October 21, 1997.

II.

Application 47809 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹¹⁶ and more specifically on the grounds as follows:¹¹⁷

- Parcel 1 - Lack of perfection, abandonment
- Parcel 2 - Forfeiture, abandonment
- Parcel 4 - Abandonment
- Parcel 5 - Abandonment.

FINDINGS OF FACT

I.

The State Engineer finds as to the request to withdraw portions of the application relevant to Parcels 4 and 5 that the protestant did not withdraw its protest claims of abandonment as to these parcels, but pursuant to Exhibit No. 545 indicated the areas were irrigated in 1948 only. Therefore, the State Engineer finds he will rule on the PLPT's claims of abandonment as to those parcels.

II.

CONTRACT DATES 47809

Parcel 1 - Exhibit CC from the 1985 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 31, 1907, covering the existing place of use.¹¹⁸ The State Engineer finds the contract date is December 31, 1907.

Parcel 2 - Exhibit CC from the 1985 administrative hearing contains aa "Application for Permanent Water Right" dated June 11, 1951, covering the existing place of use. At the 1997 administrative hearing the applicant provided evidence that this $\frac{1}{4}$ $\frac{1}{4}$ section of

¹¹⁶ Exhibit No. 538, public administrative hearing before the State Engineer, October 21, 1997.

¹¹⁷ Exhibit No. 20, public administrative hearing before the State Engineer, October 16, 1996.

¹¹⁸ Exhibit No. 540, public administrative hearing before the State Engineer, October 21, 1997.

land was patented in 1906,¹¹⁹ however, no other evidence was provided as to the date a water right was initiated on the existing place of use. The State Engineer finds the contract date is June 11, 1951, and water rights were initiated on this parcel under the evidence provided on June 11, 1951.

II.

PERFECTION

Parcel 1 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"¹²⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, bare land adjacent to the road, and the Harmon Deep Drain. At the 1997 administrative hearing, a witness for the applicant testified that the existing place of use did not include the road, that the existing place of use included irrigated land, that the area around the Harmon Drain was historically used for agricultural practices, and that field roads were irrigated land with reduced crops which is pastured at the end of the irrigation season.¹²¹ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

¹¹⁹ Exhibit No. 549, public administrative hearing before the State Engineer, October 21, 1997.

¹²⁰ Exhibit No. 544, public administrative hearing before the State Engineer, October 21, 1997.

¹²¹ Transcript, pp. 3476-3481, public administrative hearing before the State Engineer, October 21, 1997.

IV.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3 held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcel 2 - The contract date is June 11, 1951, thereby making this water right subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"¹²² which indicates from aerial photographs that from 1962 through 1984 the land use on this parcel was described as bare land adjacent to road or land adjacent to road. At the 1985 administrative hearing, the applicant described the land use on this parcel as Downs Lane and Harmon Deep Drain.¹²³ The State Engineer specifically adopts and incorporates General Finding of Fact VI and finds that the greatest weight as to land use determinations will be given to those descriptions provided by the applicants at the original 1985 administrative hearing which in this case was Downs Lane and Harmon Deep Drain.

The State Engineer finds that no water was placed to beneficial use on Parcel 2 for the 22 year period from 1962 through 1984, however, the State Engineer finds that the protestant's witness agreed that portions of the proposed places of use within Section 35, T.19., R.29E. were irrigated in 1977 before the filing of the change application¹²⁴ which indicates the water was being

¹²² Exhibit No. 544, public administrative hearing before the State Engineer, October 21, 1997.

¹²³ Exhibit No. 22, public administrative hearing before the State Engineer, October 16, 1996.

¹²⁴ Transcript, pp. 3417-3419, 3422-3423, public administrative hearing before the State Engineer, October 21, 1997.

used within the farm unit precluding a determination of non-use of the water. The State Engineer further finds that testimony and evidence¹²⁵ was provided that the transfer from this parcel is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.¹²⁶ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."¹²⁷ Non-use for a period of time may inferentially be some evidence of intent to abandon,¹²⁸ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

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

¹²⁵ Exhibit No. 934 and 935, Transcript, pp. 4826-4827, public administrative hearing before the State Engineer, January 13, 1999; Declaration of Louie A. Guazzini, filed in the office of the State Engineer February 16, 1999.

¹²⁶ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

¹²⁷ Revert v. Ray, 95 Nev. 782, 786 (1979).

¹²⁸ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1 and 2 - The applicant provided testimony and evidence¹²⁹ that the transfers from these parcels are intrafarm transfers. The State Engineer finds the evidence supports the claim that these are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 4 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"¹³⁰ which indicates from aerial photographs that from 1962 through 1984 the land use on this parcel was described as bare land and large structures. At the 1985 administrative hearing, the applicant described the land use on this parcel as a school.¹³¹ The State Engineer finds that no water has been placed to beneficial use on the existing place of use for the 22 year period from 1962 through 1984 and the land use is inconsistent with irrigated agriculture.

Parcel 5 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"¹³² which indicates from aerial photographs that from 1962 through 1984 the land use on this parcel was described as bare land. At the 1985 administrative hearing, the applicant described the land use on this parcel as a

¹²⁹ Exhibit No. 934 and 935, Transcript, pp. 4826-4827, public administrative hearing before the State Engineer, January 13, 1999; Declaration of Louie A. Guazzini, filed in the office of the State Engineer February 16, 1999.

¹³⁰ Exhibit No. 544, public administrative hearing before the State Engineer, October 21, 1997.

¹³¹ Exhibit No. 22, public administrative hearing before the State Engineer, October 16, 1996.

¹³² Exhibit No. 544, public administrative hearing before the State Engineer, October 21, 1997.

school.¹³³ The State Engineer finds that no water has been placed to beneficial use on the existing place of use for the 22 year period from 1962 through 1984 and the land use is inconsistent with irrigated agriculture.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹³⁴

II.

PERFECTION

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

III.

FORFEITURE

The State Engineer found that no water was placed to beneficial use on Parcel 2 for a period of 22 years, but this is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

ABANDONMENT

The State Engineer concludes that the transfers from Parcels 1 and 2 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer found that no water was placed to beneficial use on Parcel 2 for a period of 22 years, but that the proposed place of use had been irrigated precluding a claim of non-use of the water or an intent to abandon. The State Engineer further concludes as to Parcels 4 and 5 that the water rights are subject to abandonment.

¹³³ Exhibit No. 22, public administrative hearing before the State Engineer, October 16, 1996.

¹³⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

RULING

The protest to Application 47809 is hereby upheld in part and overruled in part. The State Engineer's decision granting the transfer of water rights from Parcels 1 and 2 is hereby re-affirmed. The water rights appurtenant to Parcels 4 and 5 are declared abandoned. Therefore, the permit granted under Application 47809 is amended to allow the transfer of water rights appurtenant to 3.10 acres of land totalling 13.95 acre-feet to be perfected at the proposed place of use.

APPLICATIONS 48465 AND 48466

GENERAL

I.

Application 48465 was filed on October 5, 1984, by Virgil Getto to change the place of use of 113.42 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 662, 659, 657-1, 662-1, 662-1-A, 538, 613-2-A, 724, 724-13, 724-14, 725-15, 724-16, 724-18, 724-19, 630, 652-1-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.¹³⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 0.90 acres NW¼ NE¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

Parcel 2 - 1.30 acres NE¼ NE¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

Parcel 3 - 0.40 acres NW¼ SE¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

Parcel 4 - 2.77 acres NW¼ SE¼, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 5 - 1.10 acres SE¼ SE¼, Sec. 07, T.19N., R.29E., M.D.B.&M.

Parcel 6 - 9.90 acres NE¼ NW¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

Parcel 7 - 9.94 acres SW¼ SW¼, Sec. 32, T.19N., R.29E., M.D.B.&M.

Parcel 8 - 3.15 acres NW¼ SW¼, Sec. 36, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 3.60 acres in the SE¼ SE¼ and 6.71 acres in the NE¼ SE¼ of Section 7, T.19N., R.29E., M.D.B. & M., 16.75 acres in the SE¼ NW¼ of Section 19, T.19N., R.29E., M.D.B. & M. and 2.40 acres in the NE¼ SE¼ of Section 18, T.19N., R.29E., M.D.B. & M.¹³⁶

By letter dated June 7, 1995, the applicant requested the withdrawal of the Parcel 8 request for transfer and the withdrawal of 9.00 acres from the Parcel 7 request for transfer.¹³⁷ By letter dated July 12, 1999, as amended by letter dated August 19, 1999, the applicant requested that the transfers from Parcels 4, 6

¹³⁵ Exhibit No. 260, public administrative hearing before the State Engineer, April 15, 1997.

¹³⁶ Exhibit Nos. 261 and 263, public administrative hearing before the State Engineer, April 15, 1997.

¹³⁷ Exhibit No. 261, public administrative hearing before the State Engineer, April 15, 1997.

and the remaining portion of 7 be withdrawn.

II.

Application 48466 was filed on October 5, 1984, by Virgil Getto to change the place of use of 58.63 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 659 and Permit 47873.¹³⁸ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 16.75 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 19, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as 1.00 acre in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 1.60 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 4.30 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, 4.25 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 3.10 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, all in Section 19, T.19N., R.29E., M.D.B. & M.; 0.25 of an acre in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 1.15 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 20, T.19N., R.29E., M.D.B. & M., and 1.10 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7, T.19N., R.29E., M.D.B. & M.

Permit 47873 approved the transfer of water rights to 30.55 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, T.19N., R.29E., M.D.B. & M.¹³⁹ Application 48465 requested the transfer of water rights to 16.75 acres of land in the same place that Application 47873 moved water which resulted in the stacking of water rights. Therefore, Application 48466 was filed to move that stacked water to a different proposed place of use.¹⁴⁰ The parties agreed that if water rights had been perfected on the existing places of use under Application 48465 and the water rights were neither forfeited or abandoned then the protest claims of lack of perfection, forfeiture

¹³⁸ Exhibit No. 265, public administrative hearing before the State Engineer, April 15, 1997.

¹³⁹ File No. 47873, official records in the office of the State Engineer.

¹⁴⁰ Transcript, pp. 2100-2105, public administrative hearing before the State Engineer, April 15, 1997.

and abandonment would be moot as to Application 48466.¹⁴¹ The State Engineer notes that while the parties made such an agreement Application 48466 does not seek to move water using Application 48465 as the base water right, but rather seeks to move water using the base right of Permit 47873, but he will accept the stipulation as entered.

III.

Applications 48465 and 48466 were protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹⁴² and more specifically on the grounds as follows:¹⁴³

APPLICATION 48465

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Lack of perfection, forfeiture, abandonment
- Parcel 3 - Lack of perfection, abandonment
- Parcel 5 - Lack of perfection, abandonment

APPLICATION 48466

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

FINDINGS OF FACT

I.

CONTRACT DATES 48465 AND 48466

APPLICATION 48465

Parcels 1 and 2 - Exhibit CC from the 1985 administrative hearing contains a "Water-right Application" under Serial Number 213 dated July 11, 1918, in the name of Caroline Getto covering Farm Unit "A" in the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19, T.19N., R.29E., M.D.B. & M. which includes Parcels 1 and 2.¹⁴⁴ At the 1997 administrative hearing,

¹⁴¹ Transcript, p. 2101, public administrative hearing before the State Engineer, April 15, 1997.

¹⁴² Exhibit Nos. 262 and 266, public administrative hearing before the State Engineer, April 15, 1997.

¹⁴³ Exhibit No. 20, public administrative hearing before the State Engineer, October 16, 1996.

¹⁴⁴ Exhibit No. 264, public administrative hearing before the State Engineer, April 15, 1997.

the applicants provided evidence of a "Receipt - Water Right Application" dated February 25, 1908, under the name of Charles Hoover covering 76 acres of irrigable land for Farm Unit "A" under Certificate 257 which has the number 213 written above it in longhand.¹⁴⁵ The Water-right Application admitted at the 1985 administrative hearing indicated it was for Serial Number 213 and covered 76 acres of irrigable land within the tract described as Farm Unit "A", and that Oda Hoover assigned to Caroline Getto all right, title and interest she had in Water Right Application No. 213 for the described land. Further, a document presented in a later Getto application (Application 53661) included a "Certificate of Filing Water Right Application" dated February 24, 1908, under the name of Charles Hoover which also covers these existing places of use.¹⁴⁶ The State Engineer finds that the February 25, 1908, receipt for water right application in conjunction with the Certificate of Filing Water Right Application dated February 24, 1908, shows that water rights were first initiated for use on these parcels on or before February 24, 1908.

Parcel 3 - The applicant first alleged that Exhibit CC from the 1985 administrative hearing included a vested water right contract dated December 28, 1907, covering Parcel 3.¹⁴⁷ The State Engineer notes that his office copy of Exhibit CC does not contain a copy of a document dated that date nor does it appear that the protestant's copy of Exhibit CC contained a copy of such document as the protestant's Exhibit No. 269 did not cite to that contract.

At the 1997 administrative hearing, the United States introduced a "Certificate of Filing Water Right Application" under the name of John Ferguson dated December 31, 1907, covering Parcel

¹⁴⁵ Exhibit No. 281, public administrative hearing before the State Engineer, April 15, 1997.

¹⁴⁶ Exhibit No. 290, public administrative hearing before the State Engineer, April 16, 1997.

¹⁴⁷ Rebuttal Brief Submitted for Applications 48465 and 48466.

3.¹⁴⁸ At the 1999 administrative hearing, the applicant introduced a December 28, 1911, "Water-right Application" filed by John and Andrew Getto.¹⁴⁹ However, in reviewing the documents introduced in the hearing on Mr. Getto's Application 53661, a "Certificate of Filing Water Right Application" dated November 12, 1908¹⁵⁰ under the name of C.W. Foote covers this same land.

The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds by reviewing Exhibit Nos. 277, 290, 896, 897, 898, 899 and 924 it can be determined that John Ferguson was on the land and had applied for water by December 1907¹⁵¹, and that around November 1908 C.W. Foote applied for water on the same land with said land conveyed to him in May 1911 by John Ferguson.¹⁵² The State Engineer further finds that in October 1911 the Getto family came into ownership of this property and that in December 1911 first applied for water on the same land.¹⁵³ The State Engineer finds that the property at issue went into the Getto family's ownership in 1911, but that water rights were initiated on this parcel on December 31, 1907.

¹⁴⁸ Exhibit No. 277, public administrative hearing before the State Engineer, April 15, 1997.

¹⁴⁹ Exhibit Nos. 897 and 898, public administrative hearing before the State Engineer, January 13, 1999.

¹⁵⁰ Exhibit No. 290, public administrative hearing before the State Engineer, April 16, 1990.

¹⁵¹ Exhibit No. 277, public administrative hearing before the State Engineer, April 16, 1997.

¹⁵² Exhibit No. 924, public administrative hearing before the State Engineer, January 13, 1999.

¹⁵³ Exhibit Nos. 896, 897, 898, 899, public administrative hearing before the State Engineer, January 13, 1999.

Parcel 5 - Exhibit CC from the 1985 administrative hearing contains a "Certificate of Filing Water Right Application" dated May 10, 1907, covering Parcel 5.¹⁵⁴ The State Engineer finds the contract date is May 10, 1907.

APPLICATION 48466

As noted above, Permit 47873 approved the transfer of water rights onto 16.75 acres in the SE¼ NW¼ of Section 19, T.19N., R.29E., M.D.B.& M. Application 48465 requested the transfer of water to the same 16.75 acres which resulted in the stacking of water rights. Therefore, Application 48466 was filed to move that stacked water to a different proposed place of use.¹⁵⁵ The parties agreed that if water rights had been perfected on the existing places of use under Application 48465 and the water rights were neither forfeited or abandoned then the protest claims of lack of perfection, forfeiture and abandonment would be moot under Application 48466.

II.

PERFECTION

Parcel 1 - The contract date is February 24, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁵⁶ which indicates from aerial photographs that in 1948 the land use was described as bare land adjacent to road. At the 1985 administrative hearing, the applicant indicated that water on Parcel 1 was being transferred from land covered by the Old River Road and Getto drain.¹⁵⁷ The applicant testified at the 1997 administrative hearing that the land was part of the farm and

¹⁵⁴ Exhibit No. 264, public administrative hearing before the State Engineer, April 15, 1997.

¹⁵⁵ Transcript, pp. 2100-2105, public administrative hearing before the State Engineer, April 15, 1997.

¹⁵⁶ Exhibit No. 270, public administrative hearing before the State Engineer, April 15, 1997.

¹⁵⁷ Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

then the District or the Bureau built a drain and cut it off.¹⁵⁸ At the 1997 administrative hearing, the applicant testified that this part of the farm has been in the Getto family since 1907¹⁵⁹ (however, at the 1999 administrative hearing a deed was entered into evidence which showed that Oda Hoover sold the property to Caroline Getto on July 2, 1918).¹⁶⁰

The State Engineer accepts the knowledge of the applicant as to irrigation on this parcel over the PLPT's witnesses' aerial photograph analysis. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is February 24, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁶¹ which indicates from aerial photographs that in 1948 the land use was described as bare land and trees.

At the 1997 administrative hearing, the PLPT's witness testified that 0.38 of an acre on this parcel was irrigated in 1977.¹⁶² At the 1985 administrative hearing, the applicant

¹⁵⁸ Transcript, p. 2258, public administrative hearing before the State Engineer, April 16, 1997.

¹⁵⁹ Transcript, p. 2246, public administrative hearing before the State Engineer, April 16, 1997.

¹⁶⁰ Exhibit No. 901, public administrative hearing before the State Engineer, January 13, 1999.

¹⁶¹ Exhibit No. 270, public administrative hearing before the State Engineer, April 15, 1997.

¹⁶² Transcript, pp. 2114-2115, public administrative hearing before the State Engineer, April 15, 1997.

indicated that water on Parcel 2 was being transferred from land covered by a stack yard.¹⁶³ The applicant testified at the 1997 administrative hearing that the land was not productive so he moved the water and converted the area to a place to store equipment, however, most of it was irrigated, that "just the tip that went up in the higher area was not irrigated, but I'd say over an acre of that was irrigated."¹⁶⁴ At the 1997 administrative hearing, the applicant testified that this part of the farm has been in the Getto family since 1907¹⁶⁵ (however, at the 1999 administrative hearing a deed was entered into evidence which showed that Oda Hoover sold the property to Caroline Getto on July 2, 1918).¹⁶⁶

The State Engineer accepts the knowledge of the applicant as to irrigation on this parcel over the PLPT's witnesses' aerial photograph analysis. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

¹⁶³ Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁶⁴ Transcript, pp. 2256-2257, public administrative hearing before the State Engineer, April 16, 1997.

¹⁶⁵ Transcript, p. 2246, public administrative hearing before the State Engineer, April 16, 1997.

¹⁶⁶ Exhibit No. 901, public administrative hearing before the State Engineer, January 13, 1999.

Parcel 3 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁶⁷ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and irrigated. At the 1997 administrative hearing, the PLPT's witness testified that 0.21 of an acre on this parcel was irrigated in 1948.¹⁶⁸

At the 1985 administrative hearing, the applicant indicated that water on Parcel 3 was being transferred from land adjacent to a river.¹⁶⁹ At the 1997 administrative hearing, a witness for the applicant testified that:

"based upon interviewing the land owner and the irrigator who's been on this property since the '20's, this portion, this four-tenths of an acre has been irrigated over a long period of, long period of time. In all likelihood it was irrigated in the early 1900's before 1913. Looking at the interpretation that I've made in 1948, in that year a portion of that parcel was irrigated. In 1962, a portion of it was irrigated. In 1972, a portion was irrigated. In 1973, a portion was irrigated, and in 1974, a portion of it was irrigated. In 1975, a portion was irrigated. In 1977, it appeared that it was totally in corrals and a field. And then in 1980, it was still corrals and field road. And then in 1984, corrals and a field road."¹⁷⁰

At the 1997 administrative hearing, the applicant testified that this part of the farm has been in the Getto family since 1907¹⁷¹ (however, at the 1997 administrative hearing a deed was entered

¹⁶⁷ Exhibit No. 270, public administrative hearing before the State Engineer, April 15, 1997.

¹⁶⁸ Transcript, p. 2114, public administrative hearing before the State Engineer, April 15, 1997.

¹⁶⁹ Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁷⁰ Transcript, pp. 2197-2198, public administrative hearing before the State Engineer, April 16, 1997.

¹⁷¹ Transcript, pp. 2245-2246, public administrative hearing before the State Engineer, April 16, 1997.

into evidence showing the Gettos came into ownership of the property in late 1911).¹⁷² (See footnote below wherein the State Engineer describes what he believes to be a mistake in the deeds.)¹⁷³ The applicant further testified that between 1980 and 1984 there were no stockyards on that parcel, that the Getto's took part of that land to build stockyards and roadways, and that part of the 0.4 acre was irrigated around that time frame.¹⁷⁴

The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant's witness conceded perfection on at least 0.21 of an acre. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 5 - The contract date is May 10, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"¹⁷⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as farm yard and trees. At the 1985 administrative hearing, the applicant indicated that

¹⁷² Exhibit Nos. 896 and 899, public administrative hearing before the State Engineer, January 13, 1999.

¹⁷³ The State Engineer wishes to point out for the applicant what appears to have been an error created in his deeds beginning in 1976. The State Engineer believes that Exhibit Nos. 916 and 918 incorrectly locate the described 1.49 acres of land in the wrong $\frac{1}{4}$ $\frac{1}{4}$ section of land. Exhibit Nos. 911 and 913 describe this 1.49 acres as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$, but Exhibit Nos. 916 and 918 describe this 1.49 acres as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$. The State Engineer believes the mistake was first made in the Gift Deed from Virgil Getto to Marilyn Getto.

¹⁷⁴ Transcript, p. 2256, public administrative hearing before the State Engineer, April 16, 1997.

¹⁷⁵ Exhibit No. 270, public administrative hearing before the State Engineer, April 15, 1997.

the land use on Parcel 5 was trees and building.¹⁷⁶ At the 1997 administrative hearing, the applicant testified that he has owned this parcel for 25-30 years and has personal knowledge that the entire parcel was irrigated before he owned it.¹⁷⁷

The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract that dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Application 48466

As noted above, Permit 47873 approved the transfer of water rights onto 16.75 acres in the SE¼ NW¼ of Section 19, T.19N., R.29E., M.D.B.& M. Application 48465 requested the transfer of water to the same 16.75 acres which resulted in the stacking of water rights. Therefore, Application 48466 was filed to move that stacked water to a different proposed place of use.¹⁷⁸ The parties agreed that if water rights had been perfected on the existing places of use under Application 48465 and the water rights were neither forfeited or abandoned then the protest claims of lack of perfection, forfeiture and abandonment would be moot under Application 48466. Pursuant to this ruling, the State Engineer finds the water rights were perfected, therefore, the protestant's claims need not be considered under the agreement made between the parties.

¹⁷⁶ Exhibit No. 22, public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁷⁷ Transcript, pp. 2242-2243, public administrative hearing before the State Engineer, April 16, 1997.

¹⁷⁸ Transcript, pp. 2100-2105, public administrative hearing before the State Engineer, April 15, 1997.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

APPLICATION 48465

Parcels 1 and 2 - Evidence was introduced in the form of deeds covering the proposed places of use and the existing places of use that showed that the transfer requests from Parcels 1 and 2 are intrafarm transfers,¹⁷⁹ not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further finds as to Parcels 1 and 2 that since the contract date is February 24, 1908, the water rights were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provision of NRS § 533.060.

APPLICATION 48466

The parties agreed that if water rights had been perfected on the existing places of use under Application 48465 and the water rights were neither declared forfeited or abandoned then the protest claims of lack of perfection, forfeiture and abandonment would be moot under Application 48466.¹⁸⁰ Pursuant to this ruling, the State Engineer is not declaring any water rights forfeited or abandoned. Therefore, the protestant's claims need not be considered under the agreement made between the parties.

¹⁷⁹ Exhibit Nos. 896, 899, 900, 901, 902, 906, 910, 911, 912, 913, 914, 916, 917, 918, 924; Transcript, pp. 4770-4775, public administrative hearing before the State Engineer, January 13, 1999.

¹⁸⁰ Transcript, p. 2101, public administrative hearing before the State Engineer, April 15, 1997.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.¹⁸¹ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."¹⁸² Non-use for a period of time may inferentially be some evidence of intent to abandon,¹⁸³ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer find the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

APPLICATION 48465

Parcels 1, 2, 3 and 5 - Testimony and evidence in the form of deeds were introduced covering the proposed and the existing places of use that showed that the transfer requests from Parcels 1, 2, 3 and

¹⁸¹ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

¹⁸² Revert v. Ray, 95 Nev. 782, 786 (1979).

¹⁸³ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

5 are intrafarm transfers,¹⁸⁴ not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

Testimony was provided at the 1985 and the 1996 hearings that the owner of the water right under Application 48465 had continually paid the assessments and taxes due on these water rights and that none were delinquent.¹⁸⁵ Further, the applicant testified that he never intended to abandon any of the water rights,¹⁸⁶ and in fact much of the water was already being used on the farm and he was given instructions to apply for the transfer to properly indicate where he was irrigating his property.¹⁸⁷ The State Engineer finds the transfers from Parcels 1, 2, 3 and 5 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁸⁸

II.

PERFECTION

As to Parcels 1, 2, 3 and 5, the State Engineer concludes the protestant did not prove its claims of lack of perfection.

¹⁸⁴ Exhibit Nos. 896, 899, 900, 901, 902, 906, 910, 911, 912, 913, 914, 916, 917, 918, 924; Transcript, pp. 4770-4775, public administrative hearing before the State Engineer, January 13, 1999.

¹⁸⁵ Exhibit No 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985. Exhibit No. 49, public administrative hearing before the State Engineer, November 12-15, 1996.

¹⁸⁶ Transcript, pp. 2243-2244, public administrative hearing before the State Engineer, April 16, 1997.

¹⁸⁷ Transcript, pp. 4771-4772, public administrative hearing before the State Engineer, January 13, 1999.

¹⁸⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

III.

FORFEITURE

APPLICATION 48465

The State Engineer concludes that the transfers from Parcels 1 and 2 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further concludes as to Parcels 1 and 2 that since the contract date is February 24, 1908, the water rights were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provision of NRS § 533.060.

APPLICATION 48466

The parties agreed that if water rights had been perfected on the existing places of use under Application 48465 and the water rights were neither forfeited or abandoned then the protest claims of lack of perfection, forfeiture and abandonment would be moot under Application 48466.¹⁸⁹ The State Engineer concludes the protest claims are moot.

IV.

ABANDONMENT

The State Engineer concludes that the transfers from Parcels 1, 2, 3 and 5 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and much of the water was already being used on other parts of the farm precluding an intent to abandon the water rights.

RULING

The protest to Application 48465 is overruled. The State Engineer's decision granting the transfer of water rights from Parcels 1, 2, 3 and 5 is hereby re-affirmed. Therefore, the permit granted under Application 48465 is amended to allow the transfer of water rights appurtenant to 3.70 acres of land totalling 16.65

¹⁸⁹ Transcript, p. 2101, public administrative hearing before the State Engineer, April 15, 1997.

Ruling
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acre-feet to be perfected at the proposed place of use. The State Engineer's decision granting the transfer under Application 48466 is hereby re-affirmed.

APPLICATIONS 48669 AND 52669

GENERAL

I.

Application 48669 was filed on December 31, 1984, by Steve Hancock to change the place of use of 14.00 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 5-1¹⁹⁰, Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 4.00 acres NE¼ SE¼, Sec. 2, T.17N., R.28E., M.D.B.&M.

The proposed place of use is described as being 4.00 acres in the NE¼ SE¼ of Section 2, T.17N., R.28E., M.D.B. & M. By letter received in the office of the State Engineer on October 28, 1988, the applicant withdrew 2.50 acres from the transfer request.¹⁹¹ The protestant conceded it has no claim as to 0.85 of an acre of the existing place of use as it was irrigated in 1984,¹⁹² leaving 0.65 of an acre under dispute.

II.

Application 52669 was filed on October 28, 1988, by Steve Hancock to change the place of use of 13.65 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 5-1¹⁹³, Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

¹⁹⁰ Exhibit No. 235, public administrative hearing before the State Engineer, April 15, 1997.

¹⁹¹ Exhibit No. 236, public administrative hearing before the State Engineer, April 15, 1997.

¹⁹² Exhibit No. 891, public administrative hearing before the State Engineer, January 13, 1999.

¹⁹³ Exhibit No. 240, public administrative hearing before the State Engineer, April 15, 1997.

Parcel 1 - 3.90 acres NE¼ SE¼, Sec. 2, T.17N., R.28E., M.D.B.&M.

The proposed place of use is described as being located on 3.90 acres in the NE¼ SE¼ of Section 2, T.17N., R.28E., M.D.B. & M. The protestant conceded it has no claim as to 1.61 acres of the existing place of use as it was irrigated from 1962 through 1984.¹⁹⁴

III.

Applications 48669 and 52669 were protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹⁹⁵ and more specifically on the grounds as follows:¹⁹⁶

APPLICATION 48669

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

APPLICATION 52669

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

FINDINGS OF FACT

I.

CONTRACT DATES 48669 AND 52669

APPLICATION 48669

Exhibit CC from the 1985 administrative hearing contains an "Application for Permanent Water Right" dated September 30, 1949, covering the existing place of use.¹⁹⁷ The Exhibit CC contract does not provide for the payment of Project construction charges which indicates that the water applied for was based on an exchange of a pre-Project vested water right. The applicant introduced a State patent dated June 14, 1895, as evidence that a water right

¹⁹⁴ Exhibit No. 892, public administrative hearing before the State Engineer, January 13, 1999.

¹⁹⁵ Exhibit Nos. 237 and 241 public administrative hearing before the State Engineer, April 15, 1997.

¹⁹⁶ Exhibit No. 20, public administrative hearing before the State Engineer, October 15-18, 1996. Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

¹⁹⁷ Exhibit No. 239, public administrative hearing before the State Engineer, April 15, 1997.

was confirmed on this parcel of land in 1895.¹⁹⁸ The State Engineer finds that he does not agree that the patent granted or confirmed a water right, but it does evidence that activity was taking place with regard to this parcel of land in 1895. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is September 30, 1949, but evidences a water right was initiated on this parcel pre-1913 as the contract is based on a pre-Project vested water right.

APPLICATION 52669

Exhibit XXX from the 1991 administrative hearing contains an "Application for Permanent Water Right" dated September 30, 1949, covering the existing place of use.¹⁹⁹ This is the exact same document that was provided to demonstrate a water right under Application 48669; therefore, the State Engineer finds the contract date is also September 30, 1949, but evidences a water right was initiated on this parcel pre-1913 as the contract is based on a pre-Project vested water right.

II.

PERFECTION

APPLICATION 48669

The contract date is September 30, 1949, but is based on a pre-Project vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁰⁰ which indicates from aerial photographs that in 1948, 1962, and 1972 the land use on this parcel was described as bare land and natural vegetation.

¹⁹⁸ Exhibit No. 254, public administrative hearing before the State Engineer, April 15, 1997.

¹⁹⁹ Exhibit No. 243, public administrative hearing before the State Engineer, April 15, 1997.

²⁰⁰ Exhibit No. 246, public administrative hearing before the State Engineer, April 15, 1997.

The protestant's witnesses admitted that at least 0.85 of an acre out of the 1.50 acres comprising the existing place of use had been irrigated in 1984 and that irrigation had taken place on parts of the existing place of use in 1975.²⁰¹ The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X as to perfection of pre-statutory vested water rights and finds a water right on this parcel was perfected as a matter of fact and law.

APPLICATION 52669

The contract date is September 30, 1949, but is based on a pre-Project vested water right. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁰² which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal and adjacent land, bare land and natural vegetation. In 1962, the land use was described as a road, canal and adjacent land, bare land, and irrigated.

The protestant's witnesses admitted that at least 1.61 acres out of the 3.90 acres comprising the existing place of use had been irrigated from 1962 through 1984 and that irrigation had taken place on parts of the existing place of use in 1962, 1973, 1977, 1980 and 1984.²⁰³ The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel, therefore, the protestant did not prove

²⁰¹ Transcript, pp. 2014-2015, and Exhibit No. 246, public administrative hearing before the State Engineer, April 15, 1997.

²⁰² Exhibit No. 251, public administrative hearing before the State Engineer, April 15, 1997.

²⁰³ Transcript, pp. 2023-2026, and Exhibit No. 251, public administrative hearing before the State Engineer, April 15, 1997. Exhibit No. 892, public administrative hearing before the State Engineer, January 13, 1999.

its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X as to perfection of pre-statutory vested water rights and finds a water right on this parcel was perfected as a matter of fact and law.

III.

FORFEITURE

APPLICATION 48669 and 52669

As to Application 48669, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁰⁴ which indicates from aerial photographs that in 1975 and 1984 a portion of the existing place of use was irrigated. The protestant's witnesses admitted that at least 0.85 of an acre out of the 1.50 acres comprising the existing place of use had been irrigated in 1984.²⁰⁵ Furthermore, the applicant provided testimony and evidence that he has owned the entire NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, T.17N., R.28E., M.D.B. & M. since 1966,²⁰⁶ that he purchased 21.50 acres of water-righted land and has irrigated 21.50 acres of land consistently since then.²⁰⁷ The State Engineer finds this is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

²⁰⁴ Exhibit No. 246, public administrative hearing before the State Engineer, April 15, 1997.

²⁰⁵ Exhibit No. 891, public administrative hearing before the State Engineer, January 13, 1999.

²⁰⁶ Transcript, pp. 2069, 2077, public administrative hearing before the State Engineer, April 15, 1997; Exhibit No. 890, public administrative hearing before the State Engineer, January 13, 1999.

²⁰⁷ Transcript, pp. 2069-2070, public administrative hearing before the State Engineer, April 15, 1997.

As to Application 52669, the PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁰⁸ which indicates from aerial photographs that the in 1962, 1973, 1977, 1980 and 1984 irrigation was taking place on a portion of the existing place of use. The protestant's witnesses admitted that at least 1.61 acres out of the 3.90 acres comprising the existing place of use had been irrigated from 1962 through 1984.²⁰⁹ The State Engineer finds this is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

The State Engineer further finds as to both applications that since the 1949 application does not require the payment of construction charges that the water rights are based on pre-Project vested water rights which were initiated prior to March 22, 1913, and which are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²¹⁰ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²¹¹ Non-use for a period of time may

²⁰⁸ Exhibit No. 251, public administrative hearing before the State Engineer, April 15, 1997.

²⁰⁹ Exhibit No. 892, public administrative hearing before the State Engineer, January 13, 1999.

²¹⁰ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²¹¹ Revert v. Ray, 95 Nev. 782, 786 (1979).

inferentially be some evidence of intent to abandon,²¹² however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Testimony was provided at the 1985 hearing that the owner of the water right under Application 48669 had continually paid the assessment and taxes due on these water rights and that none were delinquent.²¹³

APPLICATIONS 48669 AND 52669 - The State Engineer has already found that this is an intrafarm transfer, therefore, it is not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer finds in light of the testimony that the owner continued to pay the taxes and assessment charges for the water rights and used the water continuously from 1966 through the filing of the transfer applications there are no acts of abandonment or evidence of an intent to abandon the water right.

²¹² Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²¹³ Exhibit No. 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript, p. 71, public administrative hearing before the State Engineer, June 24, 1985. Exhibit No. 49, public administrative hearing before the State Engineer, October 15-18, 1996.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²¹⁴

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of partial lack of perfection as to either Application 48669 or 52669.

III.

FORFEITURE

The State Engineer concludes that the transfer requests under Applications 48669 and 52669 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998, and the water rights are based on pre-Project vested water rights not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer concludes that the applicant continued to use the entire quantity of water allotted to him from the time he purchased the land in 1966 through the filing of the transfer applications evidencing there was no failure to use the water on some place within his farm unit defeating any claim of an intent to abandon the water right. The State Engineer concludes these are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the protestant did not prove its claim of partial abandonment under either application.

RULING

The State Engineer overrules the protest and re-affirms his decisions granting Applications 48669 and 52669.

²¹⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 48670

GENERAL

I.

Application 48670 was filed on December 31, 1984, by Ernest and Richard Hucke to change the place of use of 73.31 acre-feet annually (however, upon analysis the State Engineer determined 71.02 acre-feet as the correct amount that should have been applied for under this application), a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 538, 716, and 572,²¹⁵ Claim No. 3 Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 1.50 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 30, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 0.60 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 30, T.19N., R.28E., M.D.B.&M.

Parcel 3 - 11.40 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 30, T.19N., R.28E., M.D.B.&M.

Parcel 4 - 0.84 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.

Parcel 5 - 0.14 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 31, T.19N., R.29E., M.D.B.&M.

Parcel 6 - 0.75 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 7 - 0.56 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 8 - 0.50 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 2.59 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, 2.90 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, and 10.80 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 30, T.19N., R.28E., M.D.B.& M. By letter received in the office of the State Engineer on June 30, 1993, the applicant withdrew 0.15 of an acre from the transfer request in Parcel 1 and 0.75 of an acre from the transfer request in Parcel 3.²¹⁶

²¹⁵ Exhibit No. 302, public administrative hearing before the State Engineer, August 25, 1997.

²¹⁶ File No. 48670, official records in the office of the State Engineer.

II.

Application 48670 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²¹⁷ and more specifically on the grounds as follows:²¹⁸

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

Parcel 2 - None

Parcel 3 - Lack of perfection, forfeiture, abandonment

Parcel 4 - Partial lack of perfection, abandonment

Parcel 5 - Lack of perfection, abandonment

Parcel 6 - Abandonment

Parcel 7 - Abandonment

Parcel 8 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 48670

Exhibit OO from the January 1986 administrative hearing contains contracts covering the existing places of use under Application 47860.²¹⁹

Parcels 1 and 3 - Exhibit OO contains a "Water-right Application" under the name of James Burnside dated August 23, 1915,²²⁰ covering the land described as Parcels 1 and 3. The applicant introduced into evidence a "Water-right Application" under the name of Rubyn Mobley dated October 25, 1917, also covering the land described as Parcels 1 and 3.²²¹ Page 2 of the 1917 application

²¹⁷ Exhibit No. 303, public administrative hearing before the State Engineer, August 25, 1997.

²¹⁸ Exhibit No. 215, public administrative hearing before the State Engineer, April 4, 1997.

²¹⁹ Exhibit No. 305, public administrative hearing before the State Engineer, August 25, 1997.

²²⁰ The date of the contract is illegible on the copy of the contract submitted into evidence; therefore, the State Engineer used the date the document was signed before a notary public.

²²¹ Exhibit No. 854, public administrative hearing before the State Engineer, January 11, 1999.

indicates that Mr. Burnside assigned his water rights to Mr. Mobley. The State Engineer finds the contract date is August 23, 1915, and water rights were initiated on these parcels on August 23, 1915.

Parcel 4 - Exhibit OO contains an "Agreement" dated December 6, 1907, covering the land described as Parcel 4. The contract does not provide for the payment of Project construction charges which indicates that the water applied for was based on an exchange of a pre-Project vested water right. The State Engineer finds the contract date is December 6, 1907, but evidences the water right was initiated at an earlier date.

Parcel 5 - Exhibit OO contains an "Agreement" dated July 30, 1910, covering the land described as Parcel 5. The contract does not provide for the payment of Project construction charges which indicates that the water applied for was based on an exchange of a pre-Project vested water right. The State Engineer finds the contract date is July 30, 1910, but evidences the water right was initiated at an earlier date.

Parcel 8 - Exhibit OO contains a "Certificate of Filing Water Right Application" dated December 11, 1907, covering the land described as Parcel 8. The State Engineer finds the contract date is December 11, 1907.

II.

PERFECTION

Parcel 1 - The contract date is August 23, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²² which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation, road and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. The

²²² Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is August 23, 1915. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation and canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 4 - The contract date is December 6, 1907, and is based on an exchange of pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard and irrigated. The protestant did not provide any evidence other than

²²³ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

²²⁴ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 5 - The contract date is July 30, 1910, and is based on an exchange of pre-Project vested water rights. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as land in a residential area. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1910 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1910 and 1948, therefore, the protestant did not prove its claim of lack of perfection. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 8 - The contract date is December 11, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²²⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was

²²⁵ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

²²⁶ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcels 1 and 3 - The applicant provided testimony and evidence that all the existing places and proposed place of use within Section 30, T.19N., R.28E., M.D.B. & M. (Parcels 1, 2 and 3) are within the family farm owned since 1964. Further, that he was informed by the TCID/U.S. Bureau of Reclamation that he was irrigating land on his farm that was not water-righted land and that other parts of his farm that he was not irrigating were water-righted lands and to file the transfer application to straighten out the records as to his farm.²²⁷ The State Engineer finds these transfers are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

²²⁷ Transcript, pp. 4562-4572; Exhibit No. 855, public administrative hearing before the State Engineer, January 11, 1999.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²²⁸ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²²⁹ Non-use for a period of time may inferentially be some evidence of intent to abandon,²³⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1 and 3 - The State Engineer finds these are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further finds that the applicant was using the water on other parts

²²⁸ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²²⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

²³⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

of his farm precluding any claim of an intent to abandon the water rights.

Parcel 4 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³¹ that at least from 1962 through 1984 the lands identified as the existing places of use were occupied by residential areas. The State Engineer finds no water has been placed to beneficial use on these parcels for the 22 year period from 1962 through 1984, and the land use is inconsistent with irrigated agriculture.

Parcel 5 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³² that from 1948 through 1984 the land identified as the existing place of use was occupied by a residential area. The State Engineer finds no water has been placed to beneficial use on this parcel for the 36 year period from 1948 through 1984, and the land use is inconsistent with irrigated agriculture.

Parcel 6 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³³ that at least from 1972 through 1984 the lands identified as comprising the existing places of use were occupied by residential areas. The State Engineer finds no water has been placed to beneficial use on these parcels for the 12 year period from 1972 through 1984, and the land use is inconsistent with irrigated agriculture.

Parcel 7 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³⁴ that in 1974 the land use was described as possibly irrigated field and residential

²³¹ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

²³² Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

²³³ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

²³⁴ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

construction, in 1975 as non-irrigated ag. and residential construction, in 1977 as land in a residential area and residential construction, and in 1980 and 1984 as land in a residential area. The State Engineer finds no water has been placed to beneficial use on these parcels comprising this existing places of use for the 7 year period from 1977 through 1984, and the land use is inconsistent with irrigated agriculture.

Parcel 8 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²³⁵ that from 1977 through 1984 the land use was described as land in a residential area. The State Engineer finds no water has been placed to beneficial use on this parcel for the 7 year period from 1977 through 1984, and the land use is inconsistent with irrigated agriculture.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²³⁶

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claims of lack of perfection as to Parcels 1, 3, 4, 5 and 8.

III.

FORFEITURE

The State Engineer concludes as to Parcels 1 and 3 that these are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

²³⁵ Exhibit No. 309, public administrative hearing before the State Engineer, August 25, 1997.

²³⁶ NRS Chapter 533 and Order of Remand from Federal District Court.

IV.

ABANDONMENT

The State Engineer concludes as to Parcels 1 and 3 that these are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that the applicant proved lack of intent to abandon the water rights by evidence of use of the water rights on other parts of his farm. The State Engineer concludes that the water rights appurtenant to Parcels 4, 5, 6, 7 and 8 are subject to abandonment.

RULING

The protest to Application 48670 is hereby upheld in part and overruled in part. The State Engineer's decision granting the transfer of water rights from Parcels 1, 2 and 3 is hereby affirmed. The water rights appurtenant to Parcels 4, 5, 6, 7 and 8 are hereby declared abandoned. Therefore, the permit granted under Application 48670 is amended to allow the transfer of water rights appurtenant to 12.60 acres of land totalling 56.70 acre-feet to be perfected at the proposed place of use.

APPLICATION 49109

GENERAL

I.

Application 49109 was filed on June 5, 1985, by Elbert L. & Sophie Brown and Marshall L. Brown to change the place of use of 28.30 acre-feet annually (however, upon analysis the State Engineer determined 24.67 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 538-50-B, 538-50-F, 564-3, 538-C and 538-50-C, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²³⁷ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 2.670 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 28, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 3.617 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 3.80 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 2.487 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, both in Section 5, T.19N., R.28E., M.D.B. & M. By letter dated July 12, 1999, the applicant withdrew the Parcel 2 request for transfer.²³⁸

II.

Application 49109 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²³⁹ and more specifically on the grounds as follows:²⁴⁰

Parcel 1 - Lack of perfection, abandonment.

²³⁷ Exhibit No. 216, public administrative hearing before the State Engineer, April 14, 1997.

²³⁸ File No. 49109, official records in the office of the State Engineer.

²³⁹ Exhibit No. 217, public administrative hearing before the State Engineer, April 14, 1997.

²⁴⁰ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

FINDINGS OF FACT

I.

CONTRACT DATES 49109

Exhibit GG from the January 1986 administrative hearing contains a contract covering the existing place of use under Application 49109.²⁴¹

Parcel 1 - Exhibit GG contains a "Certificate of Filing Water Right Application" dated June 6, 1907, covering the land described as Parcel 1. The State Engineer finds the contract date is June 6, 1907.

II.

PERFECTION

Parcel 1 - The contract date is June 6, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁴² which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. At the 1986 administrative hearing, the applicants indicated in 1948 the land use on this parcel was pasture.²⁴³ At the 1997 administrative hearing, the applicants provided photographs showing irrigation structures which would have allowed water to be applied to the existing place of use,²⁴⁴ and provided testimony of actual observation of irrigation of native pasture from 1971 through 1977 on the existing place of use.²⁴⁵

²⁴¹ Exhibit No. 219, public administrative hearing before the State Engineer, April 14, 1997.

²⁴² Exhibit No. 222, public administrative hearing before the State Engineer, April 14, 1997.

²⁴³ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

²⁴⁴ Exhibit No. 233, public administrative hearing before the State Engineer, April 14, 1997.

²⁴⁵ Transcript, pp. 1946-1948, 1962-1970, public administrative hearing before the State Engineer, April 14, 1997.

The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection, and any lack of perfection claim was refuted by the testimony of Mr. Brown actually observing this parcel being irrigated. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

II.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²⁴⁶ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²⁴⁷ Non-use for a period of time may inferentially be some evidence of intent to abandon,²⁴⁸ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer

²⁴⁶ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁴⁷ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁴⁸ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁴⁹ which indicates from aerial photographs that in 1948, 1962, 1973, 1974 and 1975 the land use on this parcel was described as bare land and natural vegetation. In 1977, the protestant's witness described the land use as a non-irrigated field, however, for the years 1980 and 1984 the protestant's witnesses again describe the land use as bare land and natural vegetation. At the 1986 administrative hearing, the applicants indicated the past land use on this parcel was pasture,²⁵⁰ and at the 1997 administrative hearing, the applicants provided testimony of actual observation of irrigation of pasture from 1971 through 1977 on the existing place of use.²⁵¹ Testimony and evidence was provided at the 1997 hearing that owner of the water right under Application 49109 had continually paid the assessments and taxes due on the water right and that none were delinquent,²⁵² and that an agreement to sell these water rights to

²⁴⁹ Exhibit No. 222, public administrative hearing before the State Engineer, April 14, 1997.

²⁵⁰ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

²⁵¹ Transcript, pp. 1946-1948, 1962-1970, public administrative hearing before the State Engineer, April 14, 1997.

²⁵² Exhibit No. 232, public administrative hearing before the State Engineer, April 14, 1997. Transcript, pp. 1946-1947, public administrative hearing before the State Engineer, April 14, 1997.

the applicants was made in 1984.²⁵³

The State Engineer finds the protestant did not provide clear and convincing evidence of non-use of the water right or an intent to abandon the water right. The State Engineer further finds the land use is not inconsistent with irrigation and the protestant did not prove its claim of abandonment as to Parcel 1.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁵⁴

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes that the protestant did not prove its claim of abandonment as to Parcel 1 by clear and convincing evidence.

RULING

The protest to Application 49109 is hereby overruled and the State Engineer's affirms his decision granting Application 49109. Due to the withdrawal requested, the permit granted under Application 49109 is amended to allow the transfer of water rights appurtenant to 2.67 acres of land totalling 12.02 acre-feet of water to be perfected at the proposed place of use.

²⁵³ Transcript pp. 1946, 1961, 1971, public administrative hearing before the State Engineer, April 14, 1997.

²⁵⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49110

GENERAL

I.

Application 49110 was filed on June 5, 1985, by Mark A. and Joan R. Bunker to change the place of use of 20.25 acre-feet annually (however, upon analysis the State Engineer determined 17.75 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 303-2, 617-4, and 716, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²⁵⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 2.00 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 0.23 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 31, T.19N., R.29E., M.D.B.&M.

Parcel 3 - 2.27 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 26, T.18N., R.29E., M.D.B.&M.

The proposed place of use is described as 4.50 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, T.18N., R.28E., M.D.B. & M.

II.

Application 49110 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁵⁶ and more specifically on the grounds as follows:²⁵⁷

Parcel 1 - Abandonment

Parcel 2 - Abandonment

Parcel 3 - Abandonment.

²⁵⁵ Exhibit No. 205, public administrative hearing before the State Engineer, April 14, 1997.

²⁵⁶ Exhibit No. 206, public administrative hearing before the State Engineer, April 14, 1997.

²⁵⁷ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

FINDINGS OF FACT

I.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²⁵⁸ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."²⁵⁹ Non-use for a period of time may inferentially be some evidence of intent to abandon,²⁶⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

No testimony was provided at the 1986 or 1997 administrative hearings that the owner of the water rights under Application 49110 had continually paid the assessments and taxes due on these water

²⁵⁸ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

²⁵⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁶⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

rights and that none were delinquent.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁶¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, trees and a portion possibly irrigated. In 1962 the land use was described as bare land, trees and structures. In 1972 the land use was described as bare land, trees and structures with 0.65 of an acre irrigated. In 1973, 1974 and 1975 the land use was described as bare land, trees with 0.65 of an acre irrigated, however, no mention is made of structures. In 1977 the protestant's witness described the land use as trees, structures and a non-irrigated field, but in 1980 through 1984 the structures again disappear and the land use is described as bare land and trees. At the 1986 administrative hearing, the applicants described the 1948 land use on this parcel as a pasture and the present land use as a church.²⁶²

The State Engineer finds with the descriptions of structures appearing and then disappearing, combined with descriptions of irrigation or non-irrigated field and bare land and trees that the protestant did not prove non-use by clear and convincing evidence nor prove a land use over a substantial period of time inconsistent with irrigated agriculture.

Parcel 2 - The PLPT presented evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁶³ which indicates from aerial photographs that from 1948 through 1984 the land on this parcel was described as land in a residential area. At the 1986 administrative hearing, the applicant described the 1948 land use

²⁶¹ Exhibit No. 211, public administrative hearing before the State Engineer, April 14, 1997.

²⁶² Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

²⁶³ Exhibit No. 211, public administrative hearing before the State Engineer, April 14, 1997.

on this parcel as a pasture and the present land use as a city lot.²⁶⁴

The State Engineer finds based on the applicants' description that this land was a pasture in 1948. The State Engineer finds that from 1962 through 1984 the existing place of use was within a residential area, a land use inconsistent with irrigated agriculture and that no water was placed to beneficial use on Parcel 2 for the 22 year period from 1962 through 1984. The State Engineer finds the applicants did not provide any evidence demonstrating a lack of intent to abandon the water right and the water right on Parcel 2 is subject to abandonment.

Parcel 3 - The PLPT presented evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁶⁵ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as roads, canals and adjacent land. At the 1986 administrative hearing, the applicants described the land use on this parcel from 1948 through 1985 as ditches and a road.²⁶⁶

The State Engineer finds based on both the applicants' and the protestant's witnesses' descriptions (since there is no evidence that this is an on-farm, dirt-lined ditch) that from 1948 through 1984 the existing place of use was covered by roads, canals and adjacent land, a land use inconsistent with irrigated agriculture. The State Engineer finds that no water was placed to beneficial use on Parcel 3 for the 36 year period from 1948 through 1984. The State Engineer finds the applicants did not provide any evidence demonstrating a lack of intent to abandon the water right and the water right on Parcel 3 is subject to abandonment.

²⁶⁴ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

²⁶⁵ Exhibit No. 211, public administrative hearing before the State Engineer, April 14, 1997.

²⁶⁶ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁶⁷

II.

ABANDONMENT

The State Engineer concludes as to Parcel 1 that the protestant did not prove its case of abandonment by clear and convincing evidence. The State Engineer concludes as to Parcels 2 and 3 that the protestant proved a substantial period of non-use of the water and a land use inconsistent with irrigated agriculture, and the applicant has not made a sufficient showing of lack of intent to abandon the water right. Therefore, the protestant proved the water rights appurtenant to Parcels 2 and 3 are subject to abandonment.

RULING

The protest to Application 49110 is upheld in part and overruled in part. The State Engineer's decision as to the granting of the transfer of water rights appurtenant to Parcel 1 is hereby affirmed. The State Engineer's decision as to Parcels 2 and 3 is hereby rescinded and the water rights appurtenant to Parcels 2 and 3 are declared abandoned. Therefore, the permit granted under Application 49110 is amended to allow the transfer of water rights appurtenant to 2.00 acres of land totalling 9.00 acre-feet of water to be perfected at the proposed place of use.

²⁶⁷ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49111

GENERAL

I.

Application 49111 was filed on June 5, 1985, by Isabelle E. Winder and James W. Johnson, Jr. to change the place of use of 18.45 acre-feet annually (however, upon analysis the State Engineer determined that 15.85 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 59 and 59-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²⁶⁸ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 4.10 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 2, T.18N., R.28E., M.D.B.&M.

The proposed place of use is described as 4.10 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, T.18N., R.28E., M.D.B. & M.

II.

Application 49111 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁶⁹ and more specifically on the grounds as follows:²⁷⁰

Parcel 1 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 49111

Parcel 1 - Exhibit GG from the 1986 administrative hearing contains an "Agreement" dated December 30, 1907, covering the existing place of use under Application 49111 and which evidences that the water

²⁶⁸ Exhibit No. 613, public administrative hearing before the State Engineer, October 23, 1997.

²⁶⁹ Exhibit No. 614, public administrative hearing before the State Engineer, October 23, 1997.

²⁷⁰ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

right on this parcel is based on a pre-Project vested water right.²⁷¹

II.

PERFECTION

Parcel 1 - The contract date is December 30, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁷² which indicates from aerial photographs that in 1948 the land use on this parcel was described as road, canal, bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that pre-Project vested water rights were perfected as a matter of fact and law.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.²⁷³ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

²⁷¹ Exhibit No. 616, public administrative hearing before the State Engineer, October 23, 1997.

²⁷² Exhibit No. 619, public administrative hearing before the State Engineer, October 23, 1997.

²⁷³ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

surrounding circumstances."²⁷⁴ Non-use for a period of time may inferentially be some evidence of intent to abandon,²⁷⁵ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

The applicant alleges this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The applicant provided several deeds in an attempt to prove this is an intrafarm transfer several of which the protestant objected to on the grounds they did not cover the existing or proposed places of use. The State Engineer finds that Exhibit No. 873 does not cover either the existing or proposed places of use as it covers just over 20 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 2, T.18N., R.28E., M.D.B. & M. The State Engineer finds that Exhibit No. 874 covers only a portion of the existing place of use. The State Engineer finds that Exhibit No. 875 does not cover either the existing or the proposed place of use, and no deed was submitted into evidence covering the proposed place of use. Part of the existing place of use was shown as being in the Winder/Johnson family names which are the same names under which

²⁷⁴ Revert v. Ray, 95 Nev. 782, 786 (1979).

²⁷⁵ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Application 49111 was filed. Exhibit No. 581 indicates that the reasons for transfer were that the applicant was moving water from impracticable to irrigate areas, such as a building site and a right-of-way, to irrigated commingled areas. These pieces of evidence cause the State Engineer to suspect this is an intrafarm transfer, however, insufficient evidence was provided to prove such claim.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"²⁷⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal, bare land and natural vegetation. In 1962 and 1972 the land use was described as road, canal, bare land and structure. In 1973, 1974, 1975, 1977, 1980 and 1984, the land use was described as a farm yard, structures, road, canal and adjacent lands. The State Engineer finds that no water was placed to beneficial use on the existing place of use for the 22 year period from 1962 through 1984, and the land use is inconsistent with irrigated agriculture. The State Engineer finds insufficient evidence was provided to prove this is an intrafarm transfer and the applicant made an insufficient showing of a lack of intent to abandon the water right.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁷⁷

II.

PERFECTION

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

²⁷⁶ Exhibit No. 619, public administrative hearing before the State Engineer, October 23, 1997.

²⁷⁷ NRS Chapter 533 and Order of Remand from Federal District Court.

III.

ABANDONMENT

The State Engineer concludes as to Parcel 1 that the protestant provided clear and convincing evidence of non-use of the water and a land use inconsistent with irrigated agriculture. The State Engineer further concludes that the applicant did not sufficiently prove this is an intrafarm transfer nor present a sufficient showing of a lack of intent to abandon the water right. Therefore, the State Engineer concludes the water right requested for transfer under Application 49111 is subject to abandonment.

RULING

The protest to Application 49111 is hereby upheld in part and overruled in part. The water right requested for transfer is declared abandoned. The State Engineer's decision granting Application 49111 is rescinded and Application 49111 is denied.

APPLICATION 49114

GENERAL

I.

Application 49114 was filed on June 5, 1985, by Richard S. and Jean C. Lattin to change the place of use of 117.65 acre-feet annually (however, upon analysis the State Engineer determined 114.15 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 65-1, 604-1 and 606, Claim No. 3 Orr Ditch Decree, and Alpine Decree.²⁷⁸ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 1.70 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 3, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 12.90 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 3, T.18N., R.28E., M.D.B.&M.
- Parcel 3 - 1.00 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34, T.19N., R.28E., M.D.B.&M.
- Parcel 4 - 4.50 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34, T.19N., R.28E., M.D.B.&M.
- Parcel 5 - 1.40 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34, T.18N., R.28E., M.D.B.&M.
- Parcel 6 - 3.70 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 34, T.19N., R.28E., M.D.B.&M.
- Parcel 7 - 0.20 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 35, T.18N., R.28E., M.D.B.&M.
- Parcel 8 - 1.30 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 35, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 6.40 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 8.20 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 3, T.18N., R.28E., M.D.B.& M., 1.00 acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, 2.00 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, 0.40 of an acre in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 3.70 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 34, T.19N., R.28E., M.D.B.& M., and 5.00 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, T.19N., R.28E., M.D.B.& M.

II.

Application 49114 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,²⁷⁹ and

²⁷⁸ Exhibit No. 643, public administrative hearing before the State Engineer, November 17, 1997.

²⁷⁹ Exhibit No. 644, public administrative hearing before the State Engineer, November 17, 1997.

more specifically on the grounds as follows:²⁸⁰

- Parcel 1** - Partial abandonment
- Parcel 2** - Partial lack of perfection, abandonment
- Parcel 3** - Lack of perfection, forfeiture, abandonment
- Parcel 4** - Partial lack of perfection, forfeiture, abandonment
- Parcel 5** - Forfeiture, abandonment
- Parcel 6** - Partial lack of perfection, forfeiture, abandonment
- Parcel 7** - Partial lack of perfection, forfeiture, abandonment
- Parcel 8** - Partial forfeiture, partial abandonment.

At the administrative hearing, and by letter dated January 6, 1999, the protestant conceded that a 1.20 acre portion of Parcel 1 was irrigated through 1984, that a 9.00 acre portion of Parcel 2 was irrigated through 1984, and that a 0.80 of an acre portion of Parcel 8 was irrigated through 1984.²⁸¹

FINDINGS OF FACT

I.

CONTRACT DATES 49114

Exhibit GG from the 1986 administrative hearing contains contracts covering the existing places of use under Application 49114.²⁸²

Parcels 1 and 2 - Exhibit GG contains three contracts covering these existing places of use. The first is a "Certificate of Filing Water Right Application" under the name of George Owings dated December 31, 1907, which covers Lots 3 and 4 and the S $\frac{1}{2}$ NW $\frac{1}{4}$ of said Section 3, T.18N., R.28E., M.D.B. & M. containing 145 acres of irrigable land. Public records in the Nevada Division of State Lands indicate that Lot 3 is comprised of 40.94 acres located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3 (Parcel 1), and Lot 4 is comprised of

²⁸⁰ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

²⁸¹ Exhibit No. 653, public administrative hearing before the State Engineer, November 17, 1997, and File No. 49114, official records in the office of the State Engineer.

²⁸² Exhibit No. 646, public administrative hearing before the State Engineer, November 17, 1997.

40.98 acres located in the NW¼ NW¼ of said Section 3. The second document is a "Certificate of Filing Water Right Application" dated October 4, 1909, covering Lot 3 and the SE¼ NW¼ of said Section 3 containing 60 acres of irrigable land. Faintly written on that document is a statement that indicates a certain number of acres are vested (possibly 8, but difficult to read) and that the applicant is an assignee of George Owings, the holder of the 1907 certificate. The third document is a July 11, 1907, "Agreement" that exchanged 8 acres of pre-Project vested water rights for Project water rights on parts of the E½ NW¼ of Section 3²⁸³ within the same area as that described as Lot 3 and the SE¼ NW¼ under the October 4, 1909, certificate.

The State Engineer recognizes that 8 acres in the E½ NW¼ of said Section 3 had a vested water right on it and that portion of Section 3 had begun to be developed before the July 11, 1907, Agreement date. The State Engineer finds that the October 1909 certificate merely reflected the assignment of rights under the December 1907 Certificate and those documents are so close in time to the July 1907 Agreement that any development on those lands can be related back to the earlier agreement date. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the first contract date is July 11, 1907, and water rights were initiated on these parcels prior to July 11, 1907.

Parcel 3 - Exhibit GG from the 1986 administrative hearing contains two documents covering this place of use. The first is an "Agreement" dated December 31, 1907, which provides for the exchange of pre-Project vested water rights for Project water rights on the SE¼ of Section 34, T.19N., R.28E., M.D.B. & M.²⁸⁴ The second document is an "Application for Permanent Water Right"

²⁸³ See also, Exhibit No. 878, public administrative hearing before the State Engineer, January 12, 1999.

²⁸⁴ See also, Exhibit No. 882, public administrative hearing before the State Engineer, January 12, 1999.

dated June 16, 1954, which indicates that in the SE¼ SE¼ of Section 34 there are 39 irrigable acres of which 26 acres are covered by vested water rights and 13 acres of new water rights were applied for under the 1954 application. The protestant provided evidence that in 1948 and 1962 the land use description on the existing place of use was that of a road.²⁸⁵ Since the existing place of use was already a road in 1948 and remained a road in 1962, the State Engineer finds it is more likely than not that the existing place of use is within that area developed prior to and under the 1907 agreement, and is not the land that a new application for water right was filed upon in 1954. The State Engineer finds the contract date is December 31, 1907, water rights were initiated on this parcel prior to December 31, 1907, and are based on the exchange of pre-Project vested water rights for Project water rights.

Parcel 4 - Exhibit GG from the 1986 administrative hearing contains three documents covering this existing place of use. The first is an "Agreement" dated December 31, 1907, which provides for the exchange of pre-Project vested water rights for Project water rights on the SE¼ of Section 34, T.19N., R.28E., M.D.B.& M.²⁸⁶ The second is a "Certificate of Filing Water Right Application" dated December 22, 1908, which covers this existing place of use.²⁸⁷ The third document is a "Water-right Application for Lands in Private Ownership" dated November 11, 1914, pursuant to which Fleming McLean applied for 8 acres of water rights in the SW¼ SE¼ of said Section 34. The December 22, 1908, Certificate in the name of Thomas Toomey indicates that on the SW¼ SE¼ of Section 34

²⁸⁵ Exhibit No. 651, public administrative hearing before the State Engineer, November 17, 1997.

²⁸⁶ See also, Exhibit No. 882, public administrative hearing before the State Engineer, January 12, 1999.

²⁸⁷ See also, Exhibit No. 880, public administrative hearing before the State Engineer, January 12, 1999.

at that time there were 27 acres of vested water rights and 9 acres of new water rights for a total of 36 acres of water rights on that approximately 40 acre $\frac{1}{4}$ $\frac{1}{4}$ section of land. The State Engineer finds based on the analysis found below for Parcels 5 and 6 that the 1914 document appears to have been merely the means by which the water rights were put in the name of Mr. McLean. The State Engineer finds the 1908 document is close enough in time to the 1907 agreement that any development on those lands can be related back to the earlier agreement date. The State Engineer finds the contract date is December 31, 1907, and water rights were initiated on this parcel prior to December 31, 1907.

Parcel 5 - Exhibit GG from the 1986 administrative hearing contains three documents covering this existing place of use. The first is an "Agreement" dated December 31, 1907, which provides for the exchange of pre-Project vested water rights for Project water rights on the SE $\frac{1}{4}$ of Section 34, T.18N., R.28E., M.D.B.& M.²⁸⁸ The second is a "Certificate of Filing Water Right Application" dated December 22, 1908, which covers this existing place of use.²⁸⁹ The third document is a "Water-right Application for Lands in Private Ownership" dated November 11, 1914, wherein Fleming McLean applied for 28 acres of water rights in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 34. The December 22, 1908, Certificate in the name of Thomas Toomey indicates that on the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34 at that time there were 28 acres of water rights of which 10 were vested water rights.

The State Engineer finds that since in 1908 there were 28 acres of water rights on this $\frac{1}{4}$ $\frac{1}{4}$ section of land, and the 1914 application applies for 28 acres of water rights (including 10 acres of vested water rights - as shown under the December 22, 1908

²⁸⁸ See also, Exhibit No. 882, public administrative hearing before the State Engineer, January 12, 1999.

²⁸⁹ See also, Exhibit No. 880, public administrative hearing before the State Engineer, January 12, 1999.

Certificate) in the same $\frac{1}{4}$ $\frac{1}{4}$ section of land, the 1914 document appears to have been merely the means by which the water rights were put in the name of Mr. McLean. The State Engineer finds the 1908 document is close enough in time to the 1907 agreement that any development on those lands can be related back to the earlier agreement date. The State Engineer finds the contract date is December 31, 1907, and water rights were initiated on this parcel prior to December 31, 1907.

Parcel 6 - Exhibit GG from the 1986 administrative hearing contains three documents covering this existing place of use. The first is an "Agreement" dated December 31, 1907, which provides for the exchange of pre-Project vested water rights for Project water rights on the SE $\frac{1}{4}$ of Section 34, T.19N., R.28E., M.D.B.& M.²⁹⁰ The second is a "Certificate of Filing Water Right Application" dated December 22, 1908, which covers the existing places of use which comprise Parcel 6.²⁹¹ The third document is a "Water-right Application for Lands in Private Ownership" dated November 11, 1914, wherein Fleming McLean applied for 19 acres of water rights in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 34. The December 22, 1908, Certificate in the name of Thomas Toomey indicates that on the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34 at that time there were 19 acres of water rights of which 16 were vested water rights. The State Engineer finds that since in 1908 there were 19 acres of water rights on this $\frac{1}{4}$ $\frac{1}{4}$ section of land, and the 1914 application applies for 19 acres of water rights in the same $\frac{1}{4}$ $\frac{1}{4}$ section of land, the 1914 document appears to have been merely the means by which the water rights were put in the name of Mr. McLean. The State Engineer finds the 1908 document is close enough in time to the 1907 agreement that any development on those lands can be related back to the earlier

²⁹⁰ See also, Exhibit No. 882, public administrative hearing before the State Engineer, January 12, 1999.

²⁹¹ See also, Exhibit No. 880, public administrative hearing before the State Engineer, January 12, 1999.

agreement date. The State Engineer finds the contract date is December 31, 1907, and water rights were initiated on this parcel prior to December 31, 1907.

Parcel 7 - Exhibit GG from the 1986 administrative hearing contains an "Application for Permanent Water Right" dated June 16, 1954, which provides that there is no existing water right on part of the NW¼ SW¼ of Section 35, but indicates that 10 acres were applied for under that application. The State Engineer finds the contract date is June 16, 1954.

Parcel 8 - Exhibit GG from the 1986 administrative hearing contains a December 31, 1907, "Agreement" that covers 30 acres of a 40 acre tract more or less west of the "L" line U.S. canal in the S½ SW¼ of Section 35, T.19N., R.28E., M.D.B. & M., and provides for the exchange of pre-Project vested water rights for Project water rights. At the 1997 administrative hearing, the protestant's witness testified that he changed the protestant's Table 1A to inconclusive as to the contract date for this parcel because the applicant had attached a 1934 contract to its rebuttal brief.²⁹² No 1934 contract was introduced into evidence by the applicant, therefore, the State Engineer finds the contract date is December 31, 1907, and is based on the exchange of pre-Project vested water rights for Project water rights, and water rights were initiated on this parcel prior to December 31, 1907.

II.

PERFECTION

Parcel 2 - The contract date is July 11, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"²⁹³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural

²⁹² Transcript, p. 3894, public administrative hearing before the State Engineer, November 17, 1997.

²⁹³ Exhibit No. 651, public administrative hearing before the State Engineer, November 17, 1997.

vegetation, drain and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant proved perfection on a 9.00 acre portion of the parcel.²⁹⁴ The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

Parcel 3 - The contract date is December 31, 1907, and is based on the exchange of pre-Project vested water rights for Project water rights. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"²⁹⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 4 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing

²⁹⁴ Exhibit No. 653, public administrative hearing before the State Engineer, November 17, 1997.

²⁹⁵ Exhibit No. 651, public administrative hearing before the State Engineer, November 17, 1997.

Place(s) of Use"²⁹⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, farm yard and portion possibly irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant proved perfection on a 1.90 acre portion of the parcel.²⁹⁷ The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

Parcel 6 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"²⁹⁸ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and portions possibly irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant proved perfection on a 2.80 acre portion of the

²⁹⁶ Exhibit No. 651, public administrative hearing before the State Engineer, November 17, 1997.

²⁹⁷ Exhibit No. 653, public administrative hearing before the State Engineer, November 17, 1997.

²⁹⁸ Exhibit No. 651, public administrative hearing before the State Engineer, November 17, 1997.

parcel.²⁹⁹ The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

Parcel 7 - The contract date is June 16, 1954. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁰⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation and portion irrigated. In 1962 and 1972 the land use was described as irrigated. The State Engineer finds the protestant's evidence alone indicates that its partial lack of perfection claim is without merit and perfection was proven.

III.

FORFEITURE

Parcels 3, 4, 5, 6 and 8 - The contract date is December 31, 1907. The State Engineer finds the contracts alone show that the water rights were initiated on these parcels prior to March 22, 1913, and are not subject to the forfeiture provision of NRS § 533.060.

Parcel 7 - The contract date is June 16, 1954, and is subject to the forfeiture provision of NRS § 533.060. The property encompassing the existing place of use was deeded to the applicants' family in 1963,³⁰¹ and this same ¼ ¼ section of land contains a proposed place of use. Testimony was provided that all the requests for transfers made under this application are from places within the family farm to places within the family farm.³⁰² The State Engineer finds this transfer is an intrafarm transfer not

²⁹⁹ Exhibit No. 653, public administrative hearing before the State Engineer, November 17, 1997.

³⁰⁰ Exhibit No. 651, public administrative hearing before the State Engineer, November 17, 1997.

³⁰¹ Exhibit No. 887, public administrative hearing before the State Engineer, January 12, 1999.

³⁰² Transcript, pp. 4683-4689, public administrative hearing before the State Engineer, January 12, 1999.

subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

ABANDONMENT

Parcels 1, 2, 3, 4, 5, 6, 7 and 8 - Testimony was provided that all the requests for transfers made under this application are from places within the family farm to places within the family farm.³⁰³ The State Engineer finds these transfers are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁰⁴

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcels 2, 3, 4, 6 and 7.

III.

FORFEITURE

The State Engineer concludes as to Parcel 7 that the water right transfer is an intrafarm transfer not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcels 3, 4, 5, 6 and 8 that the contracts alone show that the water rights pre-date March 22, 1913, and are therefore not subject to the forfeiture provision of NRS § 533.060.

³⁰³ Transcript, pp. 4683-4689, public administrative hearing before the State Engineer, January 12, 1999.

³⁰⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

IV.

ABANDONMENT

The State Engineer concludes as to Parcels 1, 2, 3, 4, 5, 6, 7 and 8 that the requests for transfer are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 49114 is overruled and the State Engineer's decision granting Application 49114 is affirmed.

APPLICATION 49116

GENERAL

I.

Application 49116 was filed on June 5, 1985, by Robert Donald and Alice Minner to change the place of use of 94.50 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 183, 183-1-A and 529-2, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³⁰⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 4.83 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 4.13 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.18N., R.28E., M.D.B.&M.
- Parcel 3 - 2.30 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.18N., R.28E., M.D.B.&M.³⁰⁶
- Parcel 4 - 5.65 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.18N., R.28E., M.D.B.&M.
- Parcel 5 - 5.90 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 36, T.18N., R.28E., M.D.B.&M.
- Parcel 6 - 0.32 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 36, T.18N., R.28E., M.D.B.&M.
- Parcel 7 - 3.87 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 23, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.90 of an acre in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and 26.10 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, both in Section 36, T.18N., R.28E., M.D.B. & M.

³⁰⁵ Exhibit No. 812, public administrative hearing before the State Engineer, February 3, 1998.

³⁰⁶ The State Engineer notes that during the time of the administrative hearing it was discovered that perhaps there is an error on the applicant's map (Exhibit No. 814) which accompanied the filing of the application. As to Parcel 3, the applicant's witness indicated and legal counsel agreed that it appears that the location of approximately 0.43 of an acre of the existing place of use was mapped incorrectly (see Transcript, pp. 4345-4346, public administrative hearing before the State Engineer, February 3, 1998). The evidence indicated that this approximately 0.43 of an acre which runs from east to west in the $\frac{1}{4}$ $\frac{1}{4}$ section of land covers the middle of an irrigated field instead of the farm road where water was intended to be transferred from to the proposed place of use. If this map does not accurately reflect the intentions of the applicant a correction must be made.

II.

Application 49116 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁰⁷ and more specifically on the grounds as follows:³⁰⁸

- Parcel 1 - Partial lack of perfection, forfeiture, abandonment
- Parcel 2 - Partial lack of perfection, forfeiture, abandonment
- Parcel 3 - Partial lack of perfection, forfeiture, abandonment
- Parcel 4 - Partial lack of perfection, forfeiture, abandonment
- Parcel 5 - Partial lack of perfection, forfeiture, abandonment
- Parcel 6 - Partial lack of perfection, forfeiture, abandonment
- Parcel 7 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 49116

Exhibit UU from the 1988 administrative hearing contains contracts covering the existing places of use under Application 49116.³⁰⁹

Parcels 1, 2, 3, 4, 5 and 6 - Exhibit UU contains two contracts covering these existing places of use. The first is a "Water-right Application for Lands in Private Ownership" under the name of Leo Pinger dated August 17, 1915. The second is a "Water-right Application for Lands in Private Ownership" under the name of Eva Pinger dated August 17, 1915. The two documents together cover the existing places of use in Section 36, T.18N., R.28E., M.D.B. & M. The State Engineer finds the contract date is August 17, 1915, for the existing places of use in Parcels 1, 2, 3, 4, 5 and 6, and water rights were initiated on these parcels on August 17, 1915.

³⁰⁷ Exhibit No. 813, public administrative hearing before the State Engineer, February 3, 1998.

³⁰⁸ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

³⁰⁹ Exhibit No. 815, public administrative hearing before the State Engineer, February 3, 1998.

Parcel 7 - Exhibit UU contains a "Water-right Application" dated August 18, 1919, but was filed on August 23, 1919, covering the existing place of use. The State Engineer finds the contract date is August 23, 1919, and a water right was initiated on this parcel on August 23, 1919.

II.

PERFECTION

Parcel 1 - The contract date is August 17, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³¹⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal, drain and adjacent land, and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. In fact, the protestant provided evidence of perfection on 0.33 of an acre of the existing place of use.³¹¹ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is August 17, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³¹² which indicates from aerial photographs that in 1948

³¹⁰ Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

³¹¹ Exhibit No. 821, public administrative hearing before the State Engineer, February 3, 1998.

³¹² Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

the land use on this parcel was described as a road, canal and adjacent land, and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. In fact, the protestant provided evidence of perfection on 2.11 acres of the existing place of use.³¹³ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is August 17, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³¹⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal and adjacent land, and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. In fact, the protestant provided evidence of perfection on 0.43 of an acre of the existing place of use.³¹⁵ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer

³¹³ Exhibit No. 821, public administrative hearing before the State Engineer, February 3, 1998.

³¹⁴ Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

³¹⁵ Exhibit No. 821, public administrative hearing before the State Engineer, February 3, 1998.

specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 4 - The contract date is August 17, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³¹⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal and adjacent land, farm yard, structures, and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. In fact, the protestant provided evidence of perfection on 1.07 acres of the existing place of use.³¹⁷ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 5 - The contract date is August 17, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³¹⁸ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal, farm yard, ditch and bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water

³¹⁶ Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

³¹⁷ Exhibit No. 821, public administrative hearing before the State Engineer, February 3, 1998.

³¹⁸ Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

right was not perfected on this parcel between 1915 and 1948. In fact, the protestant provided evidence of perfection on 2.91 acres of the existing place of use.³¹⁹ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 6 - The contract date is August 17, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³²⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

³¹⁹ Exhibit No. 821, public administrative hearing before the State Engineer, February 3, 1998.

³²⁰ Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

Parcel 7 - The contract date is August 23, 1919. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³²¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, drain and adjacent land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcels 1, 2, 3, 4, 5 and 6 - The applicant testified that all the existing places and proposed place of use within Section 36, T.18N., R.28E., M.D.B. & M. are within the family farm owned since 1964.³²² The State Engineer finds these transfers are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

³²¹ Exhibit No. 819, public administrative hearing before the State Engineer, February 3, 1998.

³²² Transcript, pp. 4830-4836, public administrative hearing before the State Engineer, January 14, 1999.

Parcel 7 - The applicant testified that the existing place of use within Section 23, T.19N., R.28E., M.D.B.&M., was owned by her parents since the 1940's, and that title was conveyed to her in 1977.³²³ The State Engineer finds that even though the properties may not be adjacent to each other it was Judge McKibben's intent that those persons moving water within their own properties and not purchasing water rights from some removed third party should have the benefit of his equitable ruling. The State Engineer finds that the water right requested for transfer from Parcel 7 was a water right in ownership of the applicant prior to the filing of the transfer application, and is thereby an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

The State Engineer finds all the transfer requests under Application 49116 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

³²³ Transcript, pp. 4830-4836, public administrative hearing before the State Engineer, January 14, 1999.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³²⁴

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6 and 7.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes as to Parcels 1, 2, 3, 4, 5, 6 and 7 that the transfers are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 49116 is hereby overruled and the State Engineer's decision granting Application 49116 is affirmed.

³²⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49117

GENERAL

I.

Application 49117 was filed on June 5, 1985, by Mario and Silvio Peraldo dba Peraldo Brothers to change the place of use of 29.75 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 619, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³²⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 2.10 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 2, T.19N., R.29E., M.D.B.&M.

Parcel 2 - 1.00 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 2, T.19N., R.29E., M.D.B.&M.

Parcel 3 - 2.90 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 2, T.19N., R.29E., M.D.B.&M.

Parcel 4 - 2.50 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 2, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as 7.30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and 1.20 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 2, T.19N., R.29E., M.D.B.& M.

II.

Application 49117 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³²⁶ and more specifically on the grounds as follows:³²⁷

Parcel 1 - Partial lack of perfection, abandonment

Parcel 2 - Lack of perfection, abandonment

Parcel 3 - Lack of perfection, abandonment

Parcel 4 - Lack of perfection, abandonment.

³²⁵ Exhibit No. 569, public administrative hearing before the State Engineer, October 22, 1997.

³²⁶ Exhibit No. 570, public administrative hearing before the State Engineer, October 22, 1997.

³²⁷ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

By letter dated January 6, 1999, the protestant conceded that a 0.95 of an acre portion of Parcel 1 was possibly irrigated through 1984.³²⁸

FINDINGS OF FACT

I.

CONTRACT DATES 49117

Exhibit GG from the January 1986 administrative hearing contains contracts covering the existing places of use under Application 49117.³²⁹ The protestant conceded at the 1997 administrative hearing that the 1920 contract found in Exhibit GG is related to the pre-1913 contracts also found in that exhibit, is an assignment of the pre-1913 water rights, and dropped its claims of forfeiture under this application.³³⁰

Parcels 1, 2, 3 and 4 - Exhibit GG contains an "Agreement" dated May 9, 1907, in which 20 acres of vested water rights were exchanged for Project vested water rights. A diagram attached to that agreement shows that the Morton Morrison farm covered the entire NW $\frac{1}{4}$ of the section and that the 20 acres of vested water rights (C=20) was in the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 2, T.19N., R.29E., M.D.B.& M. A second document in Exhibit GG is a "Certificate of Filing Water Right Application" dated October 11, 1909, which indicates that Morton Morrison added an additional 127 acres of water rights on the NW $\frac{1}{4}$ for a total of 147 irrigable acres in the NW $\frac{1}{4}$ of said Section 2. A third document is a "Certificate of Filing Water Right Application" dated April 1, 1911, which merely assigns the 147 acres of water rights from Morton Morrison to C.E. Mills. A fourth document is a December 2, 1920, "Water-

³²⁸ File No. 49117, official records in the office of the State Engineer. Exhibit No. 579, public administrative hearing before the State Engineer, October 22, 1997.

³²⁹ Exhibit No. 572, public administrative hearing before the State Engineer, October 22, 1997.

³³⁰ Transcript, p. 3659, public administrative hearing before the State Engineer, October 22, 1997.

right Application for Lands in Private Ownership". This document assigns 127 acres (the State Engineer believes this should have been 147 acres), including 20 acres of vested water rights) to E. Peraldo. The State Engineer finds that the contract dated October 11, 1909, added additional lands for development in this $\frac{1}{4}$ $\frac{1}{4}$ section of land and was filed by the original person to exchange vested water rights with the U.S. for Project water rights and is close enough in time to relate back to the original appropriation under the 1907 agreement. The State Engineer finds the contract date is May 9, 1907.

II.

PERFECTION

Parcels 1, 2, 3 and 4 - The contract date is May 9, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³³¹ which indicates from aerial photographs that in 1948 the land uses on these parcels were described as roads, farm yard, structures, canals and adjacent land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that water rights were not perfected on these parcels between 1907/1909 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that water rights were never perfected on these parcels between 1907/1909 and 1948, therefore, the protestant did not prove its claims of lack of perfection on these parcels. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds that since the 1909 contract which added additional lands is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

³³¹ Exhibit No. 577, public administrative hearing before the State Engineer, October 22, 1997.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³³² "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³³³ Non-use for a period of time may inferentially be some evidence of intent to abandon,³³⁴ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

The State Engineer finds the evidence found in the Exhibit GG contracts alone indicates that the entire NW¼ of Section 2, T.19N., R.29E., M.D.B.& M. has been considered one farm since 1907. The State Engineer finds the protestant's witness testified that when

³³² State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³³³ Revert v. Ray, 95 Nev. 782, 786 (1979).

³³⁴ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

he performed his land use analysis all the proposed places of use appeared to be irrigated.³³⁵ Testimony was provided by the applicant showing that his family has owned the entire NW¼ of said Section 2 since the 1920's, and they have always tried to use all the water allotted to them.³³⁶ The State Engineer finds and the protestant agreed³³⁷ that all the transfer requests under Application 49117 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³³⁸

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes as to Parcels 1, 2, 3 and 4 that the transfers are all intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, as was agreed to by the protestant. The State Engineer further concludes that the evidence demonstrated use of the water within the farm unit precluding an intent to abandon the water rights.

³³⁵ Transcript, p. 3682, see also pp. 3711, 3717, public administrative hearing before the State Engineer, October 22, 1997.

³³⁶ Transcript, pp. 4782-4787, public administrative hearing before the State Engineer, January 13, 1999.

³³⁷ Transcript, p. 4789, public administrative hearing before the State Engineer, January 13, 1999.

³³⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

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RULING

The protest to Application 49117 is hereby overruled and the State Engineer's decision granting Application 49117 is affirmed.

APPLICATION 49119

Application 49119 was filed on June 5, 1985, by Marjorie Ann Shepard to change the place of use of 16.10 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Serial Number 730, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³³⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 4.60 acres NW¼ SE¼, Sec. 34, T.19N., R.29E., M.D.B. & M.

The proposed place of use is described as 4.60 acres in the NW¼ SE¼ of Section 34, T.19N., R.29E., M.D.B. & M.

II.

Application 49119 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁴⁰ and more specifically on the grounds as follows:³⁴¹

Parcel 1 - Partial lack of perfection, partial abandonment.

By letter dated January 6, 1999, the protestant conceded that a 1.00 acre portion of Parcel 1 was irrigated through 1985.³⁴²

FINDINGS OF FACT

I.

CONTRACT DATES 49119

Exhibit OO from the 1986 administrative hearing contains a contract covering the existing place of use under Application

³³⁹ Exhibit No. 744, public administrative hearing before the State Engineer, February 2, 1998.

³⁴⁰ Exhibit No. 745, public administrative hearing before the State Engineer, February 2, 1998.

³⁴¹ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

³⁴² File No. 49119, official records in the office of the State Engineer. Exhibit No. 752, public administrative hearing before the State Engineer, February 2, 1998.

49119.³⁴³ The State Engineer finds the contract date is April 28, 1908.

II.

PERFECTION

Parcel 1 - The contract date is April 28, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"³⁴⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described a road, canal or drain and adjacent land, bare land and irrigated field. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. In fact, the protestant conceded perfection on 1.00 acre of the 4.60 acre parcel.³⁴⁵ The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and

³⁴³ Exhibit No. 747, public administrative hearing before the State Engineer, February 2, 1998.

³⁴⁴ Exhibit No. 750, public administrative hearing before the State Engineer, February 2, 1998.

³⁴⁵ Exhibit Nos. 750 and 752, Transcript, pp. 4128-4130, public administrative hearing before the State Engineer, February 2, 1998.

desert the water right.³⁴⁶ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³⁴⁷ Non-use for a period of time may inferentially be some evidence of intent to abandon,³⁴⁸ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer find the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcel 1 - Testimony was provided by the protestant's witness that during the time frame of 1948 through 1984 water was used at the proposed place of use for irrigating existing fields.³⁴⁹ At the 1986 administrative hearing, evidence was provided by the applicant that the water was being moved and commingled in the area of an existing field.³⁵⁰ At the 1998 administrative hearing, evidence was provided that the assessments were fully paid on the water

³⁴⁶ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁴⁷ Revert v. Ray, 95 Nev. 782, 786 (1979).

³⁴⁸ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁴⁹ Transcript, pp. 4135, 4136, 4139, public administrative hearing before the State Engineer, February 2, 1998.

³⁵⁰ Exhibit No. 592, public administrative hearing before the State Engineer, February 2, 1998.

rights.³⁵¹ The applicant provided evidence that both the existing place of use and the proposed place of use are within the applicant's ownership.³⁵² The State Engineer finds the water was used during the alleged period of non-use demonstrating a lack of intent to abandon the water right. The State Engineer finds this is an intrafarm transfer³⁵³ not subject to the doctrine abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁵⁴

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes the protestant did not prove its claim of abandonment of the water right by clear and convincing evidence, and in fact provided evidence that the water was being used during the time frame of 1948 through 1984 precluding a claim of intent to abandon. The State Engineer further concludes this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September, 3, 1998.

³⁵¹ Exhibit No. 232, public administrative hearing before the State Engineer, April 14, 1997.

³⁵² Exhibit Nos. 746, 876, public administrative hearing before the State Engineer, February 2, 1998, and January 12, 1999.

³⁵³ Exhibit Nos. 746, 876, public administrative hearing before the State Engineer, February 2, 1998.

³⁵⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

RULING

The protest to Application 49119 is overruled and the State Engineer's decision granting Application 49119 is hereby affirmed.

APPLICATION 49120

GENERAL

I.

Application 49120 was filed on June 5, 1985, by Ted R. Smitten, Jr. to change the place of use of 57.80 acre-feet annually (however, upon analysis the State Engineer determined 57.78 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 366, 569, 1025-3-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³⁵⁵

The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 1.21 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 32, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 6.00 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 6, T.19N., R.27E., M.D.B.&M.

Parcel 3 - 3.97 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 13, T.20N., R.24E., M.D.B.&M.

Parcel 4 - 0.40 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 13, T.20N., R.24E., M.D.B.&M.

Parcel 5 - 1.26 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 29, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 9.00 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, and 3.40 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 32, T.19N., R.28E., M.D.B.& M., and 0.44 of an acre in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, T.19N., R.28E., M.D.B.& M.

II.

Application 49120 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁵⁶ and more specifically on the grounds as follows:³⁵⁷

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Lack of perfection, forfeiture, abandonment

³⁵⁵ Exhibit No. 656, public administrative hearing before the State Engineer, November 17, 1997.

³⁵⁶ Exhibit No. 657, public administrative hearing before the State Engineer, November 17, 1997.

³⁵⁷ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

Parcel 3 - Abandonment

Parcel 4 - Abandonment

Parcel 5 - Partial lack of perfection, forfeiture, abandonment.

By letter dated January 6, 1999, the protestant conceded that a 1.17 acre portion of Parcel 5 was irrigated through 1984.³⁵⁸

FINDINGS OF FACT

I.

CONTRACT DATES 49120

Exhibit GG from the 1986 administrative hearing contains contracts covering the existing places of use under Application 49120.³⁵⁹

Parcels 1 and 5 - Exhibit GG contains a "Water-right Application" dated November 16, 1914, covering the lands described as Parcels 1 and 5. The State Engineer finds the contract date is November 16, 1914.

Parcel 2 - Exhibit GG contains a "Water-right Application" dated October 28, 1914, covering the land described as Parcel 2. The applicant provided evidence of a "Certificate of Filing Water Right Application" dated September 21, 1914, covering the same farm unit described in the October 1914 document.³⁶⁰ The September document appears to be related to the October 1914 document, but on the water right application the September 21, 1914, date is crossed out and replaced with the October 28, 1914, date. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds that the contract date is October 28, 1914.

Parcels 3 and 4 - Exhibit GG contains a "Certificate of Filing Water Right Application" dated February 16, 1910, covering the

³⁵⁸ File No. 49120, official records in the office of the State Engineer. See also, Exhibit No. 665, public administrative hearing before the State Engineer, November 17, 1997.

³⁵⁹ Exhibit No. 659, public administrative hearing before the State Engineer, November 17, 1997.

³⁶⁰ Exhibit No. 668, public administrative hearing before the State Engineer, November 17, 1997.

lands described as Parcels 3 and 4.³⁶¹ The State Engineer finds the contract date is February 16, 1910.

II.

PERFECTION

Parcel 1 - The contract date is November 16, 1914. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁶² which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal or road. At the administrative hearing, this description was refined to only a road.³⁶³ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

Parcel 2 - The contract date is October 28, 1914. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁶⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was

³⁶¹ See also, Exhibit No. 670, public administrative hearing before the State Engineer, November 17, 1997.

³⁶² Exhibit No. 663, public administrative hearing before the State Engineer, November 17, 1997.

³⁶³ Transcript, p. 3960, public administrative hearing before the State Engineer, November 17, 1997.

³⁶⁴ Exhibit No. 663, public administrative hearing before the State Engineer, November 17, 1997.

not perfected on this parcel between 1914 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

Parcel 5 - The contract date is November 16, 1914. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁶⁵ which indicates from aerial photographs that in 1962 the land use on this parcel was described as irrigated and a road. The protestant did not provide any evidence other than a 1962 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1962. The State Engineer finds that a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1962, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant conceded perfection on a 1.17 acre portion of Parcel 5.³⁶⁶ The State Engineer specifically adopts and incorporates General Conclusion of Law II and finds since the contract is dated pre-1927 that the water right under this contract was perfected at some point in time prior to the contract date.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the

³⁶⁵ Exhibit No. 663, public administrative hearing before the State Engineer, November 17, 1997.

³⁶⁶ Exhibit No. 665, public administrative hearing before the State Engineer, November 17, 1997.

evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcels 1 and 5 - The contract date is November 16, 1914. The 1914 contract from Exhibit GG describes Farm Unit "L" as all that portion of the S½ SW¼ of Section 29 and land lying south of the "L" Line and west of the "AA" canals in Section 32. At the bottom of the document, it is indicated that on April 29, 1915, the description of Farm Unit "L" was amended to be described as Lot 3, Section 29 and Lot 2, Section 32 containing 98.85 acres. At the 1999 administrative hearing, the applicant introduced an Indenture indicating ownership in the applicant of Farm Unit "L" which is described as Lot 3 of Section 29 and Lot 2 of Section 32.³⁶⁷ At the 1999 administrative hearing, the applicant also introduced a patent in the name of Ted Smitten which describes Farm Unit "L" as Lot 3 in Section 29 and Lot 4 in Section 32 totalling 96.56 acres.³⁶⁸ Since the land description in the patent does not match the contract or indenture, the State Engineer is excluding it from consideration. However, since the indenture puts the land comprising Farm Unit "L" as identified under the contract into the name Ted R. Smitten (this appears to be the father of the applicant Ted R. Smitten, Jr.), the State Engineer finds the applicant provided sufficient evidence to prove that the transfers within Sections 29 and 32 (Parcels 1 and 5) are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 2 - The contract date is October 28, 1914. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing

³⁶⁷ Exhibit No. 943, public administrative hearing before the State Engineer, January 15, 1999.

³⁶⁸ Exhibit No. 942, public administrative hearing before the State Engineer, January 15, 1999.

Place(s) of Use"³⁶⁹ which indicates from aerial photographs that from 1948 through 1980 the land use was described as bare land and natural vegetation. The 1984 land use description was given as just bare land. At the 1986 administrative hearing, the applicants indicated in 1948 and 1986 the land use on this parcel was non-irrigated land.³⁷⁰ The State Engineer finds that no water was placed to beneficial use on Parcel 2 for the 36 year period from 1948 through 1984.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³⁷¹ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³⁷² Non-use for a period of time may inferentially be some evidence of intent to abandon,³⁷³ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

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

³⁶⁹ Exhibit No. 663, public administrative hearing before the State Engineer, November 17, 1997.

³⁷⁰ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

³⁷¹ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁷² Revert v. Ray, 95 Nev. 782, 786 (1979).

³⁷³ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1 and 5 - The State Engineer finds the transfer requests from these parcels are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 2 - The State Engineer holds below that the water rights have been forfeited, therefore, the protestant's claim of abandonment is moot.

Parcel 3 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁷⁴ which indicates from aerial photographs that in 1948 the land use was described as irrigated. In 1962 the land use was described as bare land, natural vegetation and portion irrigated. In 1973 the land use was described as bare land and portion irrigated. In 1974 and 1975 the land use was described as bare land and trees, and in 1977 as bare land, trees, non-irrigated ag. land. The 1980 and 1984 land use descriptions were bare land and land in a residential area. At the 1986 administrative hearing, the applicant indicated that in 1948 the land use on this parcel was a pasture, and the 1986 land use description was given as urban development.³⁷⁵

The State Engineer finds that from 1948 through 1977 the protestant did not prove non-use of the water right by clear and convincing evidence. The State Engineer finds that a portion of

³⁷⁴ Exhibit No. 663, public administrative hearing before the State Engineer, November 17, 1997.

³⁷⁵ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

the existing place of use was devoted to urban development from 1980 through 1984, but nothing in this record enables him to identify the lands covered by that urban development and those covered by bare lands upon which the protestant did not prove non-use by clear and convincing evidence. The State Engineer finds the protestant did not prove its claim of non-use as to any specifically identifiable portion of the existing place of use by clear and convincing evidence, therefore, the protestant did not prove its claim of non-use.

Parcel 4 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁷⁶ which indicates from aerial photographs that in 1948, 1962, 1973 and 1975 the land use was described as irrigated. In 1977 the land use was described as non-irrigated ag. land. The 1980 and 1984 land use descriptions were given as land in residential area. At the 1986 administrative hearing, the applicants indicated in 1948 the land use on this parcel was a pasture, and the 1986 land use description was given as urban development.³⁷⁷ The State Engineer finds that in similar circumstances under Application 48667 the Federal District Court held that the protestant had proved non-use for the statutory period. The State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁷⁸

³⁷⁶ Exhibit No. 663, public administrative hearing before the State Engineer, November 17, 1997.

³⁷⁷ Exhibit No. 214, public administrative hearing before the State Engineer, April 14, 1997.

³⁷⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcels 1, 2 and 5.

III.

FORFEITURE

The State Engineer concludes as to Parcel 2 that the protestant proved the statutory period of non-use, the water rights are subject to the forfeiture provision of NRS § 533.060, the applicant did not prove this is an intrafarm transfer and the water right appurtenant to Parcel 2 is subject to forfeiture. The State Engineer concludes the transfer requests from Parcels 1 and 5 are intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

ABANDONMENT

The State Engineer concludes the transfer requests from Parcels 1 and 5 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes as to Parcel 2 the protestant's claim of abandonment is moot. The State Engineer concludes as to Parcel 3 that the protestant did not prove its claim on any specifically identifiable land, therefore, the protestant did not prove its claim of non-use. The State Engineer concludes as to Parcel 4 that the protestant proved non-use for the statutory period and a land use inconsistent with irrigation and that the applicant did not sufficiently prove a lack of intent to abandon, therefore, the water right appurtenant to Parcel 4 is subject to abandonment.

RULING

The protest claims are upheld in part and overruled in part. The State Engineer's decision granting Application 49120 as to Parcels 1, 3 and 5 is hereby affirmed. The water right appurtenant to Parcel 2 is declared forfeited. The water right appurtenant to

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Parcel 4 is declared abandoned. Therefore, the permit granted under Application 49120 is amended to allow the transfer of water rights appurtenant to 6.44 acres of land totalling 28.98 acre-feet of water to be perfected at the proposed place of use.

APPLICATION 49122

GENERAL

I.

Application 49122 was filed on June 5, 1985, by Wade Workman to change the place of use of 98.82 acre-feet annually (however, upon analysis the State Engineer determined 96.76 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 567-3, 549-1-H, 549-1-I and 549-1-J, Claim No. 3 Orr Ditch Decree, and Alpine Decree.³⁷⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 4.42 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 17, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 0.48 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 17, T.19N., R.28E., M.D.B.&M.

Parcel 3 - 2.06 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 26, T.19N., R.28E., M.D.B.&M.

Parcel 4 - 2.10 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 29, T.19N., R.28E., M.D.B.&M.

Parcel 5 - 12.90 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 29, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 15.00 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 1.70 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, and 5.26 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, all in Section 17, T.19N., R.28E., M.D.B. & M.

II.

Application 49122 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,³⁸⁰ and more specifically on the grounds as follows:³⁸¹

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - None

Parcel 3 - Lack of perfection, forfeiture, abandonment

³⁷⁹ Exhibit No. 671, public administrative hearing before the State Engineer, November 18, 1997.

³⁸⁰ Exhibit No. 672, public administrative hearing before the State Engineer, November 18, 1997.

³⁸¹ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

- Parcel 4** - Lack of perfection, abandonment
Parcel 5 - Partial lack of perfection, partial forfeiture, partial abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 49122

Exhibit OO from the 1986 administrative hearing contains contracts covering the existing places of use under Application 49122.³⁸²

Parcel 1 - Exhibit OO contains a "Water-right Application" dated January 10, 1919, which covers the land described as Parcel 1. The State Engineer finds the contract date is January 10, 1919.

Parcel 3 - Exhibit OO contains a "Water-right Application" without a legible date on which it was filed with the Department of Interior,³⁸³ but on the last page is indicated that it was approved and accepted by the project manager on December 23, 1915. The State Engineer finds the contract date is December 23, 1915.

Parcel 4 - Exhibit OO contains a "Certificate of Filing Water Right Application" dated December 30, 1907, which covers the land described as Parcel 4. The State Engineer finds the contract date is December 30, 1907.

Parcel 5 - Exhibit OO contains two documents covering this existing place of use. The first is a "Certificate of Filing Water Right Application" in the name of Coe dated December 30, 1907, which covers 52 acres of irrigable land described as Farm Unit "D" in the SW¼ SE¼ and the SE¼ SW¼ of Section 29, T.19N., R.28E., M.D.B. & M. The second is a "Water-right Application" in the name of Butter dated November 16, 1914, with writing on the bottom of the document indicating that the description of the irrigable land was amended on April 29, 1915, from describing Farm Unit "L" as all that

³⁸² Exhibit No. 674, public administrative hearing before the State Engineer, November 18, 1997.

³⁸³ See also Exhibit No. 685, public administrative hearing before the State Engineer, November 18, 1997.

portion of the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29 and land in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 32 lying south of the "L" line and west of the "AA" canals to an amended description which reads Farm Unit "L" or Lot 3, Section 29 and Lot 2 Section 32. At the 1997 administrative hearing, the applicant provided a copy of a May 15, 1920, letter addressed to Mr. Coe which indicated that the irrigable area of Farm Unit "F" was being increased from 51 to 71 acres with Farm Unit "F" being described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and the S $\frac{1}{2}$ SW $\frac{1}{4}$ North of the "V" Line Canal in said Section 29.³⁸⁴

The applicant alleges the contract date is December 30, 1907.³⁸⁵ The State Engineer finds the November 16, 1914, document is the same document introduced in the matter of transfer Application 49120 in the name of Ted Smitten.³⁸⁶ The State Engineer finds that the 1914 document refers to all that portion of the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 29 and land in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 32 lying south of the "L" line and west of the "AA" canals. The August 1981 through January 1983 water right maps that are used as the basis for determining the lands with water rights available for transfer³⁸⁷ show blank areas passing through $\frac{1}{4}$ $\frac{1}{4}$ sections of land in Sections 29 and 32 which the State Engineer believes are the "L" and "AA" canal descriptions in the 1914 document. The existing place of use at issue here is east of the "L" line canal and is not traversed by the "AA" canal, therefore, the State Engineer finds that the November 16, 1914, document is not the relevant document covering the water rights at issue here, but rather is the relevant document introduced under Application 49120. The State Engineer finds that water rights were initiated on a portion of the SW $\frac{1}{4}$ SE $\frac{1}{4}$

³⁸⁴ Exhibit Nos. 688 and 689, public administrative hearing before the State Engineer, November 17, 1997.

³⁸⁵ Applicant's Closing Brief at 38.

³⁸⁶ Exhibit No. 659, public administrative hearing before the State Engineer, November 17, 1997.

³⁸⁷ See, General Finding of Fact VI.

and the SE¼ SW¼ of Section 29 under the December 30, 1907, "Certificate of Filing Water Right Application". The State Engineer further finds that by April 20, 1920, the Director of the Reclamation Service approved an amendment of the farm unit plat for Farm Unit "F" in Section 29 from 51 to 71 irrigable acres.³⁸⁸ The State Engineer cannot determine why the farm unit was changed from Farm Unit "D" to "F". Never before in these hearings has a "Supplemental Water Right Application" to increase the irrigable area for which a final certificate has been issued been introduced, and the supplemental application itself ties the water right to the December 30, 1907, document.³⁸⁹ The State Engineer finds that since the Reclamation Service approved this as an amendment and tied the water right to the 1907 date the contract date is December 30, 1907.

II.

PERFECTION

Parcel 1 - The contract date is January 10, 1919. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁹⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal and adjacent land, farm area, and trees. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The

³⁸⁸ Exhibit Nos. 688 and 689, public administrative hearing before the State Engineer, November 18, 1997.

³⁸⁹ Exhibit No. 689, public administrative hearing before the State Engineer, November 18, 1997.

³⁹⁰ Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is December 23, 1915. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁹¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 4 - The contract date is December 30, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁹² which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation and trees. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not

³⁹¹ Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

³⁹² Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 5 - The contract date is December 30, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁹³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation, trees and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

³⁹³ Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

Parcel 1 - The applicant testified that the existing and proposed places of use within said Section 17 are all his farm.³⁹⁴ The applicant also introduced into evidence a copy of the deed to his property.³⁹⁵ The State Engineer notes that it is his belief there is an error in that deed. Parcel I described in the deed excepts out a 37 acre parcel from the land described. That 37 acre parcel is then described in Parcel II of the deed. However, the description of the second parcel when plotted does not come to closure indicating an error in the description. The State Engineer believes the description of Parcel II has a typographical error in that the first metes and bounds description apparently should not be N89°48'W, but rather should actually be N89°48'E. With that correction the description comes to closure and fits exactly into the 37 acres excepted out and covers all the proposed and existing places of use in Section 17. The State Engineer finds based on the testimony of the applicant, with consideration of the deed, that the transfers within Section 17 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 3 - The contract date is December 23, 1915, therefore, water rights were initiated on this parcel on December 23, 1915, and are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"³⁹⁶ which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as bare land and natural vegetation. In 1972 the land use was described as bare land. The 1973, 1974, 1975, 1977 and 1980 the land use was

³⁹⁴ Transcript, pp. 4623-4624, public administrative hearing before the State Engineer, January 12, 1999.

³⁹⁵ Exhibit No. 867, public administrative hearing before the State Engineer, January 12, 1999.

³⁹⁶ Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

described as bare land and natural vegetation. The 1984 land use description was again just bare land. The State Engineer finds the protestant did not provide clear and convincing evidence of non-use of the water right for the statutory period, particularly since natural vegetation appears to come and go resulting in the conclusion that activity was taking place on that land.

Parcel 5 - The contract date is December 30, 1907, therefore, water rights were initiated on this parcel prior to March 22, 1913, and are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.³⁹⁷ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."³⁹⁸ Non-use for a period of time may inferentially be some evidence of intent to abandon,³⁹⁹ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

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

³⁹⁷ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

³⁹⁸ Revert v. Ray, 95 Nev. 782, 786 (1979).

³⁹⁹ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcel 1 - The State Engineer finds the transfers within said Section 17 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 3 - The State Engineer finds the protestant did not provide clear and convincing evidence of non-use of the water right for the statutory period.

Parcel 4 - The contract date is December 30, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁴⁰⁰ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as bare land, natural vegetation, and trees. The State Engineer finds the protestant did not provide clear and convincing evidence of non-use of the water right for the statutory period.

Parcel 5 - The contract date is December 30, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁴⁰¹ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as bare land, natural vegetation, trees and portion irrigated. The protestant conceded irrigation on 1.05 acres of this existing place of use through 1985.⁴⁰² The State Engineer finds the protestant did not provide clear and convincing evidence of non-use of the water

⁴⁰⁰ Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

⁴⁰¹ Exhibit No. 679, public administrative hearing before the State Engineer, November 18, 1997.

⁴⁰² Exhibit No. 681, public administrative hearing before the State Engineer, November 18, 1997.

right for the statutory period.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁰³

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 3, 4 and 5.

III.

FORFEITURE

The State Engineer concludes that the transfer from Parcel 1 is an intrafarm transfer not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes that the protestant did not prove non-use of the water on Parcel 3 by clear and convincing evidence. The State Engineer concludes the contract date alone indicates that the water rights on Parcel 5 are not subject the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer concludes that the transfer from Parcel 1 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes that the protestant did not prove non-use of the water on Parcels 3, 4 or 5 by clear and convincing evidence.

RULING

The protest to Application 49122 is hereby overruled and the State Engineer's decision granting Application 49122 is hereby affirmed.

⁴⁰³ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49282

GENERAL

I.

Application 49282 was filed on August 20, 1985, by Larry L. Knowles⁴⁰⁴ to change the place of use of 29.70 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 64, 76-1 and 76-1-B, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁴⁰⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 3.46 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 3, T.18N., R.28E., M.D.B.&M.

Parcel 2 - 0.90 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 9, T.18N., R.28E., M.D.B.&M.

Parcel 3 - 2.24 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 9, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.90 of an acre in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 1.00 acre in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 3.40 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, 0.10 of an acre in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, and 1.20 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, all in Section 9, T.18N., R.28E., M.D.B.& M. By letter dated October 27, 1992, the applicant withdrew 0.45 of an acre from the transfer in Parcel 2 and withdrew 0.55 of an acre from the transfers in Parcel 3.⁴⁰⁶

II.

Application 49282 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴⁰⁷ and more specifically on the grounds as follows:⁴⁰⁸

⁴⁰⁴ The current owner of record is the Merwyn Lewis Johnson Trust.

⁴⁰⁵ Exhibit No. 365, public administrative hearing before the State Engineer, August 26, 1997.

⁴⁰⁶ Exhibit No. 366, public administrative hearing before the State Engineer, August 26, 1997.

⁴⁰⁷ Exhibit No. 367, public administrative hearing before the State Engineer, August 26, 1997.

⁴⁰⁸ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

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

FINDINGS OF FACT

I.

CONTRACT DATES 49282

Exhibit 00 from the January 1986 administrative hearing contains contracts covering the existing places of use under Application 49282.⁴⁰⁹

Parcel 1 - Exhibit 00 contains a "Certificate of Filing Water Right Application" dated January 4, 1910, which covers the land described as Parcel 1. The State Engineer finds the contract date is January 4, 1910.

Parcels 2 and 3 - Exhibit 00 contains a "Certificate of Filing Water Right Application" dated June 16, 1908, which covers the lands described as Parcels 2 and 3. The State Engineer finds the contract date is June 16, 1908.

II.

PERFECTION

Parcel 1 - The contract date is January 4, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as canals. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1910 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1910 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts

⁴⁰⁹ Exhibit No. 369, public administrative hearing before the State Engineer, August 26, 1997.

⁴¹⁰ Exhibit No. 372, public administrative hearing before the State Engineer, August 26, 1997.

and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is June 16, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is June 16, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹² which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal and road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of

⁴¹¹ Exhibit No. 372, public administrative hearing before the State Engineer, August 26, 1997.

⁴¹² Exhibit No. 372, public administrative hearing before the State Engineer, August 26, 1997.

perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁴¹³ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁴¹⁴ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁴¹⁵ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing

⁴¹³ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴¹⁴ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴¹⁵ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

evidence.

No testimony was provided at the 1986 or 1997 administrative hearings that the owner of the water rights under Application 49282 had continually paid the assessments and taxes due on these water rights and that none were delinquent.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as canals. From 1962 through 1984 the land use on this parcel was described as a canal and road. At the 1986 administrative hearing, the applicant indicated that the land use on this parcel was laterals.⁴¹⁷ The State Engineer finds no water was placed to beneficial use on Parcel 1 for the 36 year period from 1948 through 1984, the land use is inconsistent with irrigation, and no evidence was provided to prove a lack of intent to abandon the water right.

Parcel 2 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹⁸ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as a canal. At the 1986 administrative hearing, the applicant indicated that the land use on this parcel was laterals.⁴¹⁹ The State Engineer finds no water was placed to beneficial use on Parcel 2 for the 36 year period from 1948 through 1984, the land use is inconsistent with irrigation, and no evidence was provided to prove a lack of intent to abandon the water right.

⁴¹⁶ Exhibit No. 372, public administrative hearing before the State Engineer, August 26, 1997.

⁴¹⁷ Exhibit No. 364, public administrative hearing before the State Engineer, August 26, 1997.

⁴¹⁸ Exhibit No. 372, public administrative hearing before the State Engineer, August 26, 1997.

⁴¹⁹ Exhibit No. 364, public administrative hearing before the State Engineer, August 26, 1997.

Parcel 3 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴²⁰ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as a canal and road. At the 1986 administrative hearing, the applicant indicated that the land use on this parcel was laterals.⁴²¹ The State Engineer finds no water was placed to beneficial use on Parcel 3 for the 36 year period from 1948 through 1984, the land use is inconsistent with irrigation, and no evidence was provided to prove a lack of intent to abandon the water right.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴²²

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes the water rights appurtenant to Parcels 1, 2 and 3 are subject to abandonment.

RULING

The protest to Application 49282 is upheld as to the claims of abandonment and the State Engineer's decision granting Application 49282 is hereby rescinded and Application 49282 is hereby denied.

⁴²⁰ Exhibit No. 372, public administrative hearing before the State Engineer, August 26, 1997.

⁴²¹ Exhibit No. 364, public administrative hearing before the State Engineer, August 26, 1997.

⁴²² NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49283

GENERAL

I.

Application 49283 was filed on August 20, 1985, by Harvey O. Kolhoss to change the place of use of 2.63 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 538-13-B-8 and 265-1, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁴²³ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 0.13 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 17, T.18N., R.29E., M.D.B.&M.

Parcel 2 - 0.19 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.

Parcel 3 - 0.43 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 0.75 of an acre in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, T.18N., R.29E., M.D.B. & M. By letter dated July 12, 1999, as amended by letter dated August 19, 1999, the applicant withdrew the transfer requests from Parcels 2 and 3.⁴²⁴

II.

Application 49283 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴²⁵ and more specifically on the grounds as follows:⁴²⁶

Parcel 1 - Forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 49283

Parcel 1 - Exhibit OO from the 1986 administrative hearing contains an "Application for Permanent Water Right" dated March 20,

⁴²³ Exhibit No. 690, public administrative hearing before the State Engineer, November 18, 1997.

⁴²⁴ File No. 49283, official records in the office of the State Engineer.

⁴²⁵ Exhibit No. 691, public administrative hearing before the State Engineer, November 18, 1997.

⁴²⁶ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

1962, covering the existing place.⁴²⁷ At the 1997 administrative hearing, the applicant introduced an "Agreement" dated July 31, 1908, which exchanged pre-Project vested water rights for Project water rights.⁴²⁸ However, at the 1999 re-opened administrative hearing, counsel for the applicant indicated his belief that the water right requested for transfer was under the 1962 application.⁴²⁹ Upon review of the 1981-1983 maps on file at the office of the State Engineer,⁴³⁰ the State Engineer agrees with the applicant that the water right on this existing place of use was initiated under the March 20, 1962, application as those maps indicate that in this area the water right was applied for and not covered by a vested water right. The State Engineer finds the contract date is March 20, 1962.

II.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcel 1 - The applicant provided evidence that the existing and proposed places of use within Section 17, T.18N., R.29E., M.D.B.& M. are all his farm.⁴³¹ The State Engineer finds the transfer

⁴²⁷ Exhibit No. 693, public administrative hearing before the State Engineer, November 18, 1997.

⁴²⁸ Exhibit No. 703, public administrative hearing before the State Engineer, November 18, 1997.

⁴²⁹ Transcript, p. 4847, public administrative hearing before the State Engineer, January 14, 1999.

⁴³⁰ See, General Finding of Fact VI.

⁴³¹ Exhibit No. 939, public administrative hearing before the State Engineer, January 14, 1999.

within Section 17 is an intrafarm transfer not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁴³² "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁴³³ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁴³⁴ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

⁴³² State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴³³ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴³⁴ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Parcel 1 - The State Engineer finds the transfer within said Section 17 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴³⁵

II.

FORFEITURE

The State Engineer concludes the transfer from Parcel 1 is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

III.

ABANDONMENT

The State Engineer concludes the transfer from Parcel 1 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 49283 is hereby overruled. The State Engineer's decision granting the transfer of the water right appurtenant to Parcel 1 is affirmed. The permit granted under Application 49283 is amended to allow the transfer of water rights appurtenant to 0.13 acre of land totalling 0.455 acre-feet of water to be perfected at the proposed place of use.

⁴³⁵ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49285

GENERAL

I.

Application 49285 was filed on August 20, 1985, by Darrell W. and Patricia A. Norman to change the place of use of 15.17 acre-feet annually, a portion of the decreed waters of the Truckee River previously appropriated under the Serial Numbers 1028-1-I, 1028-4 and 1028-8, Claim No. 3 Orr Ditch Decree.⁴³⁶ The proposed point of diversion is described as being located at Derby Dam. The existing place of use is described as:

Parcel 1 - 3.37 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 13, T.20N., R.24E., M.D.B.&M.

The proposed place of use is described as 3.37 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T.20N., R.25E., M.D.B. & M. By letter dated July 12, 1999, the applicant withdrew all of the Parcel 1 request for transfer except for 1.40 acres along the eastern border of the $\frac{1}{4}$ $\frac{1}{4}$ section of land as identified and locatable in Exhibit No. 629.

II.

Application 49285 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴³⁷ and more specifically on the grounds as follows:⁴³⁸

Parcel 1 - Partial lack of perfection, abandonment.

In the applicant's letter of withdrawal dated July 12, 1999, it alleges that the PLPT withdrew its protest as to the remaining 1.40 acres of land. The State Engineer does not agree with that interpretation. While the PLPT at the administrative hearing did not qualify in testimony when it presented Exhibit No. 629 that the 1.40 acres of land were only irrigated through 1974, in a letter dated January 6, 1999, it made such a qualification. This

⁴³⁶ Exhibit No. 622, public administrative hearing before the State Engineer, October 23, 1997.

⁴³⁷ Exhibit No. 623, public administrative hearing before the State Engineer, October 23, 1997.

⁴³⁸ Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

qualification is supported by evidence the PLPT provided at the administrative hearing in Exhibit Nos. 628 and 630.

FINDINGS OF FACT

I.

CONTRACT DATES 49285

Parcel 1 - Exhibit 00 from the 1986 administrative hearing contains a "Certificate of Filing Water Right Application" dated May 14, 1909, covering the existing place of use.⁴³⁹ The State Engineer finds the contract date is May 14, 1909.

II.

PERFECTION

Parcel 1 - The contract date is May 14, 1909. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁴⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land adjacent to road and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1909 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1909 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant conceded perfection on the eastern portion of the existing place of use, i.e., that portion remaining after the withdrawals of July 12, 1999.⁴⁴¹ The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at

⁴³⁹ Exhibit No. 625, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁴⁰ Exhibit No. 628, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁴¹ Exhibit No. 629, public administrative hearing before the State Engineer, October 23, 1997.

some point in time prior to the date of the contract the water right was perfected, and finds that perfection was conceded by the protestant.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁴⁴² "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁴⁴³ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁴⁴⁴ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

⁴⁴² State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴⁴³ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴⁴⁴ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Parcel 1 - Parcel 1 was originally made up of three distinct parcels of land in that $\frac{1}{4}$ $\frac{1}{4}$ section of land. The "C"-shaped parcel on the western side of the $\frac{1}{4}$ $\frac{1}{4}$ section of land, and the parcel in the middle of the $\frac{1}{4}$ $\frac{1}{4}$ were described by the protestant's witness as bare ground with no structures,⁴⁴⁵ and the parcel on the eastern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land was described as being covered by a church and its surrounding parking lot and grounds.⁴⁴⁶ The parcel on the eastern edge covered by the church and its parking lot and grounds is the 1.40 acres of land left under Application 49285 after the withdrawals of July 12, 1999. Evidence was provided that the O & M assessments are paid and current on the water rights requested for transfer.⁴⁴⁷

The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁴⁸ which indicates from aerial photographs that the parcel on the eastern edge of the property, was irrigated through at least 1974, but from 1977 through 1984 the land was occupied by structures surrounded by bare land, and that bare land was a parking lot type area and not a field or pasture.

The State Engineer finds as to the eastern parcel no water has been placed to beneficial use on the parcel for the seven year period from 1977 through 1984, the land use is inconsistent with irrigated agriculture, and insufficient evidence was provided to show a lack of intent to abandon the water right.

⁴⁴⁵ Transcript, pp. 3846, 3853-3854, Exhibit No. 630, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁴⁶ Exhibit No. 630, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁴⁷ Exhibit No. 232, public administrative hearing before the State Engineer, April 14, 1997.

⁴⁴⁸ Exhibit No. 628, public administrative hearing before the State Engineer, October 23, 1997.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁴⁹

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes as to the eastern parcel since no water has been placed to beneficial use on the parcel for at least seven years, the land use is inconsistent with irrigated agriculture, and there was an insufficient showing of a lack of intent to abandon, the water right is subject to abandonment.

RULING

The protest to Application 49285 is upheld as to the claim of abandonment. The State Engineer's decision granting the transfer of the water right appurtenant to the eastern portion of the $\frac{1}{4}$ $\frac{1}{4}$ of the section is rescinded, the water right appurtenant to the eastern portion of the existing place of use is declared abandoned and is not available for transfer, and Application 49285 is denied.

⁴⁴⁹ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49287

GENERAL

I.

Application 49287 was filed on August 20, 1985, by Thomas A. Pflum to change the place of use of 9.45 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 113, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁴⁵⁰ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.10 acres NE¼ SW¼, Sec. 10, T.18N., R.28E., M.D.B.&M.

The proposed place of use is described as 2.10 acres in the NE¼ SW¼ of Section 10, T.18N., R.28E., M.D.B. & M.

Application 49287 was protested by the PLPT on the grounds described in the General Introduction I of this ruling⁴⁵¹ and more specifically on the grounds as follows:⁴⁵²

Parcel 1 - Lack of perfection, forfeiture, abandonment.

By letter dated January 6, 1999, the protestant conceded that a 0.47 of an acre portion of Parcel 1 was possibly irrigated through 1984.⁴⁵³

FINDINGS OF FACT

I.

CONTRACT DATE 49287

Parcel 1 - Exhibit OO from the 1986 administrative hearing contains a "Water-right Application" dated October 26, 1914, covering the

⁴⁵⁰ Exhibit No. 582, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁵¹ Exhibit No. 583, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁵² Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

⁴⁵³ File No. 49287, official records in the office of the State Engineer.

existing place of use.⁴⁵⁴ The applicant provided evidence of a "Certificate of Filing Water Right Application" dated October 6, 1914.⁴⁵⁵ The State Engineer finds it difficult to reconcile how the certificate of filing water right application pre-dates the water right application by 20 days unless there is a typographical error. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is October 26, 1914.

II.

PERFECTION

Parcel 1 - The contract date is October 26, 1914. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁵⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal and adjacent land, and farm yard. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1914 and 1948, and provided evidence that a water right was perfected on a 0.47 of an acre portion of the existing place of use.⁴⁵⁷ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1914 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at

⁴⁵⁴ Exhibit No. 585, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁵⁵ Exhibit No. 593, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁵⁶ Exhibit No. 588, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁵⁷ Exhibit No. 590, public administrative hearing before the State Engineer, October 23, 1997.

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

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrines of forfeiture or abandonment. The State Engineer finds Exhibit No. 889 and the Exhibit No. 585 water right contract show this is an intrafarm transfer in that the NE¼ of the SW¼ of Section 10, T.18N., R.28E., M.D.B.& M. is called Farm Unit "K", and both the existing and proposed places of use are within the NE¼ of the SW¼ of said Section 10. The State Engineer finds that Exhibit No. 592 from the 1986 hearing which provided the applicant's reasons for the transfer request indicates that the water rights were being moved to commingled areas in existing fields.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁵⁸

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes the water right requested for transfer is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further concludes that the

⁴⁵⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

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water was moved to commingled areas in existing fields demonstrating use of the water and a lack of intent to abandon the water right.

RULING

The protest to Application 49287 is overruled and the State Engineer's decision granting Application 49287 is hereby affirmed.

APPLICATION 49288

Application 49288 was filed on August 20, 1985, by David F. and Donna R. Stix⁴⁵⁹ to change the place of use of 45.00 acre-feet annually, a portion of the decreed waters of the Truckee River previously appropriated under Serial Number 1076, Claim No. 3 Orr Ditch Decree.⁴⁶⁰ The proposed point of diversion is described as being located at Derby Dam. The existing places of use are described as:

Parcel 1 - 1.00 acres NW¼ NE¼, Sec. 22, T.20N., R.25E., M.D.B.&M.

Parcel 2 - 5.00 acres SW¼ NE¼, Sec. 22, T.20N., R.25E., M.D.B.&M.

Parcel 3 - 4.00 acres NW¼ SE¼, Sec. 22, T.20N., R.25E., M.D.B.&M.

The proposed places of use are described as 8.30 acres in the SW¼ NE¼ and 1.70 acres in the NW¼ SE¼, both in Section 22, T.20N., R.25E., M.D.B. & M.

II.

Application 49288 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴⁶¹ and more specifically on the grounds as follows:⁴⁶²

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Lack of perfection, forfeiture, abandonment

Parcel 3 - Lack of perfection, forfeiture, abandonment.

⁴⁵⁹ Application 49288 is now held in the name of Harald V. and Erika M. Zipprich. See, File No. 49288, official records in the office of the State Engineer.

⁴⁶⁰ Exhibit No. 757, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁶¹ Exhibit No. 758, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁶² Exhibit No. 215, public administrative hearing before the State Engineer, April 14, 1997.

FINDINGS OF FACT

I.

CONTRACT DATES 49288

Parcels 1, 2 and 3 - Exhibit OO from the 1986 administrative hearing contains an "Application for Permanent Water Right" dated January 21, 1955, covering the existing places of use.⁴⁶³ Evidence was presented by both the applicant and the protestant which indicated a belief, based on the presence of irrigation structures in the 1948 aerial photographs and field investigations, that perhaps irrigation took place on a part of these lands prior to 1948.⁴⁶⁴ However, no evidence was provided of the existence of a water right contract or any other document to show a water right was granted for these lands before the 1955 "Application for Permanent Water Right", and that application does not provide evidence of any earlier water right on these parcels. Without such evidence, the only evidence before the State Engineer to prove the initiation of a water right on these parcels is the 1955 water right application. The State Engineer finds the contract date is January 21, 1955.

II.

PERFECTION

Parcels 1, 2 and 3 - The contract date is January 21, 1955. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁶⁵ which indicates from aerial photographs that in 1948 and 1962 the land uses on these parcels were described as bare land and natural vegetation. The applicant's witness provided testimony that in his belief in 1973

⁴⁶³ Exhibit No. 760, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁶⁴ Transcript, pp. 4184-85, 4211-4230, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁶⁵ Exhibit No. 763, public administrative hearing before the State Engineer, February 3, 1998.

and 1984 the existing places of use in the NW¼ NE¼ and the SW¼ NE¼ (Parcels 1 and 2) had received water, but at the time of the photographs were either harvested or under stress, and that in 1977 Parcels 1 and 2 were irrigated as pasture.⁴⁶⁶ The State Engineer finds the land use description of bare land and natural vegetation is not sufficient to prove that water was never applied to Parcels 1, 2 and 3, particularly in light of the fact that irrigation structures exist which at one time apparently could deliver water to all three parcels. The State Engineer finds that a 1962 photograph is not sufficient evidence to prove that water rights were never perfected on these parcels between 1955 and 1962, therefore, the protestant did not prove its claims of lack of perfection on these parcels.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcels 1, 2 and 3 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁶⁷ which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980 and 1984 the land uses on these parcels were described as bare land and natural vegetation. At the 1986 administrative hearing, the applicant provided evidence that the land uses in 1948 on Parcels 1 and 2 were bare land and on Parcel 3 was partial cultivation, and in 1986 the land uses on Parcels 1 and 2 were bare

⁴⁶⁶ Transcript, pp. 4211-4213, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁶⁷ Exhibit No. 763, public administrative hearing before the State Engineer, February 3, 1998.

land, and on Parcel 3 was not cultivated.⁴⁶⁸ The protestant's witness believed the proposed places of use were being irrigated and had always been irrigated.⁴⁶⁹

The State Engineer finds Exhibit Nos. 759, 768, 769, 770 and 937 show this is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁴⁷⁰ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁴⁷¹ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁴⁷² however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to

⁴⁶⁸ Exhibit No. 364, public administrative hearing before the State Engineer, August 25, 1997.

⁴⁶⁹ Transcript, p. 4199, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁷⁰ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴⁷¹ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴⁷² Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1, 2 and 3 - The State Engineer finds evidence was provided that the assessments for these water rights had been paid,⁴⁷³ the land uses are not inconsistent with irrigation, and the protestant provided evidence that the water was being used on the farm unit during the relevant time period precluding a finding of an intent to abandon the water right. The State Engineer finds this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the protestant did not prove its claim of abandonment by clear and convincing evidence.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁷⁴

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

Parcels 1, 2 and 3 - The State Engineer concludes this is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes the use of water on other

⁴⁷³ Exhibit No. 771, public administrative hearing before the State Engineer, February 3, 1998.

⁴⁷⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

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portions of the farm unit precludes a finding of an intent to abandon the water right, therefore, the protestant did not prove its claims of abandonment.

RULING

The protest to Application 49288 is overruled and the State Engineer's decision granting Application 49288 is hereby affirmed.

APPLICATION 49563

GENERAL

I.

Application 49563 was filed on December 10, 1985, by the Lem S. Allen Family Trust to change the place of use of 3.50 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 538-47, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁴⁷⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 1.00 acre SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.

The proposed place of use is described as 1.00 acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T.19N., R.28E., M.D.B. & M.

Application 49563 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴⁷⁶ and more specifically on the grounds as follows:⁴⁷⁷

Parcel 1 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 49563

Parcel 1 - Exhibit UU from the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated January 25, 1908, covering the existing place of use.⁴⁷⁸ At the 1997 administrative hearing, the applicant provided evidence of an "Agreement" dated December 6, 1907, covering this parcel pursuant to which pre-Project vested water rights were exchanged for Project

⁴⁷⁵ Exhibit No. 632, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁷⁶ Exhibit No. 633, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁷⁷ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

⁴⁷⁸ Exhibit No. 635, public administrative hearing before the State Engineer, October 23, 1997.

water rights.⁴⁷⁹ The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is December 6, 1907.

II.

PERFECTION

Parcel 1 - The contract date is December 6, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁸⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁴⁸¹ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

⁴⁷⁹ Exhibit No. 641, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁸⁰ Exhibit No. 638, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁸¹ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

surrounding circumstances."⁴⁸² Non-use for a period of time may inferentially be some evidence of intent to abandon,⁴⁸³ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁸⁴ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as bare land and natural vegetation. The applicant provided evidence that the O&M assessments were paid and current.⁴⁸⁵ At the 1999 administrative hearing, the applicant provided evidence that both the existing and proposed places of use have been held by members of the Lem Allen family since 1969.⁴⁸⁶ At the 1988 administrative hearing, the applicant provided evidence

⁴⁸² Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴⁸³ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴⁸⁴ Exhibit No. 638, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁸⁵ Exhibit No. 232, public administrative hearing before the State Engineer, April 14, 1997.

⁴⁸⁶ Exhibit No. 893, public administrative hearing before the State Engineer, January 13, 1999.

showing that it was moving the water from barren land to commingled areas in existing fields⁴⁸⁷ which indicates that the water was being used in those fields at the time the application was filed in 1985.

The State Engineer finds the land use is not inconsistent with irrigated agriculture. The State Engineer finds the use of the water on other parts of the farm precludes a finding of an intent to abandon the water right and the protestant did not prove its claim of abandonment by clear and convincing evidence. The State Engineer finds the transfer is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁸⁸

II.

PERFECTION

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

III.

ABANDONMENT

Parcel 1 - The State Engineer concludes the water right requested for transfer is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and further concludes the protestant did not prove its claim of abandonment by clear and convincing evidence.

RULING

The protest to Application 49563 is overruled and the State Engineer's decision granting Application 49563 is hereby affirmed.

⁴⁸⁷ Exhibit No. 608, public administrative hearing before the State Engineer, October 23, 1997.

⁴⁸⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49564

GENERAL

I.

Application 49564 was filed on December 10, 1985, by James William and Georgiann Di Giacomo to change the place of use of 5.25 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 318-2, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁴⁸⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 1.50 acres NE¼ NE¼, Sec. 35, T.18N., R.29E., M.D.B&M.

The proposed place of use is described as 1.50 acres in the NW¼ NE¼ of Section 35, T.18N., R.29E., M.D.B. & M.

Application 49564 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴⁹⁰ and more specifically on the grounds as follows:⁴⁹¹

Parcel 1 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 49564

Exhibit UU from the January 1988 administrative hearing contains a contract covering the existing place of use.⁴⁹²

Parcel 1 - Exhibit UU contains a "Water-right Application" dated December 3, 1919, covering the existing place of use. The State Engineer finds the contract date is December 3, 1919.

⁴⁸⁹ Exhibit No. 450, public administrative hearing before the State Engineer, September 24, 1997.

⁴⁹⁰ Exhibit No. 451, public administrative hearing before the State Engineer, September 24, 1997.

⁴⁹¹ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

⁴⁹² Exhibit No. 453, public administrative hearing before the State Engineer, September 24, 1997.

II.

PERFECTION

Parcel 1 - The contract date is December 3, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁹³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, canal and adjacent land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture. While the State Engineer expects from reviewing Exhibit Nos. 450, 452 and 453 that this is an intrafarm transfer in that the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 35, T.18N., R.29E., M.D.B. & M. is called Farm Unit "F", the applicant never appeared or made such a claim.

⁴⁹³ Exhibit No. 456, public administrative hearing before the State Engineer, September 24, 1997.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴⁹⁴ which indicates from aerial photographs that from 1948 through 1984 the land use on this parcel was described as a road, canal and adjacent land. The State Engineer finds there is clear and convincing evidence that no water was placed to beneficial use on the existing place of use for the 36 year period from 1948 through 1984.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁴⁹⁵ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁴⁹⁶ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁴⁹⁷ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

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

⁴⁹⁴ Exhibit No. 456, public administrative hearing before the State Engineer, September 24, 1997.

⁴⁹⁵ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴⁹⁶ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴⁹⁷ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

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

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁹⁸

II.

PERFECTION

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

III.

FORFEITURE

Parcel 1 - The State Engineer concludes that the protestant proved the statutory period of non-use, the water right on Parcel 1 is subject to the forfeiture provision of NRS § 533.060, and the water right appurtenant to Parcel 1 is subject to forfeiture.

IV.

ABANDONMENT

Parcel 1 - The water right appurtenant to this parcel is below declared forfeited, therefore, the State Engineer concludes the PLPT's claim of abandonment are moot.

RULING

The protest to Application 49564 is upheld as to the claim of forfeiture. As to Parcel 1, the State Engineer's decision granting

⁴⁹⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

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the transfer of water rights under Application 49564 is hereby rescinded and the water rights appurtenant to Parcel 1 are hereby declared forfeited.

APPLICATION 49567

GENERAL

I.

Application 49567 was filed on December 10, 1985, by Roy and Erma Dean Rogers to change the place of use of 20.70 acre-feet annually (however, upon analysis the State Engineer determined 18.70 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Numbers 541-3-A and 398, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁴⁹⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 2.00 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.

Parcel 2 - 2.60 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 14, T.19N., R.27E., M.D.B.&M.

The proposed place of use is described as 4.60 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 14, T.19N., R.27E., M.D.B. & M.

II.

Application 49567 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁵⁰⁰ and more specifically on the grounds as follows:⁵⁰¹

Parcel 1 - None

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

FINDINGS OF FACT

I.

CONTRACT DATE 49567

Parcel 2 - Exhibit UU from the 1988 administrative hearing contains a "Water-right Application" dated February 15, 1918, covering the

⁴⁹⁹ Exhibit No. 787, public administrative hearing before the State Engineer, February 3, 1998.

⁵⁰⁰ Exhibit No. 788, public administrative hearing before the State Engineer, February 3, 1998.

⁵⁰¹ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

existing place of use. The State Engineer finds the contract date is February 15, 1918.

II.

PERFECTION

Parcel 2 - The contract date is February 15, 1918. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁵⁰² which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, non-irrigated and irrigated fields, bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1918 and 1948. In fact, the protestant's witness proved perfection of the water right on at least 1.35 acres of this 2.60 acre parcel.⁵⁰³ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1918 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrines of forfeiture or abandonment. The

⁵⁰² Exhibit No. 794, public administrative hearing before the State Engineer, February 3, 1998.

⁵⁰³ Exhibit No. 795, public administrative hearing before the State Engineer, February 3, 1998.

applicant testified that the proposed and existing places of use within Section 14, T.19N., R.27E., M.D.B. & M. are within his farm, and that he owns the lands in Section 25 from which water is also being transferred to said Section 14.⁵⁰⁴ The State Engineer finds the transfer from Parcel 2 is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵⁰⁵

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcel 2.

III.

FORFEITURE AND ABANDONMENT

Parcel 2 - The State Engineer concludes the water right requested for transfer is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 49567 is overruled and the State Engineer's decision granting Application 49567 is hereby affirmed.

⁵⁰⁴ Transcript, pp. 4900-4913, public administrative hearing before the State Engineer, January 15, 1999. Exhibit No. 941, public administrative hearing before the State Engineer, January 15, 1999.

⁵⁰⁵ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 49568

GENERAL

I.

Application 49568 was filed on December 10, 1985, by Arnold H. and Laura B. Rhom⁵⁰⁶ to change the place of use of 73.40 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 44 and 125-2, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁵⁰⁷ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 8.35 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 18, T.17N., R.29E., M.D.B.&M.

Parcel 2 - 7.50 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 18, T.17N., R.29E., M.D.B.&M.

Parcel 3 - 2.50 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 18, T.17N., R.29E., M.D.B.&M.

Parcel 4 - 2.35 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 18, T.17N., R.29E., M.D.B.&M.

Parcel 5 - 0.27 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 12, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.30 of an acre in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and 20.67 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, both in Section 18, T.17N., R.29E., M.D.B. & M.

II.

Application 49568 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁵⁰⁸ and more specifically on the grounds as follows:⁵⁰⁹

Parcel 1 - Partial lack of perfection, forfeiture, abandonment

Parcel 2 - Partial lack of perfection, forfeiture, abandonment

Parcel 3 - None

Parcel 4 - None

Parcel 5 - None.

⁵⁰⁶ The records of the State Engineer indicate that Walter and Charmaine Christie are now the owners of record of Application 49568.

⁵⁰⁷ Exhibit No. 437, public administrative hearing before the State Engineer, September 24, 1997.

⁵⁰⁸ Exhibit No. 438, public administrative hearing before the State Engineer, September 24, 1997.

⁵⁰⁹ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

FINDINGS OF FACT

I.

CONTRACT DATES 49568

Exhibit UU from the January 1988 administrative hearing contains contracts covering some of the existing places of use under Application 49568.⁵¹⁰

Parcel 1 - Exhibit UU contains two documents covering the existing place of use described as Parcel 1. The first is a "Certificate of Filing Water Right Application" dated September 30, 1910, which provides for water rights for the 40 acres of irrigable lands in the NW¼ NE¼ of Section 18, T.17N., R.29E., M.D.B.& M. The second document is a "Water-right Application for Lands in Private Ownership" dated July 2, 1914, which also provides for water rights for the 40 acres of irrigable lands in the NW¼ NE¼ of said Section 18. The State Engineer finds the second document appears to be a new owner applying for the right to put water on the same lands as under the 1910 document, because on the 1914 document it has the name of the applicant from the 1910 document, but that name was crossed out with the name of Percy Hibbard typed in its place. The State Engineer finds the contract date is September 30, 1910.

Parcel 2 - Exhibit UU did not contain a contract covering this existing place of use, however, the applicant provided a "Water-right Application for Lands in Private Ownership" dated May 1, 1920, which covers this parcel.⁵¹¹ The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is May 1, 1920.

⁵¹⁰ Exhibit No. 440, public administrative hearing before the State Engineer, September 24, 1997.

⁵¹¹ Exhibit No. 441, public administrative hearing before the State Engineer, September 24, 1997.

II.

PERFECTION

Parcel 1 - The contract date is September 30, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵¹² which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal or drain, road and adjacent land, bare land and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1910 and 1948, and in fact, the protestant's witness admitted that over half (4.29 acres) of the parcel had been irrigated⁵¹³ proving perfection of part of the water right. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1910 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is May 1, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵¹⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal or drain, road and adjacent land, and portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920

⁵¹² Exhibit No. 444, public administrative hearing before the State Engineer, September 24, 1997.

⁵¹³ Transcript, p. 2926, public administrative hearing before the State Engineer, September 24, 1997.

⁵¹⁴ Exhibit No. 444, public administrative hearing before the State Engineer, September 24, 1997.

and 1948, and in fact, the protestant's witness admitted that nearly all the parcel (6.37 acres) had been irrigated proving perfection of a substantial part of the water right.⁵¹⁵ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel and, in fact, the protestant proved perfection on nearly the entire parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

Parcel 1 - The State Engineer finds that since the contract date is September 30, 1910, the water right was initiated in accordance with the law in effect prior to March 22, 1913, and therefore, is not subject to the forfeiture provision of NRS § 533.060.

Parcel 2 - The State Engineer finds the contract date is May 1, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵¹⁶ which indicates from aerial photographs that from 1962 through 1985⁵¹⁷ the land uses on this parcel (which is actually comprised of land on 4 sides of the SW¼ NE¼ of Section 18, T.17N., R.29E., M.D.B.& M.) were described as a canal or drain, road and adjacent land, and bare land. The protestant did not clearly demonstrate the land use on each of the 4 sides as those land uses cannot be determined from the record.

⁵¹⁵ Transcript, p. 2926, public administrative hearing before the State Engineer, September 24, 1997.

⁵¹⁶ Exhibit No. 444, public administrative hearing before the State Engineer, September 24, 1997.

⁵¹⁷ Exhibit No. 446, public administrative hearing before the State Engineer, September 24, 1997.

The State Engineer finds from the protestant's evidence⁵¹⁸ and the applicants' testimony that the land on the east side of Parcel 2 is occupied by an on-farm, dirt-lined, water-righted ditch filled with water and since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water to the date of the photograph.⁵¹⁹

The State Engineer finds he cannot tell from the protestant's evidence⁵²⁰ the land use on the west side of Parcel 2, therefore, the protestant did not prove non-use by clear and convincing evidence. The parcel just to the north of this portion of Parcel 2 is occupied by a road and an on-farm, dirt-lined, water-righted ditch, but the State Engineer cannot tell from the evidence if that same condition exists on this portion of Parcel 2, since the existing place of use gets larger and smaller throughout this specific area.

The State Engineer finds the protestant did not sufficiently demonstrate what the land use was on the northern and southern portions of the Parcel 2 existing place of use for the State Engineer to even be able to determine what the land use on those parcels is, therefore, the protestant did not adequately prove its case as to non-use on those portions of the Parcel 2 existing place of use.

To summarize, the State Engineer finds the protestant's witness did not provide a sufficient land use description for the west, north and south sides of the parcel for the State Engineer to be able to determine the land use, therefore, the protestant did not prove the land use over time on those portions of the parcels

⁵¹⁸ Exhibit Nos. 439 (arrows added to exhibit) and 447, photograph 5R2-3, public administrative hearing before the State Engineer, September 24, 1997.

⁵¹⁹ Transcript, p. 2942, public administrative hearing before the State Engineer, September 23, 1997.

⁵²⁰ Exhibit Nos. 439 and 447, photograph 5R2-4, public administrative hearing before the State Engineer, September 24, 1997.

making up Parcel 2. The State Engineer finds the land use on the east side of the parcel demonstrates beneficial use of the water over time in the on-farm ditch. The State Engineer finds the protestant did not prove its claim of non-use or forfeiture as to Parcel 2.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁵²¹ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁵²² Non-use for a period of time may inferentially be some evidence of intent to abandon,⁵²³ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing

⁵²¹ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁵²² Revert v. Ray, 95 Nev. 782, 786 (1979).

⁵²³ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

evidence.

Parcel 1 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵²⁴ which indicates from aerial photographs that from 1974 through 1985⁵²⁵ the land uses on this parcel (which is actually comprised of land on 4 sides of the NW¼ NE¼ of Section 18, T.17N., R.29E., M.D.B.& M.) were described as a canal or drain, road and adjacent land, and bare land. The protestant's witness incorrectly identified the road on the north portion of Parcel 1 as part of the existing place of use. The applicant testified that the road is not part of his property and does not comprise the existing place of use,⁵²⁶ however, the applicant did not dispute that the ditch and adjacent land are part of the existing place of use.

The State Engineer finds as to the land on the north part of the ¼ ¼ section that the land adjacent to the ditch is part of the ditch as it forms the ditch bank⁵²⁷, is on the applicant's property, and is an on-farm, dirt-lined, water-righted ditch⁵²⁸, which the protestant's evidence showed was full of water being beneficially used at the time of the photograph. Therefore, the State Engineer finds as to the north portion of this existing place of use the protestant's evidence demonstrates beneficial use of the water up to the time of the 1997 photograph precluding a claim of abandonment.

⁵²⁴ Exhibit No. 444, public administrative hearing before the State Engineer, September 24, 1997.

⁵²⁵ Exhibit No. 446, public administrative hearing before the State Engineer, September 24, 1997.

⁵²⁶ Transcript, pp.2942-2947, public administrative hearing before the State Engineer, September 24, 1997.

⁵²⁷ Transcript, pp. 2947-2948, public administrative hearing before the State Engineer, September 24, 1997.

⁵²⁸ Exhibit No. 447, photograph 5R2-2, public administrative hearing before the State Engineer, September 24, 1997.

As to the east side of the Parcel 1 existing place of use, the protestant's evidence provides this also is an on-farm, dirt-lined, water-righted ditch with water in it and being used in 1997⁵²⁹ demonstrating beneficial use of the water up to the time of the hearing precluding a claim of abandonment.

As to the south side of Parcel 1, the evidence is inadequate to sufficiently demonstrate the land use over time, therefore, the protestant did not prove its claim of abandonment.

As to the west side of Parcel 1, the evidence does not sufficiently demonstrate which portion of the existing place of use is occupied by the road and which portion is occupied by the ditch, therefore, the protestant did not prove non-use as to a specifically quantifiable and locatable piece of ground and the evidence provides this also is an on-farm, dirt-lined, water-righted ditch with water in it and being used in 1997⁵³⁰ demonstrating beneficial use of the water up to the time of the 1997 photograph precluding a claim of abandonment.

Parcel 2 - The State Engineer has already found that the protestant did not prove non-use by clear and convincing evidence, therefore, the protestant did not provide sufficient evidence as to non-use to support its claim of abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵³¹

⁵²⁹ Exhibit No. 447, photograph 5R2-3, public administrative hearing before the State Engineer, September 24, 1997.

⁵³⁰ Exhibit No. 447, photograph 5R2-4, public administrative hearing before the State Engineer, September 24, 1997.

⁵³¹ NRS Chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcels 1 and 2.

III.

FORFEITURE

Parcel 1 - The State Engineer concludes that the contract alone demonstrates that the water right was initiated prior to March 22, 1913, and therefore, is not subject to the forfeiture provision of NRS § 533.060.

Parcel 2 - The State Engineer concludes the protestant did not prove its claim of non-use by clear and convincing evidence, therefore, the protestant did not prove its claim of forfeiture as to this parcel.

IV.

ABANDONMENT

Parcel 1 - The State Engineer concludes the land adjacent to the ditch on the north portion of the parcel is part of the ditch as it forms the ditch bank⁵³², is on the applicant's property, is an on-farm, dirt-lined ditch⁵³³, which the protestant's evidence showed was full of water being beneficially used at the time of the photograph. Therefore, the State Engineer concludes as to the north portion of this existing place of use the protestant's evidence demonstrates beneficial use of the water up to the time of the hearing precluding a claim of abandonment.

As to the east side of the Parcel 1 existing place of use, the protestant's evidence provides this also is an on-farm ditch with

⁵³² Transcript, pp. 2947-2948, public administrative hearing before the State Engineer, September 24, 1997.

⁵³³ Exhibit No. 447, photograph 5R2-2, public administrative hearing before the State Engineer, September 24, 1997.

water in it and being used in 1997⁵³⁴ demonstrating beneficial use of the water up to the time of the hearing precluding a claim of abandonment.

As to the south side of Parcel 1, the evidence is inadequate to sufficiently demonstrate the land use over time, therefore, the protestant did not prove its claim of abandonment.

As to the west side of Parcel 1, the evidence does not sufficiently demonstrate which portion of the existing place of use is occupied by the road and which portion is occupied by the ditch, therefore, the protestant did not prove non-use as to a specifically quantifiable and locatable piece of ground and the evidence provides part of the existing place of use is also an on-farm ditch with water in it and being used in 1997⁵³⁵ demonstrating beneficial use of the water up to the time of the hearing precluding a claim of abandonment. The State Engineer concludes the protestant did not prove its claim of abandonment as to Parcel 1.

Parcel 2 - The State Engineer concludes the protestant did not prove its claim of abandonment as to Parcel 2.

RULING

The protest to Application 49568 is overruled and the State Engineer's decision granting Application 49568 is hereby affirmed.

⁵³⁴ Exhibit No. 447, photograph 5R2-3, public administrative hearing before the State Engineer, September 24, 1997.

⁵³⁵ Exhibit No. 447, photograph 5R2-4, public administrative hearing before the State Engineer, September 24, 1997.

APPLICATION 49998

GENERAL

I.

Application 49998 was filed on July 16, 1986, by Larry G. Yori to change the place of use of 16.65 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 1075-2-B, Claim No. 3 Orr Ditch Decree.⁵³⁶ The proposed point of diversion is described as being located at Derby Dam. The existing places of use are described as:

Parcel 1 - 1.40 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.20N., R.25E., M.D.B.&M.

Parcel 2 - 0.90 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.20N., R.25E., M.D.B.&M.

Parcel 3 - 1.40 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.20N., R.25E., M.D.B.&M.

The proposed place of use is described as 3.30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 0.40 of an acre in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 22, T.20N., R.25E., M.D.B. & M.

II.

Application 49998 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁵³⁷ and more specifically on the grounds as follows:⁵³⁸

Parcel 1 - Abandonment

Parcel 2 - Partial lack of perfection, abandonment

Parcel 3 - Partial lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 49998

Exhibit UU from the January 1988 administrative hearing contains contracts covering the existing places of use under

⁵³⁶ Exhibit No. 597, public administrative hearing before the State Engineer, October 23, 1997.

⁵³⁷ Exhibit No. 598, public administrative hearing before the State Engineer, October 23, 1997.

⁵³⁸ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

Application 49998.⁵³⁹

Parcel 2 - Exhibit UU contains three documents covering the existing place of use described as Parcel 2. The first is a "Certificate of Filing Water Right Application" dated December 20, 1907, which provides for water rights for the 82 acres of irrigable lands in Farm Unit C which includes the E½ NW¼ of Section 22, T.20N., R.25E., M.D.B.& M. The second document is another "Certificate of Filing Water Right Application" dated February 25, 1909, which also provides for water rights for the 82 acres of irrigable lands in Farm Unit C. The third document is a "Water-right Application" dated February 23, 1918, which provides for the assignment of water rights under application 3828 which is the serial number found on the February 25, 1909, "Certificate of Filing Water Right Application". The State Engineer finds the contract date is either December 20, 1907, or February 25, 1909.

Parcel 3 - Exhibit UU contains two documents covering the existing place of use described as Parcel 3. The first is a "Certificate of Filing Water Right Application" dated December 20, 1907, which provides for water rights for the 88 acres of irrigable lands in Farm Unit D which includes the W½ NW¼ of Section 22, T.20N., R.25E., M.D.B.& M. The second document is another "Certificate of Filing Water Right Application" dated February 25, 1909, which also provides for water rights for the 88 acres of irrigable lands in Farm Unit D. The State Engineer finds the contract date is either December 20, 1907, or February 25, 1909.

II.

PERFECTION

Parcel 2 - The contract date is either December 20, 1907, or February 25, 1909. The PLPT provided evidence in Table 2A - "Land

⁵³⁹ Exhibit No. 600, public administrative hearing before the State Engineer, October 23, 1997.

Use Descriptions for Existing Place(s) of Use"⁵⁴⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, ditch and non-irrigated field. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907/1909 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907/1909 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is either December 20, 1907, or February 25, 1909. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁵⁴¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as irrigated and road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907/1909 and 1948. Further, the protestant conceded that 0.86 of an acre of the existing place of use was irrigated through 1977.⁵⁴² The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907/1909 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on

⁵⁴⁰ Exhibit No. 604, public administrative hearing before the State Engineer, October 23, 1997.

⁵⁴¹ Exhibit No. 604, public administrative hearing before the State Engineer, October 23, 1997.

⁵⁴² File No. 49998, official records in the office of the State Engineer. Letter of January 6, 1999.

this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁵⁴³ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁵⁴⁴ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁵⁴⁵ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

⁵⁴³ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁵⁴⁴ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁵⁴⁵ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

Testimony was provided that the applicant or his family has owned this farm since 1976.⁵⁴⁶ Testimony was also provided that the applicant was using all the water at the time of the filing of Application 49998.⁵⁴⁷ The State Engineer finds that all water rights requested for transfer under Application 49998 were water rights in ownership and being used by the applicant on his farm prior to the filing of the transfer application, and are thereby intrafarm transfers.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵⁴⁸

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcels 2 and 3.

III.

ABANDONMENT

The State Engineer concludes that all water rights requested for transfer under Application 49998 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 49998 is overruled and the State Engineer's decision granting Application 49998 is hereby affirmed.

⁵⁴⁶ Transcript, pp. 3805-3806, public administrative hearing before the State Engineer, October 23, 1997, and Exhibit No. 894, public administrative hearing before the State Engineer, January 13, 1999.

⁵⁴⁷ Transcript, p. 3810, public administrative hearing before the State Engineer, October 23, 1997.

⁵⁴⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 50001

GENERAL

I.

Application 50001 was filed on July 16, 1986, by Robert E. Williamson to change the place of use of 7.70 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 682, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁵⁴⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.20 acres NE¼ SE¼, Sec. 25, T.19N., R.29E., M.D.B.&M.

The proposed place of use is described as 2.20 acres in the NW¼ SE¼ of Section 25, T.19N., R.29E., M.D.B. & M.

II.

Application 50001 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁵⁵⁰ and more specifically on the grounds as follows:⁵⁵¹

Parcel 1 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 50001

Parcel 1 - Exhibit UU from the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated May 29, 1908, covering the existing place of use.⁵⁵² The State Engineer finds the contract date is May 29, 1908.

⁵⁴⁹ Exhibit No. 829, public administrative hearing before the State Engineer, February 3, 1998.

⁵⁵⁰ Exhibit No. 830, public administrative hearing before the State Engineer, February 3, 1998.

⁵⁵¹ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

⁵⁵² Exhibit No. 832, public administrative hearing before the State Engineer, February 3, 1998.

II.

PERFECTION

Parcel 1 - The contract date is May 29, 1908. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁵⁵³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, structure, road and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁵⁵⁴ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁵⁵⁵ Non-use for a period of time may

⁵⁵³ Exhibit No. 836, public administrative hearing before the State Engineer, February 3, 1998.

⁵⁵⁴ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁵⁵⁵ Revert v. Ray, 95 Nev. 782, 786 (1979).

inferentially be some evidence of intent to abandon,⁵⁵⁶ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcel 1 - The applicant provided evidence that both the existing and proposed places of use have been owned by the applicant since 1952.⁵⁵⁷ The State Engineer finds that the water right requested for transfer under Application 50001 was a water right in ownership of the applicant for use on his farm prior to the filing of the transfer application, and is an intrafarm transfer.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵⁵⁸

II.

PERFECTION

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

⁵⁵⁶ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁵⁵⁷ Exhibit No. 895, public administrative hearing before the State Engineer, January 13, 1999.

⁵⁵⁸ NRS Chapter 533 and Order of Remand from Federal District Court.

III.

ABANDONMENT

The State Engineer concludes that the water right requested for transfer under Application 50001 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 50001 is overruled and the State Engineer's decision granting Application 50001 is hereby affirmed.

APPLICATION 50008

GENERAL

I.

Application 50008 was filed on July 16, 1986, by Rambling River Ranches, Inc., to change the place of use of 83.70 acre-feet annually (however, upon analysis the State Engineer determined 72.0 acre-feet was the correct amount that should have been applied for under this application), a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Numbers 399-1 and 554-2, Claim No. 3 Orr Ditch Decree, and Alpine Decree, and Applications 47892 and 48865.⁵⁵⁹ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 1.80 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 14, T.19N., R.27E., M.D.B.&M.
- Parcel 2 - 2.00 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 22, T.19N., R.27E., M.D.B.&M.
- Parcel 3 - 0.50 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 23, T.19N., R.27E., M.D.B.&M.
- Parcel 4 - 2.20 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 23, T.19N., R.27E., M.D.B.&M.
- Parcel 5 - 0.40 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 23, T.19N., R.27E., M.D.B.&M.
- Parcel 6 - 0.70 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.
- Parcel 7 - 1.80 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.
- Parcel 8 - 1.90 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.
- Parcel 9 - 1.50 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.
- Parcel 10 - 0.50 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.
- Parcel 11 - 0.50 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.⁵⁶⁰
- Parcel 12 - 1.60 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 27, T.19N., R.28E., M.D.B.&M.
- Parcel 13 - 3.20 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 28, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.40 of an acre in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, 4.70 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 2.40 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, 4.20 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, all in Section 27, T.19N., R.28E., M.D.B.& M., and 6.90 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 23, T.19N., R.27E.,

⁵⁵⁹ Exhibit No. 387, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁶⁰ In Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997, the protestant originally identified Parcel 11 as being located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, T.19N., R.28E., M.D.B.& M. This legal description was an error.

M.D.B. & M. By letter received in the office of the State Engineer on November 12, 1993, the applicant withdrew 0.40 of an acre from the Parcel 8 transfer request,⁵⁶¹ withdrew 0.15 of an acre from the Parcel 9 transfer request, withdrew 0.30 of an acre from the Parcel 12 transfer request, and withdrew 0.40 of an acre from the Parcel 13 transfer request.⁵⁶²

II.

Application 50008 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁵⁶³ and more specifically on the grounds as follows:⁵⁶⁴

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 3 - Lack of perfection, forfeiture, abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Lack of perfection, forfeiture, abandonment
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Lack of perfection, forfeiture, abandonment
- Parcel 8 - Partial lack of perfection, forfeiture, abandonment
- Parcel 9 - Lack of perfection, forfeiture, abandonment
- Parcel 10 - Lack of perfection, forfeiture, abandonment
- Parcel 11 - Lack of perfection, forfeiture, abandonment

⁵⁶¹ The applicant in its Factual Summary entered as Exhibit No. 401 at footnote 2 says that the protestant's Table 2 lists 0.40 of an acre as having been withdrawn from the original transfer, however, the 0.15 of an acre withdrawn in Parcel 9 was erroneously included in Parcel 8; thus, 1.65 acres were actually transferred from Parcel 8. The State Engineer does not agree with the applicant's interpretation based on Exhibit No. 388 which is the applicant's withdrawal letter. On page 3 of the applicant's withdrawal letter, the applicant requests that 0.15 of an acre be withdrawn from the Parcel 8 transfer and then on page 6 of the withdrawal letter the applicant requested another 0.25 of an acre be withdrawn from the Parcel 8 transfer for a total of 0.40 of an acre withdrawn from the Parcel 8 transfer. Therefore, the protestant's exhibit is correct as to the records on file at the State Engineer's office.

⁵⁶² Exhibit No. 388, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁶³ Exhibit No. 389, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁶⁴ Exhibit No. 400, public administrative hearing before the State Engineer, September 22-23, 1997.

- Parcel 12** - Lack of perfection, forfeiture, abandonment
Parcel 13 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 50008

Exhibit ZZ-1 from the January 1988 administrative hearing contains contracts covering many, but not all, of the existing places of use under Application 50008.⁵⁶⁵

Parcel 1 - This water right transfer presents a unique situation not yet before addressed by the State Engineer. Most of Parcel 1 (1.50 acres) is covered by water rights moved on to the area under water right Applications 47892 and 48865. Application 47892 was part of what is called the Group 2 transfer applications and those applications were not protested by the PLPT on the grounds of forfeiture or abandonment. In U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1219 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that the PLPT was precluded on appeal from challenging the forfeiture or abandonment of the water rights under Application 47892 because it failed to protest the transfers before the State Engineer on those grounds. Application 48865 was affirmed in full by the Federal District Court of Nevada pursuant to its Order dated September 3, 1998.

The State Engineer believes once the waters were commingled on the existing place of use found under Application 50008 from the multiple parcels (under multiple contracts) which comprised the existing places of use under Applications 47892 and 48865 they lost their identity as to the previous contract date. The proposed place of use under Applications 47892 and 48865 is now part of the existing places of use under Parcel 1 of Application 50008. The State Engineer believes that transfers under applications that have been affirmed by the courts should not be re-visited under protests to later filed applications. Therefore, the State Engineer agrees

⁵⁶⁵ Exhibit No. 391, public administrative hearing before the State Engineer, September 22-23, 1997.

with the applicant that 1.50 acres of the 1.80 acres comprising the existing place of use of Parcel 1 are not at issue.

Exhibit ZZ-1 introduced at the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 31, 1907, which provides that it covers a sufficient portion of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, T.19N., R.27E., M.D.B.& M. (among other lands identified) to make an application for a total new water right for 160 acres. Exhibit ZZ-1 also contains an "Application for Permanent Water Right" dated May 22, 1935, which provides that in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 14 there were 13 acres of which 10 were classed as irrigable.

As to the 0.30 of an acre remaining for the State Engineer's consideration under Parcel 1, at the 1997 administrative hearing the applicant provided evidence of a 1981 water rights map from the TCID⁵⁶⁶ that shows the location of the pre-Project vested water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section of Section 14, T.19N., R.27E., M.D.B.& M. The applicant also provided evidence of an April 3, 1907, "Agreement" between the United States and the original patentee whereby Carson River vested water rights were conveyed for Project water rights on parts of the S $\frac{1}{2}$ SE $\frac{1}{4}$ of said Section 14.⁵⁶⁷

The State Engineer finds by looking at the map which accompanied Application 50008⁵⁶⁸ and the Water Right Map found in Exhibit No. 402 for Section 14 it is possible to discern that the May 22, 1935, Application refers to other water rights in the $\frac{1}{4}$ $\frac{1}{4}$ of said Section 14. The State Engineer finds that most of the water rights requested for transfer from Parcel 1 were moved on to the existing place of use under Permits 47892 and 48865 (1.50

⁵⁶⁶ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997

⁵⁶⁷ Exhibit No. 401, Attachment No. 2, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁶⁸ Exhibit No. 390, public administrative hearing before the State Engineer, September 22-23, 1997.

acres) and the only other water right in the area of the existing place of use are those vested water rights shown under the April 3, 1907, "Agreement". The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract date is April 3, 1907, since that agreement seems to be the basis for the 1907 "Certificate of Filing Water Right Application".

Parcel 2 - Exhibit ZZ-1 from the 1988 administrative hearing contains a "Application for Permanent Water Right" dated February 10, 1936. The State Engineer finds the contract date is February 10, 1936.

Parcel 3 - Exhibit ZZ-1 from the 1988 administrative hearing contained two documents covering this parcel of land, one dated January 13, 1909, and the other dated November 4, 1913. The January 13, 1909, document is a "Certificate of Filing Water Right Application" which provides that in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 23, T.19N., R.27E., M.D.B.& M. there are 38 acres of irrigable land of which 14 are covered by vested water rights. A hand written note on that document provides that it is superseded by an application on a new form dated November 4, 1913. The November 4, 1913, document is a "Water-right Application for Lands in Private Ownership" which provides that the applicant applied for a water right to be appurtenant to 24 acres of irrigable land within the N $\frac{1}{2}$ NW $\frac{1}{4}$ of said Section 23.

At the 1997 administrative hearing, the applicant provided evidence that on November 16, 1908, an "Agreement" was entered into between the United States and the same person identified in the Exhibit ZZ-1 contracts which provided for the exchange of pre-Project vested water rights on 14 acres for Project water rights.⁵⁶⁹ A 1913 U.S. Reclamation Service map⁵⁷⁰ and a 1981 TCID

⁵⁶⁹ Exhibit No. 401, Attachment 39, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁷⁰ Exhibit No. 401, Attachment 40, public administrative hearing before the State Engineer, September 22-23, 1997.

water rights map⁵⁷¹ show the location of the pre-Project vested water rights and those applied for water rights and provides information that the existing place of use under Parcel 3 is within that area described as pre-Project vested water rights. The January 13, 1909, "Certificate of Filing Water Right Application" appears to merely confirm the November 16, 1908, "Agreement". The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract date is November 16, 1908.

Parcel 4 - No document covering Parcel 4 was found in Exhibit ZZ-1. The protestant did not provide any evidence as to a contract date. Parcel 4 is actually two parcels of land. As with Parcel 1, this water right transfer presents the same unique situation. All of Parcel 4 (2.20 acres) is covered by water rights moved onto the area under water right Applications 47892 and 48865. The State Engineer believes once the waters were commingled on the existing place of use found under Application 50008 from the multiple parcels (under multiple contracts) which comprised the existing places of use under Applications 47892 and 48865 they lost their identity as to the previous contract date. The proposed place of use under Applications 47892 and 48865 is now the existing place of use under Parcel 4 Application 50008. The State Engineer believes that transfers under applications that have been affirmed by the courts should not be re-visited under later applications. Therefore, the State Engineer agrees with the applicant that the 2.20 acres of land comprising the existing place of use of Parcel 4 are not at issue.

Parcel 5 - No document covering Parcel 5 was found in Exhibit ZZ-1. The protestant did not provide any evidence as to a contract date. At the 1997 administrative hearing, the applicant provided evidence

⁵⁷¹ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

of an "Agreement" dated December 27, 1907,⁵⁷² wherein pre-Project vested Carson River water rights were exchanged for Project water rights on 34 acres in the NE¼ NE¼ of Section 23, T.19N., R.27E., M.D.B.& M. The applicant also provided evidence in the form of two maps which show the existing place of use. The first map⁵⁷³ is a 1913 U.S. Reclamation Service irrigable area map which indicates that in the very northwest corner of the NE¼ NE¼ of said Section 23 there is what appears to be a corral area in the same area as the existing place of use. The second map⁵⁷⁴ is a 1981 TCID water rights map which provides that the existing place of use is covered by pre-Project vested water rights. The State Engineer recognizes the conflict between the two maps. However, in General Finding of Fact VI, the State Engineer found that the 1988 Operating Criteria and Procedures (issued by the U.S. Bureau of Reclamation) for the Project provides that the TCID maps dated August 1981 through January 1983 should be used as the basis for determining lands with valid water rights eligible for transfer, and there is no valid reason for using any other maps as to the location of the irrigable lands within a water righted parcel. The maps that were accepted in the OCAP are those which are used by the State Engineer in his review of the transfer applications and are cumulative work prepared from the records of the TCID which were found to be substantially accurate. Further, just because a 1913 map shows the area at that time as a corral does not mean that prior to the inception of the Project this area was not irrigated pursuant to the vested water right.

⁵⁷² Exhibit No. 401, Attachment 63, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁷³ Exhibit No. 401, Attachment 40, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁷⁴ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract date is December 27, 1907.

Parcel 6 - Exhibit ZZ-1 introduced at the 1988 administrative hearing contains two documents believed to cover the existing place of use. The first document is an August 19, 1911, "Water Right Application" which provides that in the S½ of the N½ of Section 27, T.19N., R.28E., M.D.B.& M. 43 acres are covered by vested water rights and 6 acres were considered "new" water rights. The second document, is an "Application for Permanent Water Right" dated June 4, 1947. That document (while illegible on the first page) on the second page indicates that out of the 66 acres in the S½ of the N½ of said Section 27, 49 acres are irrigable and 43 of those acres are covered by vested water rights and 6 acres were applied for under the contract.

At the 1997 administrative hearing, the applicant introduced evidence of a May 9, 1903, "Agreement",⁵⁷⁵ and a May 27, 1907, "Agreement"⁵⁷⁶ wherein pre-Project Carson River water rights were conveyed for Project water rights, however, the applicant's map evidence also indicated⁵⁷⁷ that the existing place of use is not covered by those pre-Project vested water rights, but is covered by water rights in an amount equal to the 6 acres of "new" water under the August 19, 1911, Water Rights Application.

The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is August 19, 1911.

Parcel 7 - Exhibit ZZ-1 introduced at the 1988 administrative hearing contains two documents covering the existing place of use.

⁵⁷⁵ Exhibit No. 401, Attachment 71, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁷⁶ Exhibit No. 401, Attachment 72, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁷⁷ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

The first document is an August 19, 1911, "Water Right Application" which provides that in the S½ of the N½ of Section 27, T.19N., R.28E., M.D.B.& M. 43 acres are covered by vested water rights and 6 acres were considered "new" water rights. The second document is an "Application for Permanent Water Right" dated June 4, 1947, which indicates that out of the 66 acres in the S½ of the N½ of said Section 27, 49 acres are irrigable and 43 of those acres are covered by vested water rights and 6 acres were applied for under the contract.

At the 1997 administrative hearing, the applicant introduced evidence of a May 9, 1903, "Agreement",⁵⁷⁸ and a May 27, 1907, "Agreement"⁵⁷⁹ wherein pre-Project Carson River water rights were conveyed for Project water rights. The applicant also provided evidence in the form of two maps which show the existing place of use. The first map⁵⁸⁰ is a 1913 U.S. Reclamation Service irrigable area map indicates that some of the existing place of use is covered by pre-Project vested water rights and some of it appears to be irrigable area not yet water righted in 1913. The second map⁵⁸¹ is a 1981 TCID water rights map which provides that the existing place of use is covered by pre-Project vested water rights. The State Engineer recognizes the conflict between the two maps. However, in General Finding of Fact VI, the State Engineer found that the 1988 Operating Criteria and Procedures (issued by the U.S. Bureau of Reclamation) for the Project provides that the TCID maps dated August 1981 through January 1983 should be used as the basis for determining lands with valid water rights eligible

⁵⁷⁸ Exhibit No. 401, Attachment 71, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁷⁹ Exhibit No. 401, Attachment 72, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁸⁰ Exhibit No. 402, Attachment L, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁸¹ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

for transfer, and there is no valid reason for using any other maps as to the location of the irrigable lands within a water righted parcel. The maps that were accepted in the OCAP are those which are used by the State Engineer in his review of the transfer applications and are cumulative work prepared from the records of the TCID which were found to be substantially accurate.

The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract date is as early as May 27, 1907, and could go back as far as May 9, 1903.

Parcel 8 - Parcel 8 is actually two parcels of land, and again presents a unique situation not previously analyzed. Exhibit ZZ-1 introduced at the 1988 administrative hearing contains two documents covering the existing places of use.

The first document is an August 19, 1911, "Water Right Application" which provides that in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 27, T.19N., R.28E., M.D.B.& M. 26 acres are covered by vested water rights and there are no "new" water rights. The second document is an "Application for Permanent Water Right" dated June 4, 1947, which indicates that out of the 40 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 27, 31 acres are irrigable, 16 acres are covered by vested water rights, there are 15 acres of irrigable area in excess of water rights, and the "corrected water right" for the NW $\frac{1}{4}$ SW $\frac{1}{4}$ is 31 acres.

At the 1997 administrative hearing, the applicant introduced evidence of a May 9, 1903, "Agreement",⁵⁸² and a May 27, 1907, "Agreement"⁵⁸³ wherein pre-Project Carson River water rights were conveyed for Project water rights. The applicant also introduced

⁵⁸² Exhibit No. 401, Attachment 71, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁸³ Exhibit No. 401, Attachment 72, public administrative hearing before the State Engineer, September 22-23, 1997.

evidence⁵⁸⁴ in the form of a map that shows the NW $\frac{1}{4}$ SW $\frac{1}{4}$ is covered by three types of water rights: in dark green it indicates 16 acres, in yellow 13 acres and blue 2 acres. The "Application for Permanent Water Right" dated June 4, 1947, indicates 16 acres are covered by vested water rights, and that is same amount demonstrated by the green on the map. The areas covered by yellow and blue become the applied for water right. Therefore, the State Engineer must assume that the water right applied for under the August 19, 1911, "Water Right Application" is the 16 acres of vested water rights shown in green on the map in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 27, plus the 10 acres of vested water rights shown on the map in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 27.

What is unique about this $\frac{1}{4}$ $\frac{1}{4}$ section of land is the 1947 Application for Permanent Water Right appears to have been used to correct mistakes previously made in that it "corrects" the water rights on this $\frac{1}{4}$ $\frac{1}{4}$ section or perhaps this was a way that water rights were transferred, but it was just not called a transfer. It adds the 15 acres of land identified as irrigable area in excess of water right (13 acres in yellow and 2 acres in blue). Testimony was provided indicating that the green areas on maps depict pre-Project water right, yellow areas depict pre-March 22, 1913, water right, and blue areas depict post-March 22, 1913, water rights;⁵⁸⁵ however, no documentary key to the water rights map was provided to corroborate that testimony.

The map found in Exhibit No. 402, Attachment M shows that the existing place of use on the west side of the $\frac{1}{4}$ $\frac{1}{4}$ section is covered by pre-Project vested water rights and applied for water rights (yellow), and the existing place of use on the SE corner of the $\frac{1}{4}$ $\frac{1}{4}$ section of land is covered by applied for water rights

⁵⁸⁴ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁸⁵ Transcript, p. 2655, public administrative hearing before the State Engineer, September 22, 1997,

(yellow) and a small section (less than 1.0 acre) is covered by applied for water rights shown in blue. The area covered by the blue applied for water rights was withdrawn from the request for transfer.

The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract dates as to the parcel on the west side of the $\frac{1}{4}$ $\frac{1}{4}$ section are as early as May 27, 1907, (perhaps May 9, 1903) and June 4, 1947. The State Engineer finds the contract date as to the parcel in the southeast corner of the $\frac{1}{4}$ $\frac{1}{4}$ section is also June 4, 1947.

Parcel 9 - Exhibit ZZ-1 introduced at the 1988 administrative hearing contains three documents covering the existing place of use. The first is an August 19, 1911, "Water Right Application" which provides that in the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 27, T.19N., R.28E., M.D.B.& M., 26 acres are covered by vested water rights and no new water rights were applied for under the application.

Parcel 9 presents the same situation as found in Parcel 8. A second document, an "Application for Permanent Water Right" dated June 4, 1947, makes a similar "correction" in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 27 in that it provides there are 35 irrigable acres out of the 40 acres comprising the $\frac{1}{4}$ $\frac{1}{4}$ section of land, that 10 acres are covered by vested water rights, there are 25 irrigable acres in excess of water rights and that the "corrected" water right is for 35 acres. There is no indication that any "applied" for water rights are added to the $\frac{1}{4}$ $\frac{1}{4}$ section of land, but only that the water right is "corrected". However, the map found in Exhibit No. 402, Attachment M shows that the existing place of use has both pre-Project vested water rights (green) and applied for water rights (blue).

A third document, a May 24, 1952, "Application for Permanent Water Right" provides for an additional 0.50 of an acre in this $\frac{1}{4}$

¼ section of land. The applicant provided a map⁵⁸⁶ which indicates that this 0.5 of an acre is in the very southeast corner of the ¼ ¼ section of land and is not part of the existing place of use requested for change. The area not covered by the 10 acres of vested water right (green) must be the "corrected" water right (25 acres of blue) under the 1947 application. The State Engineer finds that since the 1947 "corrected" application does not indicate any additional water was applied for, but the map indicates that the water right is not a pre-Project vested water right the correction must be some sort of recognition of a valid water right, but that it is not a pre-Project vested water right. The State Engineer adopts and incorporates General Finding of Fact VIII and finds a very small (unquantifiable with the evidence before him) portion of the existing place of use on the very eastern edge of the existing place of use has a contract date of May 27, 1907, and the contract date for the remaining portion of the existing place of use is June 4, 1947.

Parcel 10 - As with Parcel 1, this water right transfer presents the same unique situation. All of Parcel 10 (0.50 of an acre) is covered by water rights moved onto the area under water right Applications 47892 and 48865. The State Engineer believes once the waters were commingled on the existing place of use found under Application 50008 from the multiple parcels (under multiple contracts) which comprised the existing places of use under Applications 47892 and 48865 they lost their identity as to the previous contract date. The proposed place of use under Applications 47892 and 48865 is now the existing place of use under Parcel 10 Application 50008. The State Engineer believes that transfers under applications that have been affirmed by the courts should not be re-visited under later applications. Therefore, the State Engineer agrees with the applicant that the 0.50 of an acre

⁵⁸⁶ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

of land comprising the existing place of use of Parcel 10 is not at issue.

Parcel 11 - Exhibit ZZ-1 introduced at the 1988 administrative hearing contains an "Application for Permanent Water Right" dated April 26, 1949. The applicant's evidence at the 1997 administrative hearing as to a contract date for this parcel appears to have been gathered before the applicant realized that the protestant had listed the wrong $\frac{1}{4}$ $\frac{1}{4}$ section of land in its Table 1. The applicant's evidence goes to the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, however, the applied for existing place of use is the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T.19N., R.28E., M.D.B.& M. The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract date is April 26, 1949.

Parcel 12 - Exhibit ZZ-1 introduced at the 1988 administrative hearing contains an "Application for Permanent Water Right" dated May 24, 1952, covering the existing place of use. The State Engineer finds the contract date is May 24, 1952, however, as with Parcel 1, this water right transfer presents the same unique situation. In Parcel 12, 1.00 acre is covered by water rights moved onto the area under water right Applications 47892 and 48865. The State Engineer believes once the waters were commingled on the existing place of use found under Application 50008 from the multiple parcels (under multiple contracts) which comprised the existing places of use under Applications 47892 and 48865 they lost their identity as to the previous contract date. The proposed place of use under Applications 47892 and 48865 is now the existing place of use under Parcel 12 Application 50008. The State Engineer believes that transfers under applications that have been affirmed by the courts should not be re-visited under later applications. Therefore, the State Engineer agrees with the applicant that the 1.00 acre of land comprising the existing place of use of Parcel 12 is not at issue. Therefore, only the remaining 0.30 of an acre is under consideration as 0.30 of an acre was withdrawn from the application. As to the 0.30 of an acre, there is no dispute as to

the contract date, therefore, the State Engineer finds the contract date is May 24, 1952.

Parcel 13 - Exhibit ZZ-1 introduced at the 1988 administrative hearing contains two documents covering the existing place of use. As with Parcel 1, this water right transfer presents the same unique situation. In Parcel 13, 0.90 of an acre is covered by water rights moved onto the area under water right Applications 47892 and 48865. The State Engineer believes once the waters were commingled on the existing place of use found under Application 50008 from the multiple parcels (under multiple contracts) which comprised the existing places of use under Applications 47892 and 48865 they lost their identity as to the previous contract date. Part of the proposed place of use under Applications 47892 and 48865 is now the existing place of use under Parcel 13 Application 50008. The State Engineer believes that transfers under applications that have been affirmed by the courts should not be re-visited under later applications. Therefore, the State Engineer agrees with the applicant that the 0.90 of an acre of land comprising part of the existing place of use of Parcel 13 is not at issue. Therefore, only the remaining 1.90 acres are under consideration as 0.40 of an acre was withdrawn from the application. As to the remaining 1.90 acres, at the 1988 administrative hearing, an August 19, 1911, "Water Right Application" was introduced into evidence which provides that in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, T.19N., R.28E., M.D.B. & M. 19 acres were covered by vested water rights and no acres were covered by application. A second document, an "Application for Permanent Water Right" dated June 4, 1947, provides that out of the 24 acre total area 19 acres were considered irrigable and 19 acres were covered by vested water rights. At the 1997 administrative hearing, the applicant introduced evidence of a May 9, 1903,

"Agreement",⁵⁸⁷ and a May 27, 1907, "Agreement"⁵⁸⁸ wherein pre-Project Carson River water rights were conveyed for Project water rights, and the applicant's map evidence also indicated⁵⁸⁹ that the existing place of use is covered by pre-Project vested water rights. The State Engineer adopts and incorporates General Finding of Fact VIII and finds the contract date is as early as May 27, 1907, and could go back as far as May 9, 1903.

II.

PERFECTION

Parcel 1 - The contract date is April 3, 1907, as to that portion of the existing place of use the State Engineer will be considering, and water rights were moved onto this parcel under change Applications 47892 and 48865 already affirmed by the courts. (See, contract date section of this ruling). The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since the contract is based on a pre-Project vested water right, the water

⁵⁸⁷ Exhibit No. 401, Attachment 71, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁸⁸ Exhibit No. 401, Attachment 72, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁸⁹ Exhibit No. 402, Attachment M, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁹⁰ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

right was perfected as a matter of fact and law. The State Engineer finds Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁵⁹¹

Parcel 2 - The contract date is February 10, 1936. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹² which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1936 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1936 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel.

Parcel 3 - The contract date is November 16, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since the

⁵⁹¹ NRS § 533.324 and 533.325.

⁵⁹² Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁹³ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

contract is based on a pre-Project vested water right the water right was perfected as a matter of fact and law.

Parcel 4 - Since the State Engineer has already agreed with the applicant that he will not revisit those transfers already confirmed by the courts, the protestant's claim of lack of perfection is without merit since Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁵⁹⁴ (See, contract date section of this ruling).

Parcel 5 - The contract date is December 27, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since the contract is based on a pre-Project vested water right the water right was perfected as a matter of fact and law.

Parcel 6 - The contract date is August 19, 1911. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. The

⁵⁹⁴ NRS § 533.324 and 533.325.

⁵⁹⁵ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁹⁶ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1911 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1911 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 7 - The contract date is May 9, 1903 or May 27, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹⁷ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and bare land. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1903/1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1903/1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since the contract is based on a pre-Project vested water right the water right was perfected as a matter of fact and law.

Parcel 8 - The contract dates are May 27, 1907, and June 4, 1947. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹⁸ which indicates from aerial

⁵⁹⁷ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

⁵⁹⁸ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

photographs that in 1948 the land use on this parcel was described as bare land, natural vegetation and irrigated. In 1962 the land use was described as bare land, road and canal. The protestant did not provide any evidence other than a 1948 and 1962 photograph as its evidence that a water right was not perfected on this parcel between 1907/1947 and 1948/1962. The State Engineer finds that a 1948 and 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907/1947 and 1948/1962, especially since the road and canal indicate activity in the area, therefore, the protestant did not prove its claim of lack of perfection on this parcel. As to those pre-Project vested water rights, the State Engineer specifically adopts and incorporates General Finding of Fact X and finds since the contract is based on a pre-Project vested water right the water right was perfected as a matter of fact and law.

Parcel 9 - The contract dates are May 27, 1907, and June 4, 1947. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁵⁹⁹ which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as a ditch. The protestant did not provide any evidence other than a 1948 and 1962 photograph as its evidence that a water right was not perfected on this parcel between 1907/1947 and 1948/1962. The State Engineer specifically adopts and incorporates General Finding of Fact XI and finds that since this is an on-farm, dirt-lined ditch which in the early part of the Project was required to be water righted,⁶⁰⁰ and the map provided as Attachment M to Exhibit No 402 does not exclude the ditch from the irrigable area, a water right was perfected by use of the ditch. The State Engineer also specifically adopts and incorporates

⁵⁹⁹ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

⁶⁰⁰ Transcript, p. 2688, public administrative hearing before the State Engineer, September 22-23, 1997.

General Finding of Fact X and finds since some of the existing place of use is covered by a contract based on a pre-Project vested water right the water right was perfected as a matter of fact and law.

Parcel 10 - Since the State Engineer has already agreed with the applicant that he will not revisit those transfers already confirmed by the courts, the protestant's claim of lack of perfection is without merit since Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁶⁰¹ (See, contract date section of this ruling.)

Parcel 11 - The contract date is April 26, 1949, for that portion of the existing place of use the State Engineer will be considering. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁶⁰² which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and vegetation. In 1962 the land use was described as bare land and road area. The State Engineer finds that a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1949 and 1962, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 12 - The contract date is May 24, 1952, for that portion of the existing place of use the State Engineer will be considering. (See, contract date section of this ruling.) Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁶⁰³ The PLPT provided

⁶⁰¹ NRS § 533.324 and 533.325.

⁶⁰² Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

⁶⁰³ NRS § 533.324 and 533.325.

evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁶⁰⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. In 1962 the land use was described as bare land, road, canal, and riparian vegetation. The State Engineer finds that a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1952 and 1962, therefore, the protestant did not prove its claim of lack of perfection on this parcel

Parcel 13 - The contract date is May 27, 1907, as to that portion of the existing place of use the State Engineer will be considering, and water rights were moved onto this parcel under change Applications 47892 and 48865 already affirmed by the courts. (See, contract date section of this ruling.) The State Engineer specifically adopts and incorporates General Finding of Fact X and finds since the existing place of use is covered by a contract based on a pre-Project vested water right the water right was perfected as a matter of fact and law. The State Engineer finds Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed⁶⁰⁵, or where the water right is based on a pre-Project vested water right.

III.

FORFEITURE AND ABANDONMENT

As to forfeiture, the Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held

⁶⁰⁴ Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

⁶⁰⁵ NRS § 533.324 and 533.325.

that the water rights would not be subject to the doctrine of forfeiture.

As to abandonment, the State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁶⁰⁶ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁶⁰⁷ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁶⁰⁸ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

The protestant provided evidence which showed that some of these transfers are within the same $\frac{1}{4}$ $\frac{1}{4}$ section of land and others are as far as approximately two miles from each other.⁶⁰⁹

⁶⁰⁶ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁶⁰⁷ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁶⁰⁸ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁶⁰⁹ Exhibit No. 399 and Transcript, p. 2601, public administrative hearing before the State Engineer, September 22-23, 1997.

However, the applicant testified that all the existing places of use from which water is being moved are within Rambling River Ranches property,⁶¹⁰ and that the transfer applications relative to his ranch were to get the records in compliance with the actual irrigation practices of the ranch.⁶¹¹ The State Engineer finds that even though Rambling River Ranches has properties that may not be adjacent to each other it was Judge McKibben's intent that those persons moving water within their own properties and not purchasing water rights from some removed third party should have the benefit of his equitable ruling. The State Engineer finds that all water rights requested for transfer under Application 50008 were water rights in ownership and being used by the applicant prior to the filing of the transfer application, that the existing and proposed places of use are within the family farm, and all the requests for transfers are intrafarm transfers.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶¹²

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that all water rights requested for transfer under Application 50008 are intrafarm transfers and

⁶¹⁰ Transcript, pp. 2702-03, 2736-37, public administrative hearing before the State Engineer, September 22-23, 1997.

⁶¹¹ Transcript, pp. 2647-48, public administrative hearing before the State Engineer, September 22-23, 1997.

⁶¹² NRS Chapter 533 and Order of Remand from Federal District Court.

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were filed to correct the records as to where the water was actually being used to irrigate ranch property and are not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 50008 is overruled and the State Engineer's decision granting Application 50008 is hereby affirmed.

APPLICATION 50010

GENERAL

I.

Application 50010 was filed on July 16, 1986, by Bruce K. and Jamie L. Kent to change the place of use of 140.00 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Numbers 6-14, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁶¹³ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 11.00 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 12, T.17N., R.28E., M.D.B.&M.

Parcel 2 - 29.00 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 12, T.17N., R.28E., M.D.B.&M.

The proposed places of use are described as 20.00 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 18, T.19N., R.31E., and 20.00 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T.20N., R.31E., M.D.B. & M.

II.

Application 50010 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁶¹⁴ and more specifically on the grounds as follows:⁶¹⁵

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 50010

Parcels 1 and 2 - Exhibit UU from the 1988 administrative hearing contains an "Application for Permanent Water Right" dated September 7, 1949, covering the existing places of use. The State Engineer finds the contract date is September 7, 1949.

⁶¹³ Exhibit No. 704, public administrative hearing before the State Engineer, November 18, 1997.

⁶¹⁴ Exhibit No. 705, public administrative hearing before the State Engineer, November 18, 1997.

⁶¹⁵ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

II.

PERFECTION

Parcels 1 and 2 - The contract date is September 7, 1949. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁶¹⁶ which indicates from aerial photographs that in 1948 and 1962 the land uses on these parcels were described as bare land, natural vegetation, road and canal. At the 1997 administrative hearing, the protestant provided evidence that showed the land use is not inconsistent with irrigation and the land looks as if it could have been irrigated at one time.⁶¹⁷ The State Engineer finds that a 1948 and 1962 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1949 and 1962, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

III.

FORFEITURE AND ABANDONMENT

Parcels 1 and 2 - The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁶¹⁸ which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, and 1986⁶¹⁹ the land use on this parcel was described as bare land, natural vegetation, road and canal. The State Engineer finds the protestant did not prove its claim of non-use as to those areas identified as bare ground or natural vegetation. The State Engineer finds that no evidence was introduced which specifically located and identified the areas identified as the road or the canal, nor prove a land use

⁶¹⁶ Exhibit No. 710, public administrative hearing before the State Engineer, November 18, 1997.

⁶¹⁷ Exhibit No. 712, public administrative hearing before the State Engineer, November 18, 1997.

⁶¹⁸ Exhibit No. 710, public administrative hearing before the State Engineer, November 18, 1997.

⁶¹⁹ Exhibit No. 711, Post-1884 Land Use Description, public administrative hearing before the State Engineer, November 18, 1997.

inconsistent with irrigation. The State Engineer finds the protestant did not prove its claim of non-use as to any specifically identifiable area or prove its claims of forfeiture or abandonment.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶²⁰

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes the protestant did not prove its claims of forfeiture or abandonment.

RULING

The protest to Application 50010 is hereby overruled and the State Engineer's decision granting Application 50010 is hereby affirmed.

⁶²⁰ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 50012

GENERAL

I.

Application 50012 was filed on July 16, 1986, by Samuel R. Hiibel to change the place of use of 8.75 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 684, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁶²¹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.50 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$,⁶²² Sec. 26, T.19N., R.29E., M.D.B.&M.

The proposed place of use is described as 2.50 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26, T.19N., R.29E., M.D.B. & M.

II.

Application 50012 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁶²³ and more specifically on the grounds as follows:⁶²⁴

Parcel 1 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 50012

Parcel 1 - Exhibit UU from the 1988 administrative hearing contains three documents covering the existing place of use. The first is a "Certificate of Filing Water Right Application" dated April 9, 1908. The second is a "Certificate of Filing Water Right

⁶²¹ Exhibit No. 772, public administrative hearing before the State Engineer, February 3, 1998.

⁶²² The State Engineer notes there is a typographical error in the bookrecord (Exhibit No. 772). The original application and map put both the existing and proposed places of use within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26. See, File No. 50012, official records in the office of the State Engineer.

⁶²³ Exhibit No. 773, public administrative hearing before the State Engineer, February 3, 1998.

⁶²⁴ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

Application" dated April 1, 1909. At the bottom of that document is an indication that the applicant under the 1909 certificate is an assignee of someone else. The third document is a "Certificate of Filing Water Right Application" dated January 19, 1912, which indicates that the applicant is an assignee of the applicant under the 1909 certificate. The State Engineer finds the contract date is April 9, 1908, and since construction charges are included the water right is not based on a pre-Project vested water right.

II.

PERFECTION

Parcel 1 - The contract date is April 9, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁶²⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a canal, road, house and farm yard. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

⁶²⁵ Exhibit No. 778, public administrative hearing before the State Engineer, February 3, 1998.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁶²⁶ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁶²⁷ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁶²⁸ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

The applicant provided evidence which showed that this transfer is within the family farm that has been in the Hiibel family since before 1946, and that the proposed place of use has

⁶²⁶ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁶²⁷ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁶²⁸ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

always been irrigated as far as he knows.⁶²⁹ The State Engineer finds that the water right requested for transfer under Application 50012 is a water right in ownership and being used by the applicant or his family prior to the filing of the transfer application, is within a family farm that has been in the applicant's family since before 1946, and is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further finds the actual use of the water on the family farm precludes any claim of an intent to abandon the water right.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶³⁰

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes that the water right requested for transfer under Application 50012 is an intrafarm transfer, and the water was actually being used on the family farm precluding any claim of an intent to abandon the water right.

RULING

The protest to Application 50012 is hereby overruled and the State Engineer's decision granting Application 50012 is hereby affirmed.

⁶²⁹ Exhibit Nos. 772, 774, public administrative hearing before the State Engineer, February 3, 1998, and Exhibit No. 928, and Transcript, pp. 4795-4797, and public administrative hearing before the State Engineer, January 13, 1999.

⁶³⁰ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 50333

GENERAL

I.

Application 50333 was filed on November 7, 1986, by Cora Harmon Sanford and Donald R. Harmon to change the place of use of 13.895 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 726-1, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁶³¹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 3.97 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 33, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as 2.97 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, and 1.00 acre in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, both in Section 33, T.19N., R.29E., M.D.B. & M.

II.

Application 50333 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁶³² and more specifically on the grounds as follows:⁶³³

Parcel 1 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 50333

Parcel 1 - Exhibit ZZ-2 from the 1988 administrative hearing contains two documents covering the existing place of use. The first is an "Agreement" dated April 12, 1907, whereby pre-Project vested water rights were exchanged for Project water rights. The second is a "Certificate of Filing Water Right Application" dated

⁶³¹ Exhibit No. 800, public administrative hearing before the State Engineer, February 3, 1998.

⁶³² Exhibit No. 801, public administrative hearing before the State Engineer, February 3, 1998.

⁶³³ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

September 29, 1910. The "Certificate of Filing Water Right Application" indicates that in the S½ SW¼ of Section 33, T.19N., R.29E., M.D.B.& M. there were 66 acres of irrigable land, 66 acres of new water rights were applied for under the application, but that 14 acres of pre-Project vested water rights existed on the property described. The State Engineer finds there are two contracts covering this property and he is unable to determine if the existing place of use is covered by the pre-Project vested water rights or those applied for in 1910. The State Engineer finds the contract date is either April 12, 1907, or September 29, 1910.

II.

PERFECTION

Parcel 1 - The contract date is either April 12, 1907, or September 29, 1910. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁶³⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land, trees and road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907/1910 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907/1910 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In reference to the 1910 contract, the State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected. In reference to the 1907 contract, the State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested

⁶³⁴ Exhibit No. 806, public administrative hearing before the State Engineer, February 3, 1998.

water rights were perfected as a matter of fact and law.

III.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁶³⁵ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁶³⁶ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁶³⁷ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

The applicant provided testimony and evidence which showed that this transfer is within the family farm that has been in the Harmon family since the early 1900's, and the water was actually

⁶³⁵ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁶³⁶ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁶³⁷ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

being used on the family farm.⁶³⁸ The State Engineer finds that the water right requested for transfer under Application 50333 is a water right in ownership and being used by the applicant or his family prior to the filing of the transfer application defeating any claim of an intent to abandon the water right, is within a family farm that has been in the applicant's family since the early 1900's, and is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶³⁹

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes that the water right requested for transfer under Application 50333 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the use of the water on the family farm precludes an intent to abandon the water right.

RULING

The protest to Application 50333 is hereby overruled and the State Engineer's decision granting Application 50333 is hereby affirmed.

⁶³⁸ Exhibit No. 810, public administrative hearing before the State Engineer, February 3, 1998, and Exhibit No. 940, and Transcript, pp. 4878-4891, public administrative hearing before the State Engineer, January 15, 1999.

⁶³⁹ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51038

GENERAL

I.

Application 51038 was filed on June 18, 1987, by Arthur R. and Lani Lee Peel to change the place of use of 87.85 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Numbers 6-2 and 29, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁶⁴⁰ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 0.96 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 5, T.17N., R.29E.
- Parcel 2 - 1.76 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 6, T.17N., R.29E.
- Parcel 3 - 4.30 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 7, T.17N., R.29E.
- Parcel 4 - 0.84 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 7, T.17N., R.29E.
- Parcel 5 - 0.81 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 7, T.17N., R.29E.
- Parcel 6 - 2.56 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 8, T.17N., R.29E.
- Parcel 7 - 4.48 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 8, T.17N., R.29E.
- Parcel 8 - 6.75 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 8, T.17N., R.29E.
- Parcel 9 - 1.37 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 8, T.17N., R.29E.
- Parcel 10 - 1.27 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 8, T.17N., R.29E.

The proposed places of use are described as 2.40 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, 1.60 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, both in Section 5, 6.82 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, 6.83 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 0.94 of an acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 2.06 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 7, 2.97 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and 1.48 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 8, all in T.17N., R.29E., M.D.B.& M.

II.

Application 51038 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁶⁴¹ and

⁶⁴⁰ Exhibit No. 714, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁴¹ Exhibit No. 715, public administrative hearing before the State Engineer, November 18, 1997.

more specifically on the grounds as follows:⁶⁴²

- Parcel 1** - Partial lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, abandonment
- Parcel 3** - Lack of perfection, forfeiture, abandonment
- Parcel 4** - Lack of perfection, forfeiture, abandonment
- Parcel 5** - Lack of perfection, forfeiture, abandonment
- Parcel 6** - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 7** - Lack of perfection, forfeiture, abandonment
- Parcel 8** - Lack of perfection, forfeiture, abandonment
- Parcel 9** - Lack of perfection, forfeiture, abandonment
- Parcel 10** - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51038

Parcel 1 - Exhibit ZZ-2 from the 1988 administrative hearing contains an "Application for Permanent Water Right" dated August 15, 1944, covering the existing place of use. The State Engineer finds the contract date is August 15, 1944.

Parcels 2-10 - Exhibit ZZ-2 from the 1988 administrative hearing does not contain documents covering these existing places of use. After the time of the original hearing, the applicant's counsel and the legal counsel for the United States researched and exchanged documents to fill in the missing gaps. However, the record is not clear at this time where those supplemental documents were added to the record of the previous proceedings. The applicant did not appear at the time and place noticed for the remand hearing in 1997 and, therefore, added nothing to the record to help clarify the situation. However, documents from the record of the time of the earlier hearing, and added to the record in 1997, indicate that the United States was satisfied that contracts had been found covering all the existing places of use under Application 51038.⁶⁴³ At the

⁶⁴² Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁴³ Transcript, pp. 4045-4048; Exhibit Nos. 718, 719, 720 and 721, public administrative hearing before the State Engineer, November 18, 1997.

1997 administrative hearing, the protestants' witnesses appeared to have copies of that supplemental documentation that was provided in 1988.

Parcel 2 - An "Agreement for the Transfer of Water Right Application Contract from One Tract to Another - Same Ownership"⁶⁴⁴ dated May 3, 1973, indicates that the contractor's land which was classified as non-productive is covered by a water right application contract dated December 14, 1907, involving pre-Project vested water rights, and recorded in Miscellaneous Book 9, page 237 of the records of Churchill County and covers this existing place of use. The State Engineer finds the contract date is December 14, 1907, and is based on pre-Project vested water rights.

Parcel 3 - An "Agreement for the Transfer of Water Right Application Contract from One Tract to Another - Same Ownership"⁶⁴⁵ dated May 3, 1973, indicates that the contractor's land which was classified as non-productive is covered by a water right application contract dated December 14, 1907, involving pre-Project vested water rights, and recorded in Miscellaneous Book 9, page 237 of the records of Churchill County and covers most of this existing place of use. The State Engineer finds the contract date is December 14, 1907, and is based on pre-Project vested water rights for that land in this existing place of use which is covered as demonstrated by the third map found in Exhibit No. 732 at Book 62, page 378. No contract was introduced into evidence covering the existing place of use along the southern edge of the NE¼ NE¼ nor for the small somewhat cone-shaped piece attached to the existing place of use on the southern edge.

⁶⁴⁴ Exhibit No. 732 (Book 62, p. 366), public administrative hearing before the State Engineer, November 18, 1997.

⁶⁴⁵ Exhibit No. 732 (Book 62, p. 366), public administrative hearing before the State Engineer, November 18, 1997.

Parcel 4 - An "Agreement for the Transfer of Water Right Application Contract from One Tract to Another - Same Ownership"⁶⁴⁶ dated May 3, 1973, indicates that the contractor's land which was classified as non-productive is covered by a water right application contract dated December 14, 1907, involving pre-Project vested water rights, and recorded in Miscellaneous Book 9, page 237 of the records of Churchill County and covers this existing place of use. The State Engineer finds the contract date is December 14, 1907, and is based on pre-Project vested water rights.

Parcel 5 - An "Agreement for the Transfer of Water Right Application Contract from One Tract to Another - Same Ownership"⁶⁴⁷ dated May 3, 1973, indicates that the contractor's land which was classified as non-productive is covered by a water right application contract dated December 14, 1907, involving pre-Project vested water rights, and recorded in Miscellaneous Book 9, page 237 of the records of Churchill County and covers this existing place of use. The State Engineer finds the contract date is December 14, 1907, and is based on pre-Project vested water rights.

Parcel 6, 7 and 8 - A "Water-right Application for Lands in Private Ownership" dated July 5, 1921, covers these existing places of use.⁶⁴⁸ The State Engineer finds the contract date is July 5, 1921.

⁶⁴⁶ Exhibit No. 732 (Book 62, p. 366), public administrative hearing before the State Engineer, November 18, 1997.

⁶⁴⁷ Exhibit No. 732 (Book 62, p. 366), public administrative hearing before the State Engineer, November 18, 1997.

⁶⁴⁸ Exhibit No. 731, public administrative hearing before the State Engineer, November 17, 1997.

Parcel 9 - An "Agreement for the Transfer of Water Right Application Contract from One Tract to Another - Same Ownership"⁶⁴⁹ dated May 3, 1973, indicates that the contractor's land was classified as non-productive is covered by a water right application contract dated December 14, 1907, involving pre-Project vested water rights and covers this existing place of use. The second map in that agreement found in Book 62, page 357, shows that the water rights on this existing place of use were initiated under the December 14, 1907, contract and were moved onto this existing place of use. The State Engineer finds while the water rights were not moved onto this existing place of use until the transfer there under the May 3, 1973, agreement for the transfer of the water right, the water right that was transferred to that parcel was the 1907 pre-Project water right allowed to be transferred here by the U.S. Bureau of Reclamation. The State Engineer finds the contract date is December 14, 1907, and is based on pre-Project vested water rights.

Parcel 10 - An "Agreement for the Transfer of Water Right Application Contract from One Tract to Another - Same Ownership"⁶⁵⁰ dated May 3, 1973, indicates that the contractor's land was classified as non-productive. In the written portion of the agreement it indicates that 0.20 of an acre under a water right application dated July 30, 1919, was moved onto this $\frac{1}{4}$ $\frac{1}{4}$ section of land under TCID Serial Number 360 (Book 62, pp. 335-336). In the written portion of the agreement it also indicates that 36.44 acres under a water right application dated March 23, 1920, were moved onto this $\frac{1}{4}$ $\frac{1}{4}$ section of land under TCID Serial Number 361 (Book 62, pp. 337-338). The State Engineer finds while the water rights

⁶⁴⁹ Exhibit No. 732 (See, map Book 62, p. 357), (second May 3, 1973, agreement in the exhibit) public administrative hearing before the State Engineer, November 18, 1997.

⁶⁵⁰ Exhibit No. 732 (Book 62, p. 336), (second May 3, 1973, agreement in the exhibit) public administrative hearing before the State Engineer, November 18, 1997.

were not moved onto this existing place of use until the transfer there under the May 3, 1973, agreement for the transfer of the water right, the water rights that were transferred to this parcel were the 1919 and 1920 water rights allowed to be transferred here by the U.S. Bureau of Reclamation. The State Engineer finds the contract dates are July 30, 1919, and March 23, 1920.

II.

PERFECTION

Parcel 1 - The contract date is August 15, 1944. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁵¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land. At the 1988 administrative hearing, the applicant described the 1948 land use as a stack yard.⁶⁵² The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1944 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1944 and 1948, therefore, the protestant did not prove its claim of partial lack of perfection on this parcel.

Parcel 2 - The contract date is December 14, 1907, and is based on pre-Project vested water rights. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁵³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and canal. At the 1988 administrative hearing, the applicant described the 1948 land use

⁶⁵¹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁵² Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁵³ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

as being in cultivation.⁶⁵⁴ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 3 - The contract date for most of this existing place of use is December 14, 1907, and is based on pre-Project vested water rights. See, contract date section of this ruling as no contract was provided covering a portion of the existing place of use. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁵⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, ditch and bare land. At the 1988 administrative hearing, the applicant described the 1948 land use as a stack yard and corrals.⁶⁵⁶ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on most of this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that

⁶⁵⁴ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁵⁵ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁵⁶ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

pre-Project vested water rights were perfected as a matter of fact and law. Since no contract was provided covering the existing place of use on the southern edge of the NE¼ NE¼ of said Section 7 or for the small somewhat cone-shaped piece attached to the existing place of use on the southern edge, the State Engineer cannot rule on the protest claims for those pieces of land or allow the transfer of water rights from them.

Parcel 4 - The contract date is December 14, 1907, and is based on pre-Project vested water rights. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁵⁷ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. At the 1988 administrative hearing, the applicant described the 1948 land use as being in cultivation.⁶⁵⁸ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 5 - The contract date is December 14, 1907, and is based on pre-Project vested water rights. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁵⁹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and adjacent land. At the

⁶⁵⁷ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁵⁸ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁵⁹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

1988 administrative hearing, the applicant described the 1948 land use as being in cultivation.⁶⁶⁰ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 6 - The contract date is July 5, 1921. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁶¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, road and canal and portion irrigated. However, the protestant's witness provided evidence that through 1987 a 1.40 acre portion of the 2.56 existing place of use was irrigated.⁶⁶² At the 1988 administrative hearing, the applicant described the 1948 land use as being the homestead.⁶⁶³ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1921 and 1948, and in fact proved irrigation on a 1.40 acre portion of the 2.56 acre existing place of use. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1921 and 1948,

⁶⁶⁰ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁶¹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁶² Exhibit No. 728, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁶³ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the contract date the water right was perfected.

Parcel 7 - The contract date is July 5, 1921. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁶⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and canal. At the 1988 administrative hearing, the applicant described the 1948 land use as a lateral and drain.⁶⁶⁵ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1921 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1921 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the contract date the water right was perfected.

Parcel 8 - The contract date is July 5, 1921. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁶⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and canal. At the 1988 administrative hearing, the applicant described the 1948

⁶⁶⁴ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁶⁵ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁶⁶ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

land use as a lateral, drain and road.⁶⁶⁷ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1921 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1921 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the contract date the water right was perfected.

Parcel 9 - The contract date is December 14, 1907, and is based on pre-Project vested water rights, but as discussed in the contract date section the 1907 water rights were allowed to be transferred onto this existing place of use under the May 3, 1973, transfer agreement. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁶⁸ which indicates from aerial photographs that from 1972 through 1984 the land use on this parcel was described as a road, however, this evidence does not shed any light on the perfection of the original water right under the 1907 contract at the original place of use nor why the U.S. Bureau of Reclamation in 1973 provided for the transfer of water rights to this existing place of use. The State Engineer further finds if the U.S. Bureau of Reclamation provided for the transfer of water rights to this existing place of use in 1973, it calls into question the protestant's land use description. The State Engineer finds that the protestant's evidence is insufficient to prove that a water right was never perfected on the original place of use under the 1907 pre-Project vested water right,

⁶⁶⁷ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁶⁸ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

therefore, the protestant did not prove its claim of lack of perfection of this water right. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 10 - The contract dates are July 30, 1919, and March 23, 1920, but as discussed in the contract date section the 1907 water rights were allowed to be transferred onto this existing place of use under the May 3, 1973, transfer agreement. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁶⁹ which indicates from aerial photographs that from 1972 through 1984 the land use on this parcel was described as a road, however, this evidence does not shed any light on the perfection of the original water right under the 1919/1920 contracts at the original place of use nor why the U.S. Bureau of Reclamation in 1973 provided for the transfer of water rights to this existing place of use. The State Engineer finds that the protestant's evidence is insufficient to prove that a water right was never perfected on the original place of use under the 1919/1920 water right. The State Engineer further finds if the U.S. Bureau of Reclamation provided for the transfer of water rights to this existing place of use in 1973, it calls into question the relevance of the protestant's land use description at the original historic place of use under the 1919/1920 contract, therefore, the protestant did not prove its claim of lack of perfection of this water right. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the contract date the water right was perfected.

⁶⁶⁹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

III.

FORFEITURE

Parcel 1 - The contract date is August 15, 1944, therefore, a water right was initiated on this parcel on August 15, 1944, and is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁷⁰ which indicates from aerial photographs that in 1948, 1972, 1974, 1975, 1980, 1984, 1985, 1986 and 1987⁶⁷¹ the land use on this parcel was described as bare land. In 1962, 1973, and 1977 the land use was described as a non-irrigated field. At the 1988 administrative hearing, the applicants indicated that in 1948 and 1988 the land use on this parcel was a stack yard.⁶⁷² The State Engineer finds taking the applicant's land use description that no water was placed to beneficial use on Parcel 1 from 1948 through 1987.

Parcels 3, 4, 5, and 9 - The State Engineer finds the contract date is December 14, 1907, and the contracts themselves demonstrate the water rights are not subject to the forfeiture provision of NRS § 533.060.

Parcel 6 - The contract date is July 5, 1921, therefore, a water right was initiated on this parcel on July 5, 1921, and is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁷³ which indicates from aerial photographs that from 1948

⁶⁷⁰ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁷¹ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁷² Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁷³ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

through 1987⁶⁷⁴ the land use on this parcel was described as a farm yard, road and canal and portions irrigated. The protestant provided evidence that through 1987 1.40 acres of this existing place of use was irrigated.⁶⁷⁵ The State Engineer finds taking the applicant's land use description that no water was placed to beneficial use on 1.16 acres of Parcel 6 from 1948 through 1987.

Parcels 7 and 8 - The contract date is July 5, 1921, therefore, water rights were initiated on these parcels on July 5, 1921, and are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁷⁶ which indicates from aerial photographs that from 1948 through 1987⁶⁷⁷ the land uses on these parcels were described as roads and canals. At the 1988 administrative hearing, the applicants indicated that in 1948 and 1988 the land use on Parcel 7 was a lateral and drain and on Parcel 8 was a lateral, drain and road.⁶⁷⁸ The State Engineer finds that no water was placed to beneficial use on Parcels 7 and 8 from 1948 through 1987.

Parcel 10 - The contract dates are July 30, 1919, and March 23, 1920, therefore, a water right was initiated on this parcel on July 30, 1919, and March 23, 1920, and is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁷⁹ which

⁶⁷⁴ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁷⁵ Exhibit No. 728, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁷⁶ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁷⁷ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁷⁸ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁷⁹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

indicates from aerial photographs that from 1948 through 1987⁶⁸⁰ the land use on this parcel was described as a road. At the 1988 administrative hearing, the applicants indicated that in 1948 and 1988 the land use on Parcel 10 was road.⁶⁸¹ The State Engineer finds that no water was placed to beneficial use on Parcel 10 from 1948 through 1987.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁶⁸² "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁶⁸³ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁶⁸⁴ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

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

⁶⁸⁰ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁸¹ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁸² State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁶⁸³ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁶⁸⁴ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1, 6 (a 1.16 acre portion), 7, 8 and 10 - The State Engineer has determined the water rights on these parcels are subject to forfeiture and are below declared forfeited, therefore, the protestant's claims of abandonment are moot.

Parcel 2 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁸⁵ which indicates from aerial photographs that from 1948 through 1987⁶⁸⁶ the land use on this parcel was described as a road and canal. At the 1988 administrative hearing, the applicants indicated that in 1948 the land was in cultivation and in 1988 the land use on Parcel 2 was a ditch.⁶⁸⁷ The applicants did not provide any evidence of a lack of intent to abandon the water right and there is no evidence of the payment of taxes or assessments in the record. The State Engineer finds even if the land use was cultivation in 1948 there is no evidence to refute the protestant's evidence that from 1962 through 1987 the land use was a road and canal. The State Engineer finds since no water was placed to beneficial use on Parcel 2 for the 25 year period from 1962 through 1987, the land use is inconsistent with irrigated agriculture, and there was no showing of a lack of intent to abandon the water right, therefore, the water right is subject to abandonment.

⁶⁸⁵ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁸⁶ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁸⁷ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

Parcel 3 - The contract date is December 14, 1907, except for those lands described in the contract date section of this ruling for which no contract was provided and from which a transfer will not be allowed as the State Engineer is unable to rule on the protest claims. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁸⁸ which indicates from aerial photographs that from 1962 through 1987⁶⁸⁹ the land use on this parcel was described as a road and bare land. At the 1988 administrative hearing, the applicants indicated that in 1948 and 1988 the land use on Parcel 3 was a stack yard and corrals.⁶⁹⁰ The applicants did not provide any evidence of a lack of intent to abandon the water right and there is no evidence of the payment of taxes or assessments in the record. The State Engineer finds accepting the applicants' land use description no water was placed to beneficial use on Parcel 3 for the 39 year period from 1948 through 1987, the land use is inconsistent with irrigated agriculture, and there was no showing of a lack of intent to abandon the water right, therefore, the water right is subject to abandonment.

Parcel 4 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁹¹ which indicates from aerial photographs that from 1948 through 1987⁶⁹² the land use on this parcel was described as a road. At the 1988 administrative hearing, the applicants indicated that in 1948 the land was in

⁶⁸⁸ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁸⁹ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁹⁰ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁹¹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁹² Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

cultivation and in 1988 the land use on Parcel 4 was a ditch.⁶⁹³ The applicants did not provide any evidence of a lack of intent to abandon the water right and there is no evidence of the payment of taxes or assessments in the record. The State Engineer finds upon review of Exhibit No. 397 the terms lateral, canal and ditch are used raising the presumption for the State Engineer since the applicant described the land use as a ditch that this is an on-farm dirt-lined water righted ditch. The State Engineer finds accepting the applicants' land use description that the land use is consistent with irrigation and since the Bureau of Reclamation at one time required that the on-farm dirt-lined ditches be water righted⁶⁹⁴ that water was placed to beneficial use on Parcel 4 from 1948 through 1987 and the protestant did not prove its claim of non-use.

Parcel 5 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁹⁵ which indicates from aerial photographs that from 1948 through 1987⁶⁹⁶ the land use on this parcel was described as a road and adjacent land. At the 1988 administrative hearing, the applicants indicated that in 1948 the land was in cultivation and in 1988 the land use on Parcel 5 was a ditch.⁶⁹⁷ The applicants did not provide any evidence of a lack of intent to abandon the water right and there is no evidence of the payment of taxes or assessments in the record. The State Engineer finds upon review of Exhibit No. 397 the terms lateral,

⁶⁹³ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

⁶⁹⁴ See General Finding of Fact XI.

⁶⁹⁵ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁹⁶ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁶⁹⁷ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

canal and ditch are used raising the presumption for the State Engineer that this is an on-farm dirt-lined water-righted ditch. The State Engineer finds accepting the applicants' land use description that the land use is consistent with irrigation and since the Bureau of Reclamation at one time required that the on-farm dirt-lined ditches be water righted⁶⁹⁸ that water was placed to beneficial use on Parcel 5 from 1948 through 1987 and the protestant did not prove its claim of non-use.

Parcel 6 - The State Engineer has found a 1.16 acre portion of Parcel 6 to be subject to forfeiture and the protestant provided evidence that the remainder of the parcel was irrigated through 1987 making the protestant's claim of partial abandonment moot.

Parcel 9 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁶⁹⁹ which indicates from aerial photographs that from 1948 through 1987⁷⁰⁰ the land use on this parcel was described as a road. At the 1988 administrative hearing, the applicants indicated that in both 1948 and 1988 the land use was Parcel 9 was a road.⁷⁰¹ The applicants did not provide any evidence of a lack of intent to abandon the water right and there is no evidence of the payment of taxes or assessments in the record. The State Engineer finds that no water was placed to beneficial use on Parcel 9 for the 39 year period from 1948 through 1987, the land use is inconsistent with irrigated agriculture, and there was no showing of a lack of intent to abandon the water right, therefore, the water right is subject to abandonment.

⁶⁹⁸ See General Finding of Fact XI.

⁶⁹⁹ Exhibit No. 726, public administrative hearing before the State Engineer, November 18, 1997.

⁷⁰⁰ Exhibit No. 727, public administrative hearing before the State Engineer, November 18, 1997.

⁷⁰¹ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷⁰²

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claim of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10. The State Engineer concludes as to Parcel 3 that no water right contract was provided for the southern portion of the parcel or the cone-shaped piece attached to the southern portion of the parcel, therefore, the State Engineer cannot rule on the protest claims or allow the transfer of a water right from that portion of the existing place of use.

III.

FORFEITURE

The State Engineer concludes that the water rights appurtenant to Parcels 1, 6 (a 1.16 acre portion), 7, 8 and 10 are subject to forfeiture. The State Engineer concludes that the 1.40 acre portion of Parcel 6 that the protestant conceded was irrigated is not subject to forfeiture. The State Engineer concludes as to the water rights appurtenant to Parcels 3 (that portion under consideration), 4, 5 and 9 that the water right contracts pre-date March 22, 1913, are based on pre-Project vested water rights and are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer concludes that the water rights appurtenant to Parcels 2, 3 (a portion) and 9 are subject to abandonment. The State Engineer concludes that since the water rights appurtenant to Parcels 1, 6 (a portion), 7, 8 and 10 are declared forfeited the protestant's claims of abandonment are moot. The State Engineer

⁷⁰² NRS Chapter 533 and Order of Remand from Federal District Court.

concludes that the 1.40 acre portion of Parcel 6 that the protestant conceded was irrigated is not subject to abandonment. The State Engineer concludes the protestant did not prove its claim of abandonment as to Parcels 4 and 5.

RULING

The protestant's claims are upheld in part and overruled in part. The State Engineer's decision granting the transfer of water rights from Parcels 4, 5 and a 1.40 acre portion of Parcel 6 is hereby reaffirmed. The water rights appurtenant to Parcels 1, 6 (1.16 acre portion), 7, 8 and 10 are declared forfeited. The water rights appurtenant to Parcels 2, a 3.40 acre portion of Parcel 3 and Parcel 9 are declared abandoned. The request to transfer a 0.90 of an acre portion of the water right from Parcel 3 cannot be granted as no contract was entered into evidence covering that ground. Therefore, the permit granted under Application 51038 is amended to allow the transfer of water rights appurtenant to 3.05 acres of land totalling 10.68 acre-feet of water to be perfected at the proposed place of use.

APPLICATIONS 51040 AND 51048

GENERAL

I.

Application 51040 was filed on June 18, 1987, by The Louis Gomes Family Trust Agreement; Louis and Nancy E. Gomes⁷⁰³ to change the place of use of 78.72 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Numbers 49, 51, 53, 54, 162 and 164, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁷⁰⁴ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 0.04 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 2 - 1.45 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 3 - 0.81 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 4 - 1.58 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 5 - 1.10 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 6 - 0.56 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 7 - 4.95 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 8 - 3.41 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, T.18N., R.28E., M.D.B.&M.
- Parcel 9 - 1.24 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 25, T.18N., R.28E., M.D.B.&M.
- Parcel 10 - 1.55 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 25, T.18N., R.28E., M.D.B.&M.
- Parcel 11 - 1.83 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 25, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 0.29 of an acre in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, 7.30 acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, 4.74 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 1.57 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, all in Section 1, T.18N., R.28E., M.D.B. & M., 3.69 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and 0.93 of an acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 25, T.18N., R.28E., M.D.B. & M. By letter received in the office of the State Engineer dated July 2, 1992,

⁷⁰³ Application 51040 was assigned on January 3, 1994, in the records of the State Engineer to The Louis Gomes Family Trust (all acreage in Section 1) and The Raymond E. and Wilma M. Luiz 1984 Trust (all acreage in Section 25). See, File No. 51040, official records in the office of the State Engineer.

⁷⁰⁴ Exhibit No. 495, public administrative hearing before the State Engineer, October 8, 1997.

the applicant withdrew 0.35 of an acre from the Parcel 8 transfer request.⁷⁰⁵

II.

Application 51040 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁷⁰⁶ and more specifically on the grounds as follows:⁷⁰⁷

- Parcel 1 - Lack of perfection, forfeiture, abandonment
- Parcel 2 - Lack of perfection, abandonment
- Parcel 3 - Lack of perfection, forfeiture, abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Lack of perfection, abandonment
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Lack of perfection, abandonment
- Parcel 8 - Lack of perfection, forfeiture, abandonment
- Parcel 9 - Forfeiture, abandonment
- Parcel 10 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 11 - Partial lack of perfection, partial forfeiture, partial abandonment.

III.

Application 51048 was filed on July 18, 1987, by Christopher J. Gomes⁷⁰⁸ to change the place of use of 11.84 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 49, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁷⁰⁹ The proposed point of diversion is described as being located at Lahontan Dam.

⁷⁰⁵ Exhibit No. 497, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁰⁶ Exhibit No. 496, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁰⁷ Exhibit No. 400, public administrative hearing before the State Engineer, September 22, 1997.

⁷⁰⁸ Application 51048 was assigned on July 8, 1992, in the records of the State Engineer to The Louis Gomes Family Trust of August 18, 1988. See, File No. 51048, official records in the office of the State Engineer.

⁷⁰⁹ Exhibit No. 500, public administrative hearing before the State Engineer, October 8, 1997.

The existing places of use are described as:

Parcel 12⁷¹⁰ - 1.91 acres NE¼ SE¼, Sec. 1, T.18N., R.28E., M.D.B.&M.

Parcel 13 - 0.72 acres SE¼ SE¼, Sec. 1, T.18N., R.28E., M.D.B.&M.

The proposed places of use are described as 2.13 acres in the NW¼ SE¼, 0.38 of an acre in the NE¼ SE¼, and 0.12 of an acre in the SE¼ SE¼, all in Section 1, T.18N., R.28E., M.D.B. & M.

IV.

Application 51048 was protested by the PLPT on the grounds described in the General Introduction I of this ruling.⁷¹¹ The State Engineer finds that the PLPT's narrowed its protest claims as follows:⁷¹²

Parcel 12 - Lack of perfection, forfeiture, abandonment

Parcel 13 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51040 and 51048

Parcel 1 - Exhibit ZZ-2 from the 1988 administrative hearing did not contain a contract covering this parcel of land.⁷¹³ However, Exhibit LLL from the 1989 administrative hearing included a document which provides that the U.S. Bureau of Reclamation ledger indicated that a December 31, 1907, contract allotted 75 acres of water rights for the farm unit in the N¼ SE¼ of Section 1, T.18N., R.28E., M.D.B. & M. which includes this parcel, and indicates that

⁷¹⁰ Since the part of Applications 51040 and 51048 concerning Section 1 were considered together as transfers within a farm unit, the State Engineer consecutively numbered the parcels to avoid confusion that might arise with two separate parcels numbered 1 and 2.

⁷¹¹ Exhibit No. 501, public administrative hearing before the State Engineer, October 8, 1997.

⁷¹² Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

⁷¹³ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

the copy of this contract apparently is lost.⁷¹⁴ That a contract existed as of December 31, 1907, was supported by additional documentation provided by the applicant showing that in 1911 and 1912 water right charges were assessed for the years 1908, 1909 and 1910 for Farm Unit B consisting of 80 acres of which 75 were water righted in the N½ SE¼ of Section 1, T.18N., R.28E., M.D.B.& M.⁷¹⁵ The State Engineer finds the contract date is December 31, 1907.

Parcel 2 - Exhibit ZZ-2 from the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated June 14, 1907, covering this parcel of land.⁷¹⁶ The State Engineer finds the contract date is June 14, 1907.

Parcel 3 - Exhibit ZZ-2 from the 1988 administrative hearing did not contain a contract covering this parcel of land. However, Exhibit LLL from the 1989 administrative hearing included a document which provides that the U.S. Bureau of Reclamation ledger indicated that a December 31, 1907, contract allotted 75 acres of water rights for the farm unit in the N½ SE¼ of Section 1, T.18N., R.28E., M.D.B.& M. which includes this parcel, and indicates that the copy of this contract apparently is lost.⁷¹⁷ That a contract existed as of December 31, 1907, was supported by additional documentation provided by the applicant showing that in 1911 and 1912 water right charges were assessed for the years 1908, 1909 and 1910 for Farm Unit B consisting of 80 acres of which 75 were water righted in the N½ SE¼ of Section 1, T.18N., R.28E., M.D.B.& M.⁷¹⁸

⁷¹⁴ Exhibit No. 503, public administrative hearing before the State Engineer, October 8, 1997.

⁷¹⁵ Exhibit Nos. 522, 523 and 524, public administrative hearing before the State Engineer, October 8, 1997.

⁷¹⁶ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷¹⁷ Exhibit No. 503, public administrative hearing before the State Engineer, October 8, 1997.

⁷¹⁸ Exhibit Nos. 522, 523 and 524, public administrative hearing before the State Engineer, October 8, 1997.

The State Engineer finds the contract date is December 31, 1907.

Parcel 4 - Exhibit ZZ-2 from the 1988 administrative hearing contains three documents covering this parcel of land.⁷¹⁹ The first document is a December 31, 1907, "Certificate of Filing Water Right Application" which provides for a water right covering 62 acres of irrigable land in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.& M. A 1911 Irrigable Area Map⁷²⁰ indicates the location of those 62 irrigable acres (35 enclosed in a circle on the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and 27 enclosed in a circle on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ for a total of 62).

A second document is a February 20, 1911, "Certificate of Filing Water Right Application" covering the same 62 acres of irrigable land, but under a different name. The 1911 contract is merely a reflection of a new owner applying for the same water right under the 1907 contract as it indicates an assignment of 1131 which is the number found on the December 31, 1907, certificate.

The third document, an "Application for Permanent Water Right" dated May 24, 1954, added an additional 4 acres of irrigable area within this $\frac{1}{4}$ $\frac{1}{4}$ section of land.

The State Engineer can discern and finds that the contract dates are December 31, 1907, and May 24, 1954. While it can be generally determined from Exhibit Nos. 498 and 525 which lands are under which contract, it cannot be determined to the level of accuracy that the protestant is requesting exactly which one hundredth of an acre is under the 1907 contract or which is under the 1954 contract, and no better evidence as to the location of the water rights exists. Approximately $\frac{1}{2}$ of the area on the left side along the northern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section and the piece dangling from that edge is under the 1954 contract, but the right side of

⁷¹⁹ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷²⁰ Exhibit No. 525, public administrative hearing before the State Engineer, October 8, 1997.

the northern edge and the free standing piece of the existing place of use in the S $\frac{1}{2}$ of the $\frac{1}{4}$ $\frac{1}{4}$ section is under the 1907 contract.

Parcel 5 - Exhibit ZZ-2 from the 1988 administrative hearing contains a December 31, 1907, "Certificate of Filing Water Right Application" under the name Kinkead which covers the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.& M. and includes the existing place of use.⁷²¹ The State Engineer does not believe there is a dispute as to the contract date, but notes that the protestant appears to have thought the 1907 on the document was 1908.⁷²² The State Engineer finds the contract date is December 31, 1907.

Parcel 6 - Exhibit ZZ-2 from the 1988 administrative hearing contains three documents covering this parcel of land.⁷²³ The first document is a December 31, 1907, "Certificate of Filing Water Right Application" under the name Farwell which provides for a water right covering 62 acres of irrigable land in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.& M. A 1911 Irrigable Area Map⁷²⁴ indicates the location of those 62 irrigable acres (35 enclosed in a circle on the SE $\frac{1}{4}$ SW $\frac{1}{4}$ and 27 enclosed in a circle on the SW $\frac{1}{4}$ SE $\frac{1}{4}$ for a total of 62).

A second document is a February 20, 1911, "Certificate of Filing Water Right Application" covering the same 62 acres of irrigable land, but under a different name. The 1911 contract is merely a reflection of a new owner applying for the same water right under the 1907 contract as it indicates an assignment of 1131 which is the number found on the December 31, 1907, certificate.

The third document, an "Application for Permanent Water Right"

⁷²¹ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷²² Exhibit Nos. 499, 507, public administrative hearing before the State Engineer, October 8, 1997.

⁷²³ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷²⁴ Exhibit No. 525, public administrative hearing before the State Engineer, October 8, 1997.

dated May 24, 1954, added an additional 1 acre of irrigable area within this $\frac{1}{4}$ $\frac{1}{4}$ section of land. From Exhibit Nos. 498 and 525, the State Engineer can discern that the 1907 contract does not cover the existing place of use within this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The State Engineer finds that the contract date is May 24, 1954.

Parcel 7 - Exhibit ZZ-2 from the 1988 administrative hearing contains a December 31, 1907, "Certificate of Filing Water Right Application" under the name Kinkead which covers the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.& M. and includes the existing place of use. The State Engineer does not believe there is a dispute as to the contract date, but notes that the protestant appears to have thought the 1907 on the document was 1908.⁷²⁵ The State Engineer finds the contract date is December 31, 1907.

Parcel 8 - Exhibit ZZ-2 from the 1988 administrative hearing contains four documents covering this parcel of land.⁷²⁶ The first document is an October 19, 1907, "Agreement" between Herbert W. Gates and the U.S. Reclamation Service which provides for the exchange of pre-Project vested water rights on 13 acres for Project water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section of land.⁷²⁷ A 1911 Irrigable Area Map⁷²⁸ indicates the general location of those pre-Project vested water rights. While it can be generally determined which lands are under the October 19, 1907, contract, it cannot be determined to the level of accuracy that the protestant is requesting exactly which one hundredth of an acre is under the 1907 contract and no better evidence as to the location of the water rights exists.

⁷²⁵ Exhibit Nos. 499, 507, public administrative hearing before the State Engineer, October 8, 1997.

⁷²⁶ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷²⁷ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷²⁸ Exhibit No. 525, public administrative hearing before the State Engineer, October 8, 1997.

The second document is a December 20, 1907, "Certificate of Filing Water Right Application" filed in the name of Herbert W. Gates which added additional lands to the irrigable area in this $\frac{1}{4}$ $\frac{1}{4}$ section of land, but the document does not inform us as to how many acres were added in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The 1911 Irrigable Area Map⁷²⁹ shows 35 acres of water rights in the $\frac{1}{4}$ $\frac{1}{4}$ section which means that 22 acres of water rights were added under the 1907 contract.

The third document, a "Certificate of Filing Water Right Application" dated May 23, 1910, in the name of James B. Young provides for a water right for the same land identified in the December 20, 1907, Certificate, however, this document indicates there are 99 acres of irrigable land applied for including 13 acres of vested water rights. The May 23, 1910, document indicates Mr. Young is the assignee of Herbert W. Gates, and this assignment is also reflected on Exhibit No. 525.

A fourth document, a May 9, 1918, "Water-right Application for Lands in Private Ownership" covers 22 acres of irrigable land in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B. & M. The State Engineer finds from examining Exhibit No. 525, the 1911 Irrigable Area Map, that a portion of the existing place of use on the southern part of the western edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land is covered under the October 19, 1907, contract that exchanged pre-Project vested water rights for Project water rights. The State Engineer finds from examining Exhibit No. 525, the 1911 Irrigable Area Map, that a portion of the existing place of use is covered under the pre-1911 contracts dated December 20, 1907, and the May 23, 1910. The State Engineer finds from examining Exhibit No. 525, the 1911 Irrigable Area Map, that a portion of the existing place of use in the center part of the western edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land must be covered under the May 9, 1918, contract, as it is not

⁷²⁹ Exhibit No. 525, public administrative hearing before the State Engineer, October 8, 1997.

shown as water righted in 1911.

The State Engineer finds from examining the 1911 Irrigable Area Map that most of the $\frac{1}{4}$ $\frac{1}{4}$ section was developed by 1911 with the remaining lands added under the 1918 contract. The State Engineer finds that in light of the times (1907 and 1910 to 1918) in which this farm was being developed, and the speed with which farms could be developed with the equipment of the day⁷³⁰, 1907 to 1918 was a reasonable amount of time to develop a farm during that part of the century, and therefore, the 1918 contract should relate back to the 1907 contract date and water rights were initiated on this parcel prior to the date of the October 19, 1907, "Agreement".

Parcel 9 - Exhibit ZZ-2 from the 1988 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated March 20, 1920, covering the existing place of use.⁷³¹ The State Engineer finds the contract date is March 20, 1920.

Parcel 10 - Exhibit ZZ-2 from the 1988 administrative hearing contains an "Application for Permanent Water Right" dated January 4, 1946, covering all of the $W\frac{1}{2}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ of Section 25, T.18N., R.28E., M.D.B. & M.⁷³² Exhibit ZZ-2 also contains a "Certificate of Filing Water Right Application" dated April 20, 1908, covering the $E\frac{1}{2}$ $NE\frac{1}{4}$ $NW\frac{1}{4}$ of said Section 25. The State Engineer finds that the contract date for the portion of the existing place of use on the eastern border of the $\frac{1}{4}$ $\frac{1}{4}$ section of land is April 20, 1908. The State Engineer finds that the contract date for the portion of the existing place of use in the central portion of the $\frac{1}{4}$ $\frac{1}{4}$ section of land is also April 20, 1908, such decision being made based in part on the analysis for Parcel 11 below. At the 1988 hearing, the

⁷³⁰ Exhibit Nos. 493 and 494, public administrative hearing before the State Engineer, October 7, 1997.

⁷³¹ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷³² Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

legal counsel for the U.S. Bureau of Reclamation accepted the 1915 contract as the relevant contract for Parcel 11. If one compares the application map for Parcel 11 with the contract, it was believed that both the central portion of this existing place of use, which is directly above the central portion of the existing place of use in Parcel 11, were both in the E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ since the contract accepted for Parcel 11 covers only the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the central existing place of use here is directly above the central existing place of use in Parcel 11. The State Engineer finds the contract date is April 20, 1908.

Parcel 11 - Exhibit ZZ-2 contains a "Water-right Application for Lands in Private Ownership" received by the U.S. Reclamation Service as filed on April 10, 1915, covering most of the existing place of use, specifically, the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T.18N., R.28E., M.D.B.& M.⁷³³ No contract was provided covering that portion of the existing place of use in the W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 25 or that portion west of the existing place of use in the central portion of the $\frac{1}{4}$ $\frac{1}{4}$ of the section of land. The State Engineer finds the contract date for the central and eastern portions of the existing place of use is April 10, 1915, but no contract was provided for the existing place of use in the W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T.18N., R.28E., M.D.B.& M.

Parcel 12 - Exhibit LLL from the 1989 administrative hearing contains a document which provides that the U.S. Bureau of Reclamation ledger indicated that a December 31, 1907, contract allotted 75 acres of water rights for the farm unit in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 1, T.18N, R.28E., M.D.B.& M. which includes this parcel.⁷³⁴ That a contract existed as of December 31, 1907, was supported by additional documentation provided by the applicant

⁷³³ Exhibit No. 499, public administrative hearing before the State Engineer, October 8, 1997.

⁷³⁴ Exhibit No. 503, public administrative hearing before the State Engineer, October 8, 1997.

showing that in 1911 and 1912 water right charges were assessed for the years 1908, 1909 and 1910 for Farm Unit B consisting of 80 acres of which 75 were water righted in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 1, T.18N., R.28E., M.D.B.& M.⁷³⁵ The protestant lists a contract date of March 31, 1911,⁷³⁶ however, the protestant picked the wrong date off Exhibit No. 503 in that it appears to have chosen the date of a water right payment receipt instead of the actual contract date mentioned in the same document. The State Engineer finds the contract date is December 31, 1907.

Parcel 13 - Exhibit LLL from the 1989 administrative hearing contains a "Certificate of Filing Water Right Application" dated June 14, 1907.⁷³⁷ The State Engineer finds the contract date is June 14, 1907.

II.

PERFECTION

Parcel 1 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷³⁸ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts

⁷³⁵ Exhibit Nos. 522, 523 and 524, public administrative hearing before the State Engineer, October 8, 1997.

⁷³⁶ Exhibit No. 508, public administrative hearing before the State Engineer, October 8, 1997.

⁷³⁷ Exhibit No. 503, public administrative hearing before the State Engineer, October 8, 1997.

⁷³⁸ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is June 14, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷³⁹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as ditches. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of

⁷³⁹ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁴⁰ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 4 - The contract dates are December 31, 1907, and May 24, 1954. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴¹ which indicates from aerial photographs that in 1948 the land uses on the various parcels identified as Parcel 4 were described as a road, drain, and bare land. In 1962 the land uses were described as roads and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected under the 1907 contract on these parcels between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on these parcels under the 1907 contract between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on those parcels. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected. As to perfection under the 1954 contract, it is impossible from the evidence presented by the protestant to determine which land use description it was applying to the three distinct parcels of land that make up what is identified as Parcel 4. Further, the protestant's evidence of the 1948 land use descriptions includes a description for bare land. That bare land could be the very land that went into production under the 1954 contract. The State Engineer finds the protestant's evidence was not sufficient to prove lack of perfection under the 1954 contract,

⁷⁴¹ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

therefore, the protestant did not prove its claim of lack of perfection.

Parcel 5 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴² which indicates from aerial photographs that in 1948 the land use on this parcel was described as drains. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 6 - The contract date is May 24, 1954. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. In 1962 the land use was described as a road and bare land. The protestant did not provide any evidence other than a 1948 and a 1962 photograph as its evidence that a water right was not perfected on this parcel between 1954 and 1962. The State Engineer finds, in light of the 1948 description of bare land and natural vegetation (a land use that does not preclude irrigation) changing to a road and bare land in 1962 (evidencing activity in the vicinity), that the 1948 and 1962 photographs are not

⁷⁴² Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁴³ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

sufficient evidence to prove that a water right was never perfected on this parcel between 1954 and 1962, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 7 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴⁴ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, drain and farm yard. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 8 - The contract dates are October 19, 1907, December 20, 1907, May 23, 1910, and May 9, 1918, all with a pre-October 19, 1907, initiation date under the doctrine of relation back. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, drain and farm yard. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907, 1910, 1918 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected

⁷⁴⁴ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁴⁵ Exhibit No. 511, public administrative hearing before the State Engineer, October 8, 1997.

on this parcel between 1907 or 1910 or 1918 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 10 - The contract date is April 20, 1908. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁴⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a portion irrigated, bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1908 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact the protestant proved perfection on the 1.12 acre portion in the central portion of the $\frac{1}{4}$ $\frac{1}{4}$ section of land.⁷⁴⁷ The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 11 - The contract date for some of the parcel is April 10, 1915. (See, contract date section as no contract was provided covering a portion of this existing place of use.) The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing

⁷⁴⁶ Exhibit No. 739, public administrative hearing before the State Engineer, February 2, 1998.

⁷⁴⁷ Exhibit No. 740, public administrative hearing before the State Engineer, February 2, 1998.

Place(s) of Use"⁷⁴⁸ which indicates from aerial photographs that in 1948 the land use on this parcel was described as drains and a portion irrigated. The protestant provided evidence that 0.56 of an acre of the existing place of use in the central portion of the $\frac{1}{4}$ $\frac{1}{4}$ of the section of land was irrigated.⁷⁴⁹ The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1915 and 1948 as to that portion of the parcel for which a contract was provided. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1915 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and in fact the protestant proved perfection on the 0.56 of an acre portion in the central portion of the $\frac{1}{4}$ $\frac{1}{4}$ section of land. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 12 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁵⁰ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, road and canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove

⁷⁴⁸ Exhibit No. 739, public administrative hearing before the State Engineer, February 2, 1998.

⁷⁴⁹ Exhibit No. 740, public administrative hearing before the State Engineer, February 2, 1998.

⁷⁵⁰ Exhibit No. 513, public administrative hearing before the State Engineer, October 8, 1997.

that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 13 - The contract date is June 14, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁵¹ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a farm yard, road and canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture. This application presents a new unique situation in that it has been split between two owners

⁷⁵¹ Exhibit No. 513, public administrative hearing before the State Engineer, October 8, 1997.

since the filing of the application.

Parcels 1, 3, 4, 6, 8 and 12 - All the lands in Section 1 are now held by the Louis Gomes Family Trust and are operated as a single farm unit.⁷⁵² The Section 25, T.18N., R.28E., M.D.B.& M. lands are now held by The Raymond E. and Wilma M. Luiz 1984 Trust. The applications do not move water from Section 1 to Section 25 or from Section 25 to Section 1. The Gomes testified that all the Section 1 existing places of use from which water is being moved are within the Gomes farm property,⁷⁵³ and that the transfer applications relative to their farm were to get the records in compliance with the actual irrigation practices of the farm. The applicants further testified they had been using all the water allotted to their farm for years and that most of the water had been moved to the proposed places of use years before the applications were actually filed.⁷⁵⁴ The State Engineer finds that it was Judge McKibben's intent that those persons moving water within their own property and not purchasing water rights from some removed third party should have the benefit of his equitable ruling. The State Engineer finds that all water rights requested for transfer under Applications 51040 and 51048 within Section 1, T.18N., R.28E., M.D.B.& M. were water rights in ownership and being used by the applicant Gomes prior to the filing of the transfer applications, and are thereby intrafarm transfers not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998, and that the water was actually being used on the Gomes farm precluding forfeiture.

⁷⁵² Transcript, pp. 3207-3211, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁵³ Exhibit No. 527, Transcript, pp. 3207-3220, 3273-3274, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁵⁴ Transcript, pp. 3220-3270, public administrative hearing before the State Engineer, October 8, 1997.

Parcel 9 - The contract date is March 20, 1920, therefore, water rights were initiated on this parcel on March 20, 1920, and are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁵⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as portion irrigated, bare land and natural vegetation. In 1962 and 1972 the land use was described as a drain, road and portion irrigated. In 1973, 1974, 1975, 1977, 1980 and 1984 the land use was described as a road and canal. At the 1988 administrative hearing, the applicants indicated that in 1948 the land use on this parcel was an irrigation ditch and field, and the 1988 land use was an irrigation ditch.⁷⁵⁶ The State Engineer specifically adopts and incorporates General Finding of Fact XI and finds using the applicant's land use description that Parcel 9 is occupied by an on-farm water-righted irrigation ditch and since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water.

Parcel 10 - The contract date is April 20, 1908, therefore, a water right was initiated on this parcel on April 20, 1908, and is not subject to the forfeiture provision of NRS § 533.060.

Parcel 11 - The contract date for the central and eastern portions of the existing place of use is April 10, 1915. No contract was provided covering that portion of the existing place of use west of the long narrow existing place of use in the center of the $\frac{1}{4}$ $\frac{1}{4}$ of land, therefore, the State Engineer cannot rule on the protest claim of forfeiture and cannot allow the transfer of water rights from that piece of the existing place of use in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The contract date for the remaining portion of the existing

⁷⁵⁵ Exhibit No. 739, public administrative hearing before the State Engineer, February 2, 1998.

⁷⁵⁶ Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

place of use is April 10, 1915, therefore, water rights were initiated on portions of this parcel on April 10, 1915, and are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁵⁷ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a portion irrigated, bare land and natural vegetation. In 1962, 1972, 1973, 1974, 1975, 1980 and 1984 the land use was described as a road, bare land and portion irrigated. In 1977 the land use was described as bare land and portion irrigated. At the 1988 administrative hearing, the applicants indicated that in 1948 and the 1988 the land use on this parcel was an irrigation ditch and drain ditch. The State Engineer specifically adopts and incorporates General Finding of Fact XI and finds using the applicant's land use description that Parcel 11 is partially occupied by an on-farm water-righted irrigation ditch and since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water. The State Engineer finds the evidence is insufficient to determine where the drain ditch is located, therefore, the protestant did not prove non-use on any specifically identifiable portion of the existing place of use.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁷⁵⁸ "Abandonment, requiring a union of

⁷⁵⁷ Exhibit No. 739, public administrative hearing before the State Engineer, February 2, 1998.

⁷⁵⁸ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

acts and intent is a question of fact to be determined from all the surrounding circumstances."⁷⁵⁹ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁷⁶⁰ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications in Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1, 2, 3, 4, 5, 6, 7, 8, 12 and 13 - All the lands in Section 1, T.18N., R.28E., M.D.B. & M. are now held by the Louis Gomes Family Trust and are operated as a single farm unit.⁷⁶¹ The Section 25 lands are now held by The Raymond E. and Wilma M. Luiz 1984 Trust. The applications do not move water from Section 1 to Section 25 or from Section 25 to Section 1. The Gomes testified that all the Section 1 existing places of use from which water is being moved are within the Gomes farm property,⁷⁶² and that the transfer applications relative to their farm were to get the records in compliance with the actual irrigation practices of the

⁷⁵⁹ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁷⁶⁰ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁷⁶¹ Transcript, pp. 3207-3211, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁶² Exhibit No. 527, Transcript, pp. 3207-3220, 3273-3274, public administrative hearing before the State Engineer, October 8, 1997.

farm. The applicants further testified they had been using all the water allotted to their farm for years and that most of the water had been moved to the proposed places of use years before the applications were actually filed.⁷⁶³ The State Engineer finds that it was Judge McKibben's intent that those persons moving water within their own properties and not purchasing water rights from some removed third party should have the benefit of his equitable ruling. The State Engineer finds that all water rights requested for transfer under Applications 51040 and 51048 within Section 1, T.18N., R.28E., M.D.B. & M. were water rights in ownership and being used by the applicant Gomes prior to the filing of the transfer applications, and are thereby intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that the water was actually being used on the Gomes farm precluding an intent to abandon the water rights.

Parcel 9 - The State Engineer found that the water was placed to beneficial use on Parcel 9 from 1948 through 1984, thereby precluding the protestant's claim of abandonment.

Parcel 10 - The contract date for those portions for which a contract was provided is April 20, 1908. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁶⁴ which indicates from aerial photographs that in 1948, the land use on this parcel was described as drains and a portion irrigated. In 1962 and 1972, the land use was described as a road and portion irrigated. In 1973, 1974, 1975, 1980 and 1984 the land use was described as roads or drain and portion irrigated. In 1977 the land use description was a road, ditch, portion irrigated. At the 1988 administrative hearing, the applicants indicated that in 1948 and the 1988 the land use on this parcel was an irrigation

⁷⁶³ Transcript, pp. 3220-3270, public administrative hearing before the State Engineer, October 8, 1997.

⁷⁶⁴ Exhibit No. 739, public administrative hearing before the State Engineer, February 2, 1998.

ditch. The State Engineer finds taking the applicant's land use description and specifically adopting and incorporating General Finding of Fact XI that Parcel 10 is occupied by an on-farm water-righted irrigation ditch and since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water. The State Engineer finds that the water was placed to beneficial use on Parcel 10 from 1948 through 1984, thereby precluding the protestant's claim of abandonment.

While the State Engineer believes this is part of what was an the intrafarm transfer at the time the application was filed and as testified to by the owners of section 1, the applicant did not appear at the time and place of the hearing and has not made a claim that this is an intrafarm transfer.

Parcel 11 - The State Engineer found no contract was provided covering that portion of the existing place of use west of the long narrow existing place of use in the center of the $\frac{1}{4}$ $\frac{1}{4}$ of land, therefore, the State Engineer cannot rule on the protest claim of abandonment and cannot allow the transfer of water rights from that piece of the existing place of use in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁷⁶⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a portion irrigated, bare land and natural vegetation. In 1962, 1972, 1973, 1974, 1975, 1980 and 1984 the land use was described as a road, bare land and portion irrigated. In 1977 the land use was described as bare land and portion irrigated. At the 1988 administrative hearing, the applicants indicated that in 1948 and the 1988 the land use on this parcel was an irrigation ditch and drain ditch. The State Engineer specifically adopts and incorporates General Finding of Fact XI and finds using the applicant's land use description that Parcel 11 is partially

⁷⁶⁵ Exhibit No. 739, public administrative hearing before the State Engineer, February 2, 1998.

occupied by an on-farm water-righted irrigation ditch and since those ditches were historically required to be water righted the evidence demonstrates beneficial use of that water. The State Engineer finds the evidence is insufficient to determine where the drain ditch is located, therefore, the protestant did not prove non-use on any specifically identifiable portion of the existing place of use.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷⁶⁶

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2, 3, 4, 5, 6, 7, 8, 10, 11 (except for that portion for which no contract was provided), 12, 13.

III.

FORFEITURE

The State Engineer concludes that all water rights requested for transfer under Applications 51040 and 51048 in Section 1, T.18N., R.28E., M.D.B.& M. (Parcels 1, 2, 3, 4, 5, 6, 7, 8, 12 and 13) are intrafarm transfers and were filed to correct the records as to where the water was actually being used to irrigate the farm property, and therefore, pursuant to Judge McKibben's Order of September 3, 1998, are not subject to the doctrine of forfeiture. The State Engineer concludes the protestant did not prove its case of non-use of the water rights appurtenant to the existing places of use in Parcels 9 and 11 (excepting out that portion for which no contract was provided). The State Engineer concludes that the water right appurtenant to Parcel 10 was initiated prior to March

⁷⁶⁶ NRS Chapter 533 and Order of Remand from Federal District Court.

22, 1913, and is not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer concludes that all water rights requested for transfer under Applications 51040 and 51048 in Section 1, T.18N., R.28E., M.D.B.& M. (Parcels 1, 2, 3, 4, 5, 6, 7, 8, 12 and 13) are intrafarm transfers and were filed to correct the records as to where the water was actually being used to irrigate the farm property, and therefore, pursuant to Judge McKibben's Order of September 3, 1998, are not subject to the doctrine of abandonment. The State Engineer further concludes as to Section 1 that the water was all being used within the farm property precluding a claim of intent to abandon the water right. The State Engineer concludes the protestant did not prove its case of non-use of the water rights appurtenant to the existing places of use in Parcels 9, 10 and 11 (excepting out that portion for which no contract was provided).

RULING

As to Section 1, T.18N., R.28E., M.D.B.& M. (Parcels 1, 2, 3, 4, 5, 6, 7, 8, 12 and 13) the protests to Applications 51040 and 51048 are overruled and the State Engineer's decisions granting Applications 51040 and 51048 are hereby affirmed. As to Section 25, T.18N., R.28E., M.D.B.& M. (Parcels 9, 10 and 11 (except for a 0.40 of an acre portion for which no contract was provided) the protest is overruled and the State Engineer's decisions granting Application 51040 is hereby affirmed. The 0.04 of an acre portion of Parcel 11 is not available for transfer as no contract was ever provided for that land, therefore, the State Engineer cannot rule on the protest claims or allow the transfer of water from that land. Therefore, the permit granted under Application 51040 is amended to allow the transfer of water rights appurtenant to 17.77 acres of land totalling 75.75 acre-feet of water to be perfected at the proposed place of use.

APPLICATION 51043

GENERAL

I.

Application 51043 was filed on June 18, 1987, by David F. and Donna R. Stix to change the place of use of 57.02 acre-feet annually, a portion of the decreed waters of the Truckee River previously appropriated under the Serial Number 1079-1, Claim No. 3 Orr Ditch Decree.⁷⁶⁷ The proposed point of diversion is described as being located at Derby Dam. The existing places of use are described as:

Parcel 1 - 7.42 acres Lot 7, Sec. 24, T.20N., R.25E., M.D.B.&M.

Parcel 2 - 3.78 acres Lot 8, Sec. 24, T.20N., R.25E., M.D.B.&M.

Parcel 3 - 1.47 acres Lot 9, Sec. 24, T.20N., R.25E., M.D.B.&M.

The proposed places of use are described as 4.81 acres in Lot 5, 1.85 acres in Lot 8, 2.39 acres in Lot 9, 3.62 acres in Lot 10, all in Section 24, T.20N., R.25E., M.D.B. & M.

II.

Application 51043 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁷⁶⁸ and more specifically on the grounds as follows:⁷⁶⁹

Parcel 1 - Lack of perfection, forfeiture, abandonment

Parcel 2 - Lack of perfection, forfeiture, abandonment

Parcel 3 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51043

Exhibit ZZ-2 from the January 1988 administrative hearing contains contracts covering the existing places of use under

⁷⁶⁷ Exhibit No. 403, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁶⁸ Exhibit No. 404, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁶⁹ Exhibit No. 400, public administrative hearing before the State Engineer, September 22-23, 1997.

Application 51043.⁷⁷⁰

Parcel 1 - Exhibit ZZ-2 from the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 20, 1912, covering 55 acres of irrigable land in the SE¼ of Section 24, T.20N., R.25E., M.D.B.& M. Exhibit ZZ-2 also contains an "Application for Permanent Water Right" dated February 15, 1946, covering the east 500 feet of Lots 7 and 10. The applicant presented a detailed history of the land and water right acquisitions for his farm.⁷⁷¹ From that history, the applicant was able to determine that the 1946 contract related to another section of his farm (that section purchased by Sam and Alice Swartz)⁷⁷² and did not cover any of the existing places of use under Application 51043 as the land owned by Mr. Swartz is not the same place as the existing places of use under this application, and this evidence was not rebutted by the protestant. The State Engineer finds the contract date is December 20, 1912.

Parcels 2 and 3 - Exhibit ZZ-2 from the 1988 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 20, 1912, covering 55 acres of irrigable land in the SE¼ of Section 24, T.20N., R.25E., M.D.B.& M. The State Engineer finds the contract date is December 20, 1912.

II.

PERFECTION

Parcel 1 - The contract date is December 20, 1912. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁷⁷³ which indicates from aerial photographs that

⁷⁷⁰ Exhibit No. 406, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷¹ Exhibit No. 413, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷² Exhibit No. 413, Attachment 16, Transcript, pp. 2801-2811, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷³ Exhibit No. 409, public administrative hearing before the State Engineer, September 23, 1997.

in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1912 and 1948. The applicant provided testimony of personal knowledge of at least a portion of the existing place of use being irrigated at the time he purchased the property in 1968-1969.⁷⁷⁴ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1912 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and use of at least a portion of the parcel for irrigation was proven based on personal knowledge of the applicant. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 2 - The contract date is December 20, 1912. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁷⁷⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1912 and 1948. The applicant provided testimony of personal knowledge of at least a portion of the existing place of use being irrigated at the time he purchased the property in 1968-1969.⁷⁷⁶ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water

⁷⁷⁴ Transcript, pp. 2805-2816, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷⁵ Exhibit No. 409, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷⁶ Transcript, pp. 2805-2816, public administrative hearing before the State Engineer, September 23, 1997.

right was never perfected on this parcel between 1912 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel and use of at least a portion of the parcel for irrigation was proven based on personal knowledge of the applicant. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is December 20, 1912. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁷⁷⁷ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1912 and 1948. The applicant provided evidence that when the State of Nevada highway department took the land identified as the existing place of use in 1930 the owner of the existing place of use was compensated for the loss of fruit and poplar trees to demonstrate that agriculture was taking place on the existing place of use in the 1930's,⁷⁷⁸ and presented testimony that after the trees were removed the land was used as pasture, and there are remnants of the irrigation structures used to irrigate this piece of ground.⁷⁷⁹ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1912 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts

⁷⁷⁷ Exhibit No. 409, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷⁸ Exhibit No. 413, Attachment 9, Transcript, pp. 2795-2797, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁷⁹ Transcript, pp. 2805-2816, public administrative hearing before the State Engineer, September 23, 1997.

and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrines of forfeiture or abandonment. The applicant's testimony and exhibits demonstrate that all the existing and proposed places of use are within his property,⁷⁸⁰ and that the transfer applications relative to his farm were to get the records in compliance with the actual irrigation practices of the farm. This farm presents a situation where the original farm established around 1912 was subsequently split into several properties in the 1930's and 1940's and then in the 1960's and 1970's was reassembled to very closely resemble the original farm. The State Engineer finds that all water rights requested for transfer under Application 51043 were water rights in ownership and being used by the applicant prior to the filing of the transfer application, are within the place of use described under the 1912 water rights contract, and are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's ruling. The State Engineer finds the contract dates alone indicate that the water rights are not subject to the doctrine of forfeiture as the contract pre-dates March 22, 1913. The State Engineer further finds the evidence does not demonstrate the land uses on the existing places of use are inconsistent with

⁷⁸⁰ Exhibit Nos. 403, 405, 406, 413, Transcript, pp. 2805-2816, public administrative hearing before the State Engineer, September 23, 1997.

irrigated agriculture and finds the applicant was using the water which is the subject of this application.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷⁸¹

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that all water rights requested for transfer under Application 51043 are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the application was filed to correct the records as to where the water was actually being used to irrigate farm property.

RULING

The protest to Application 51043 is overruled and the State Engineer's decision granting Application 51043 is hereby affirmed.

⁷⁸¹ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51082

GENERAL

I.

Application 51082 was filed on June 29, 1987, by Henry C. Dieckmann to change the place of use of 9.90 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 507-1, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁷⁸² The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 2.20 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$ (Lot 1), Sec. 19, T.19N., R.28E., M.D.B.&M.

The proposed places of use are described as 1.00 acre in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, and 1.20 acres (Lot 2) in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, both in Section 19, T.19N., R.28E., M.D.B. & M.

II.

Application 51082 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁷⁸³ and more specifically on the grounds as follows:⁷⁸⁴

Parcel 1 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 51082

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains a "Water-right Application for Lands in Private Ownership" dated February 26, 1920, covering 50 acres of irrigable land within a tract described as the Railroad Farm Unit "P" or Lot 1 (handwritten above it the NW $\frac{1}{4}$ NW $\frac{1}{4}$) and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19,

⁷⁸² Exhibit No. 415, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁸³ Exhibit No. 416, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁸⁴ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

T.19N., R.28E., M.D.B.& M.⁷⁸⁵ The State Engineer finds the contract date is February 26, 1920.

II.

PERFECTION

Parcel 1 - The contract date is February 26, 1920. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁷⁸⁶ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1920 and 1948. The protestant's witness testified that he believed that at some time prior to 1948 the area was probably irrigated⁷⁸⁷, and the applicant testified that when he purchased the property in 1968 the existing place of use was pasture that was not being irrigated at that time, but because of the existence of borders and ditches it was obvious it had been irrigated in the past.⁷⁸⁸ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1920 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

⁷⁸⁵ Exhibit No. 418, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁸⁶ Exhibit No. 421, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁸⁷ Transcript, pp. 2822, 2832-34, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁸⁸ Transcript, pp. 2839 - 2842, public administrative hearing before the State Engineer, September 23, 1997.

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrines of forfeiture or abandonment. The applicant's testimony and exhibits demonstrate that all the existing and proposed places of use are within his property,⁷⁸⁹ and that the transfer application relative to his farm was to get the records in compliance with the actual irrigation practices of the farm or to take water off of land upon which he wanted to build a house for his daughter. The State Engineer finds the water right requested for transfer under Application 51082 was a water right in ownership of the applicant with some of the water being used by the applicant prior to the filing of the transfer application. The State Engineer further finds this is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further finds the evidence does not demonstrate the land use on the existing place of use at the time of the transfer application was inconsistent with irrigated agriculture.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷⁹⁰

⁷⁸⁹ Exhibit No. 425, Attachments 23, 25 and 30, Transcript, pp. 2842-2846, public administrative hearing before the State Engineer, September 23, 1997.

⁷⁹⁰ NRS Chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

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

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that the water right requested for transfer under Application 51082 is an intrafarm transfer not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the application was filed to correct the records as to where some of the water was actually being used to irrigate farm property.

RULING

The protest to Application 51082 is overruled and the State Engineer's decision granting Application 51082 is hereby affirmed.

APPLICATIONS 51137, 51138, 51139

GENERAL

I.

Application 51137 was filed on July 23, 1987, by the Clifford L. Matley Family Trust to change the place of use of 4.50 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 128, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁷⁹¹ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 2⁷⁹² - 1.00 acre NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T.18N., R.28E., M.D.B.&M.

The proposed place of use is described as 1.00 acre in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.18N., R.28E., M.D.B. & M.

Application 51138 was filed on July 23, 1987, by the David L. and Christine L. Matley Family Trust to change the place of use of 44.78 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Numbers 128 and 130, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁷⁹³ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 1.93 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T.18N., R.28E., M.D.B.&M.

Parcel 2 - 2.96 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T.18N., R.28E., M.D.B.&M.

Parcel 3 - 2.53 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T.18N., R.28E., M.D.B.&M.

Parcel 4 - 1.15 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, T.18N., R.28E., M.D.B.&M.

Parcel 5 - 1.38 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 13, T.18N., R.28E., M.D.B.&M.

⁷⁹¹ Exhibit No. 460, public administrative hearing before the State Engineer, October 7, 1997.

⁷⁹² The numbering of these parcels will appear odd as three applications were considered together and some of them have places of use within the same $\frac{1}{4}$ sections of land. The parcels were numbered in order to follow along with the protestant's exhibits which combined the 2 parcels from Applications 51137 and 51138 in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.18N., R.28E., M.D.B. & M.

⁷⁹³ Exhibit No. 464, public administrative hearing before the State Engineer, October 7, 1997.

The proposed place of use is described as 9.95 acres in the NW¼ SW¼ of Section 12, T.18N., R.28E., M.D.B.& M. By letter dated August 19, 1992, the applicant withdrew 0.65 of an acre from the transfer in Parcel 1, withdrew 1.15 acres from the transfer in Parcel 3, and withdrew 0.70 of an acre from the transfer in Parcel 5.⁷⁹⁴

Application 51139 was filed on July 23, 1987, by Matley Farms to change the place of use of 11.83 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 130-1, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁷⁹⁵ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 6 - 0.56 acres NE¼ NW¼, Sec. 13, T.18N., R.28E., M.D.B.&M.

Parcel 7 - 1.18 acres SW¼ NW¼, Sec. 13, T.18N., R.28E., M.D.B.&M.

Parcel 8 - 0.89 acres SE¼ NW¼, Sec. 13, T.18N., R.28E., M.D.B.&M.

The application indicates that 0.15 of an acre in the NE¼ NW¼ and 0.29 of an acre in the SW¼ NW¼ of Section 13, T.18N., R.28E., M.D.B.& M. were moved on to a portion of the existing places under Application 47835. The proposed place of use is described as 2.63 acres in the SW¼ NW¼ of Section 13, T.18N., R.28E., M.D.B.& M.

The hearings on these three applications were consolidated into one hearing because they are all covering the same farm unit.

II.

Applications 51137, 51138 and 51139 were protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁷⁹⁶ and more specifically on the grounds as follows:⁷⁹⁷

⁷⁹⁴ Exhibit Nos. 465, 466 and 480, public administrative hearing before the State Engineer, October 7, 1997.

⁷⁹⁵ Exhibit No. 468, public administrative hearing before the State Engineer, October 7, 1997.

⁷⁹⁶ Exhibit Nos. 461, 467, 469, public administrative hearing before the State Engineer, October 7, 1997.

- Parcel 1 - Abandonment
- Parcel 2 - Partial lack of perfection, partial forfeiture, partial abandonment
- Parcel 3 - Abandonment
- Parcel 4 - Lack of perfection, forfeiture, abandonment
- Parcel 5 - Abandonment
- Parcel 6 - Lack of perfection, forfeiture, abandonment
- Parcel 7 - Lack of perfection, forfeiture, abandonment
- Parcel 8 - Lack of perfection, forfeiture, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 51137, 51138, 51139

Parcel 1 (1.28 remaining after withdrawal from original 1.93 acres requested under Application 51138) Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated March 23, 1909, covering the existing place of use and which provides for the exchange of pre-Project vested water rights for Project water rights.⁷⁹⁸ The State Engineer finds the contract date is March 23, 1909, and evidences the water right is based on a pre-Project vested water right.

Parcel 2 (1.00 acre under Application 51137 and 2.96 acres under Application 51138) - Exhibit LLL from the 1989 administrative hearing contains two documents covering the 5 distinct existing places under this parcel.⁷⁹⁹ "An Agreement" dated March 23, 1909, provides for the exchange of 23 acres of pre-Project vested water rights for Project water rights in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.18N., R.28E., M.D.B.& M. A second document in Exhibit LLL, an "Application for Permanent Water Right" dated March 20, 1954, added an additional three acres of water rights to the $\frac{1}{4}$ $\frac{1}{4}$ section of

⁷⁹⁷ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

⁷⁹⁸ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

⁷⁹⁹ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

land, however, further evidence provided indicates⁸⁰⁰ that those three acres were already being irrigated by June 11, 1953, but without the benefit of a water right. At the 1997 administrative hearing, the applicant provided an additional document covering the existing places of use in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The applicant provided a document entitled "Application for Permanent Water Right" dated August 20, 1943,⁸⁰¹ which added an additional 10 acres of water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section of land, and further evidence was provided⁸⁰² which indicated that those 10 acres were already being irrigated by August 12, 1943. Exhibit Nos. 482 and 483 provided a sketch of the general location of the vested water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section of land, however, it is impossible to determine the location of those acres which were added under the 1943 and 1954 contracts. The State Engineer finds that for the narrow strip of land along the eastern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land below the oddly shaped polygon the contract date is March 23, 1909. The State Engineer finds for the remaining 3 parcels of land comprising the existing place of use in this $\frac{1}{4}$ $\frac{1}{4}$ section of land the contract dates are August 20, 1943, and March 20, 1954.

Parcel 3 (1.38 acres remaining after withdrawal from 2.53 acres requested under Application 51138) Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated March 23, 1909, covering the existing place of use and which provides for the exchange of pre-Project vested water rights for Project water rights.⁸⁰³ The State Engineer finds the contract date is March

⁸⁰⁰ Exhibit No. 489 public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰¹ Exhibit No. 484 public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰² Exhibit Nos. 487 and 488, public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰³ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

23, 1909, and said contract evidences the water right is based on a pre-Project vested water right.

Parcel 4 (1.15 acres under Application 51138) - Exhibit LLL from the 1989 administrative hearing contains two documents covering the 2 distinct existing places under this parcel.⁸⁰⁴ An "Agreement" dated March 23, 1909, provides for the exchange of 33 acres of pre-Project vested water rights for Project water rights. A second document in Exhibit LLL, an "Application for Permanent Water Right" dated March 20, 1954,⁸⁰⁵ added an additional three acres of water rights to the $\frac{1}{4}$ $\frac{1}{4}$ section of land, however, further evidence provided⁸⁰⁶ indicates that those three acres were already being irrigated by June 11, 1953. Using Exhibit Nos. 462, 482 and 483 (which provide the general location of the vested water rights in this $\frac{1}{4}$ $\frac{1}{4}$ section of land), the State Engineer finds that the location of the existing place of use on the east side of the $\frac{1}{4}$ $\frac{1}{4}$ is not within the area described as covered by the 1909 Agreement exchanging vested water rights, but rather appears to be covered by the March 20, 1954, water right application. As to the existing place of use on the west edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land, the State Engineer finds it is within the area described as being covered by the pre-Project water right under the 1909 Agreement. The State Engineer finds the contract date for the existing place of use on the east side of the $\frac{1}{4}$ $\frac{1}{4}$ section of land is March 20, 1954, and the contract date for the existing place of use on the west side of the $\frac{1}{4}$ $\frac{1}{4}$ section of land is March 23, 1909.

Parcel 5 (0.68 acres remaining after withdrawal from 1.38 acres requested under Application 51138) Exhibit LLL from the 1989

⁸⁰⁴ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰⁵ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰⁶ Exhibit No. 489 public administrative hearing before the State Engineer, October 7, 1997.

administrative hearing contains an "Agreement" dated March 23, 1909, covering the existing place of use and which provides for the exchange of pre-Project vested water rights for Project water rights.⁸⁰⁷ The State Engineer finds the contract date is March 23, 1909, and said contract evidences the water right is based on a pre-Project vested water right.

Parcel 6 (0.56 acres under Application 51139) - Exhibit LLL from the 1989 administrative hearing contains documents covering the existing place of use under this parcel.⁸⁰⁸ An "Agreement" dated March 23, 1909, provides for the exchange of 28 acres of pre-Project vested water rights for Project water rights. The protestant alleges that the contract date is inconclusive as it believes a second document in Exhibit LLL, an "Application for Permanent Water Right" dated December 14, 1929, also covers this parcel. The State Engineer finds that the December 14, 1929, document does not even describe the relevant $\frac{1}{4}$ $\frac{1}{4}$ section of land (the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13, T.18N., R.28E., M.D.B.& M.) identified as encompassing this existing place of use. The State Engineer finds as to the eastern most portion of the existing place of use⁸⁰⁹ water was moved onto that portion of the existing place of use under the permit granted in 1985 under Application 47835. Application 47835 was not protested by the Pyramid Lake Paiute Tribe on the grounds at issue here and the State Engineer has already agreed with the other applicants that he will not revisit those transfers already confirmed by the courts such as Application 47835. The State Engineer finds the only contract in evidence covering the $\frac{1}{4}$ $\frac{1}{4}$ section of land encompassing the existing place of

⁸⁰⁷ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰⁸ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

⁸⁰⁹ See Exhibit 462, public administrative hearing before the State Engineer, October 7, 1997.

use is the March 23, 1909, Agreement evidencing the exchange of pre-Project vested water rights for Project water rights. Therefore, the State Engineer finds the contract date is March 23, 1909.

Parcel 7 (1.18 acres under Application 53119) - Exhibit LLL from the 1989 administrative hearing contains documents covering the existing places under this parcel.⁸¹⁰ An "Agreement" dated March 23, 1909, provides for the exchange of 31 acres of pre-Project vested water rights for Project water rights. A second document, an "Application for Permanent Water Right" dated December 14, 1929, added two additional acres of water righted land in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The State Engineer finds that the western most portion of the existing place of use found on the southern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section was moved onto the existing place of use under the permit granted under Application 47835. Application 47835 was not protested by the Pyramid Lake Paiute Tribe on the grounds at issue here and the State Engineer has already agreed with the other applicants that he will not revisit those transfers already confirmed by the courts such as Application 47835. The State Engineer finds from examining Exhibit Nos. 462, 482 and 483 that the March 23, 1909, Agreement evidencing the exchange of pre-Project vested water rights for Project water rights is the contract document for the remaining portion of the existing place of use along the southern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land. Therefore, as to the portion of the existing place of use on the southern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section not covered under Permit 47835 the State Engineer finds the contract date is March 23, 1909. From examining those same exhibits, it is apparent that the December 14, 1929, contract must be the applicable document for that portion of the existing place of use in the northwest corner of the $\frac{1}{4}$ $\frac{1}{4}$ section of land.

⁸¹⁰ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

Parcel 8 (0.89 acres under Application 51139) - Exhibit LLL from the 1989 administrative hearing contains documents covering the existing place of use under this parcel.⁸¹¹ An "Agreement" dated March 23, 1909, provides for the exchange of 21 acres of pre-Project vested water rights for Project water rights. A second document, an "Application for Permanent Water Right" dated December 14, 1929, added 18 additional acres of water righted land in this $\frac{1}{4}$ $\frac{1}{4}$ section of land. The State Engineer finds from examining Exhibit Nos. 462, 482 and 483 that the March 23, 1909, Agreement evidencing the exchange of pre-Project vested water rights for Project water rights is the contract document for some of the land in the middle of the existing place of use along the southern edge of the $\frac{1}{4}$ $\frac{1}{4}$ section of land, and the December 14, 1929, document covers the remaining lands in this existing place of use. Therefore, the State Engineer finds the contract dates are March 23, 1909, and December 14, 1929.

II.

PERFECTION

Parcel 2 - The contract dates are March 23, 1909, August 20, 1943, and March 20, 1954. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that the pre-Project vested water rights were perfected as a matter of fact and law. The State Engineer finds that the evidence itself demonstrates that the water rights under the August 20, 1943, contract were perfected as the water right holder at the time was instructed to apply for a water right for areas that he was irrigating that were not water righted which resulted in the August 20, 1943, contract.⁸¹² Therefore, the State Engineer finds the water rights under that contract were perfected as a matter of

⁸¹¹ Exhibit No. 463, public administrative hearing before the State Engineer, October 7, 1997.

⁸¹² Exhibit Nos. 487 and 488, public administrative hearing before the State Engineer, October 7, 1997.

fact. The State Engineer finds that the evidence itself demonstrates that the water rights under the March 20, 1954, contract were perfected as the water right holder at the time was instructed to apply for a water right for areas that he was irrigating that were not water righted which resulted in the March 20, 1954, contract.⁸¹³ Therefore, the State Engineer finds the water rights under that contract were perfected as a matter of fact. The State Engineer finds the protestant's claims of lack of perfection are without merit as demonstrated by the evidence provided. Furthermore, as to the 1909 contract, the PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸¹⁴ which indicates from aerial photographs that in 1948 the land use on the existing place of use was described as a farm yard, road and canal. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1909 and 1948. Also, the protestant's witness testified as to irrigation of a portion of the existing place of use as demonstrated in Exhibit No. 473.⁸¹⁵ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on that portion of this parcel covered by the 1909 contract between 1909 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and perfection under the other two contracts was proven.

Parcel 4 - The contract dates are March 23, 1909, and March 20, 1954. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that the pre-Project vested

⁸¹³ Exhibit No. 489, public administrative hearing before the State Engineer, October 7, 1997.

⁸¹⁴ Exhibit No. 475, public administrative hearing before the State Engineer, October 7, 1997.

⁸¹⁵ Exhibit No. 473, public administrative hearing before the State Engineer, October 7, 1997.

water rights were perfected as a matter of fact and law. Exhibit Nos. 487 and 488 demonstrate that the existing place of use under the March 20, 1954, contract was already being irrigated before the contract date as the irrigator was instructed that he had to apply for a water right for lands he was irrigating without the benefit of a water right. The State Engineer finds that evidence alone proves perfection of the water right on that portion of the existing place of use on the east side of this $\frac{1}{4}$ $\frac{1}{4}$ section of land under the 1954 contract. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸¹⁶ which indicates from aerial photographs that in 1948 the land use on the existing place of use was described as a road and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on the portion of this parcel covered by the 1909 contract between 1909 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on that portion of this parcel covered by the 1909 contract between 1909 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel, and perfection under the 1954 contract was proven.

Parcel 6 - The contract date is March 23, 1909, except for that land where the water right was moved onto the existing place of use under Permit 47835. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that the pre-Project vested water rights were perfected as a matter of fact and law. As to the water moved onto the existing place of use under Permit 47835, Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change

⁸¹⁶ Exhibit No. 475, public administrative hearing before the State Engineer, October 7, 1997.

application is filed.⁸¹⁷ As to the portion of the parcel under the 1909 contract, the PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸¹⁸ which indicates from aerial photographs that in 1948 the land use on the existing place of use was described as a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1909 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on that portion of this parcel covered by the 1909 contract between 1909 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 7 - The contract dates are March 23 1909, and December 14, 1929, except for that land where the water right was moved onto the existing place of use under Permit 47835. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that for that land covered by the 1909 Agreement which exchanged pre-Project vested water rights for Project water rights that the water right was perfected as a matter of fact and law. As to the water moved onto the existing place of use under Permit 47835, Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁸¹⁹ As to the portion of the parcel under the 1909 and 1920 contracts, the PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸²⁰ which indicates from aerial photographs that in 1948 the land use on the

⁸¹⁷ NRS § 533.325 and 533.324.

⁸¹⁸ Exhibit No. 475, public administrative hearing before the State Engineer, October 7, 1997.

⁸¹⁹ NRS § 533.325 and 533.324.

⁸²⁰ Exhibit No. 475, public administrative hearing before the State Engineer, October 7, 1997.

existing place of use was described as bare land, road and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1909/1929 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1909/1929 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

Parcel 8 - The contract dates are March 23 1909, and December 14, 1929. The State Engineer specifically adopts and incorporates General Finding of Fact X and finds that for that land covered by the 1909 agreement which exchanged pre-Project vested water rights for Project water rights that the water right was perfected as a matter of fact and law. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸²¹ which indicates from aerial photographs that in 1948 the land use on the existing place of use was described as a road and ditch. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1909/1929 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1909/1929 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel.

III.

FORFEITURE AND ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be

⁸²¹ Exhibit No. 475, public administrative hearing before the State Engineer, October 7, 1997.

subject to the doctrines of forfeiture or abandonment. The applicant's testimony and exhibits demonstrate that all the existing and proposed places of use are within his property,⁸²² and that the transfer applications relative to his farm were to get the records in compliance with the actual irrigation practices of the farm. The State Engineer finds that all water rights requested for transfer under Applications 51137, 51138 and 51139 were water rights in ownership of the applicants, all were being used by the applicants prior to the filing of the transfer applications, and are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further finds the evidence demonstrates that all the water was being used within the farm unit at the time of the transfers precluding a claim of intent to abandon the water rights.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸²³

II.

PERFECTION

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 2, 4, 6, 7 and 8.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that the water rights requested for transfer under Applications 51137, 51138 and 51139 are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the applications were filed to correct the records as to

⁸²² Exhibit Nos. 462, 480, Transcript, pp. 3021-3024, 3055-3105, public administrative hearing before the State Engineer, October 7, 1997.

⁸²³ NRS Chapter 533 and Order of Remand from Federal District Court.

where the water was actually being used to irrigate farm property. The State Engineer further concludes as to those parcels with appurtenant water rights under the March 23, 1909, contract the water rights were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provision of NRS § 533.060. The State Engineer further concludes that the applicants were using the water on their farm at the time of the transfer applications precluding a claim of intent to abandon the water rights.

RULING

The protests to Applications 51137, 51138 and 51139 are hereby overruled and the State Engineer's decisions granting Applications 51137, 51138 and 51139 are hereby affirmed.

APPLICATION 51237

GENERAL

I.

Application 51237 was filed on August 27, 1987, by Howard and Barbara Wolf to change the place of use of 19.25 acre-feet annually, a portion of the decreed waters of the Truckee River and Carson Rivers previously appropriated under the Serial Number 864, Claim No. 3 Orr Ditch Decree and Alpine Decree.⁸²⁴ The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 5.50 acres NW¼ NE¼, Sec. 34, T.20N., R.29E., M.D.B.&M.

The proposed place of use is described as 5.50 acres NW¼ NE¼, Section 34, T.20N., R.29E., M.D.B. & M.

II.

Application 51237 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁸²⁵ and more specifically on the grounds as follows:⁸²⁶

Parcel 1 - Lack of perfection, abandonment.

FINDINGS OF FACT

I.

CONTRACT DATE 51237

Parcel 1 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated May 9, 1907, which covers the existing place of use, and demonstrates that the water right is based on a pre-Project vested water right. The State Engineer finds the contract date is May 9, 1907.

⁸²⁴ Exhibit No. 426, public administrative hearing before the State Engineer, September 23, 1997.

⁸²⁵ Exhibit No. 427, public administrative hearing before the State Engineer, September 23, 1997.

⁸²⁶ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997.

II.

PERFECTION

Parcel 1 - The contract date is May 9, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁸²⁷ which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road, bare land, natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

III.

ABANDONMENT

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of abandonment.

The applicant does not agree that the protestant's witness had properly located himself on the aerial photographs as to the existing place of use.⁸²⁸ The applicant has had the land surveyed and believes those survey marks correspond with a blue line ignored by the protestant's witness on the aerial photographs for lining up the transparency that he used to determine the existing place of

⁸²⁷ Exhibit No. 432, public administrative hearing before the State Engineer, September 23, 1997.

⁸²⁸ Transcript, pp. 2875-2895, public administrative hearing before the State Engineer, September 23, 1997.

use. The applicant testified that the existing place of use is not under a road and that when he bought the property in 1965 the existing place of use was clover being irrigated as pasture.⁸²⁹ The applicant further testified that several years after he purchased the property he re-leveled it and moved the water to the proposed place of use,⁸³⁰ however, later testimony made it confusing as to whether the applicant moved the water or not.⁸³¹ The State Engineer finds that the protestant did not sufficiently prove to the State Engineer that its witness had properly located the existing place of use making suspect his land use determinations and he will accept the applicant's description of the existing place of use.

The evidence demonstrates that all the existing and proposed places of use are within the applicants' property.⁸³² The State Engineer finds that the water right requested for transfer under Application 51237 was in applicants' ownership, most, if not all, of the water was being used by the applicants prior to the filing of the transfer application, and the transfer is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further finds the evidence does not demonstrate the land use on the existing place of use at the time of the transfer application was inconsistent with irrigated agriculture and the applicants were using some, if not all, of the water subject of this application, precluding a claim of an intent to abandon the water right.

⁸²⁹ Transcript, pp. 2888-2889, public administrative hearing before the State Engineer, September 23, 1997.

⁸³⁰ Transcript, pp. 2889-2892, public administrative hearing before the State Engineer, September 23, 1997.

⁸³¹ Transcript, pp. 2904-2905, public administrative hearing before the State Engineer, September 23, 1997.

⁸³² Exhibit No. 436, Attachment 4, public administrative hearing before the State Engineer, September 23, 1997.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸³³

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes that the water right requested for transfer under Application 51237 is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the applicants were using the water at the time the application was filed precluding any claim of abandonment.

RULING

The protest to Application 51237 is hereby overruled and the State Engineer's decision granting Application 51237 is affirmed.

⁸³³ NRS Chapter 533 and Order of Remand from Federal District Court.

APPLICATION 51738

GENERAL

I.

Application 51738 was filed on January 5, 1988, by Louie A. Guazzini, Jr. and Lila L. Guazzini to change the place of use of 134.66 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 694, 3349, 3336, 726-2-B, 3031, 3022, 1030-8-F, 1030-10-A, 1028-1-E, 741-2, 738-1-A, 738-6, 738-7-A-1, 695, 538-12-B-B, 3226, 601-4, Claim No. 3 Orr Ditch Decree, and Alpine Decree, and Permit 47809.⁸³⁴ The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 1.70 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 35, T.19N., R.29E., M.D.B.&M.⁸³⁵
- Parcel 2 - 4.40 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 35, T.19N., R.29E., M.D.B.&M.⁸³⁶
- Parcel 3 - 0.73 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 31, T.19N., R.29E., M.D.B.&M.
- Parcel 4 - 0.50 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 33, T.19N., R.29E., M.D.B.&M.
- Parcel 5 - 0.32 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 25, T.19N., R.28E., M.D.B.&M.
- Parcel 6 - 14.20 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.19N., R.29E., M.D.B.&M.
- Parcel 7 - 0.20 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 34, T.19N., R.28E., M.D.B.&M.
- Parcel 8 - 0.15 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.
- Parcel 9 - 0.30 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 36, T.19N., R.28E., M.D.B.&M.
- Parcel 10 - 0.30 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 14, T.20N., R.24E., M.D.B.&M.
- Parcel 11 - 0.27 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 13, T.20N., R.24E., M.D.B.&M.
- Parcel 12 - 4.52 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 27, T.19N., R.29E., M.D.B.&M.
- Parcel 13 - 3.00 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as 0.20 of an acre in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 9.70 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 13.90 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 3.79 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, all within Section 35, T.19N., R.29E., M.D.B.& M., and 3.00 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, T.19N., R.29E., M.D.B.& M.

⁸³⁴ Exhibit No. 550, public administrative hearing before the State Engineer, October 21, 1997.

⁸³⁵ Moved to this existing place of use under Application 47809.

⁸³⁶ 3.70 acres moved to this existing place of use under Application 47809.

By letter dated July 12, 1999, as amended, the applicant withdrew the transfer requests from Parcel 3, all but 0.45 of an acre from Parcel 4, Parcels 5, 7, 8, 9, 10, 11 and 12.

II.

Application 51738 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁸³⁷ and more specifically on the grounds as follows:⁸³⁸

- Parcel 1** - Lack of perfection, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 4** - Partial lack of perfection, abandonment
- Parcel 6** - Partial forfeiture, partial abandonment
- Parcel 13** - Lack of perfection, forfeiture, abandonment.

By letter dated January 6, 1999, the protestant conceded it has no claim as to a 0.45 of an acre portion of the 0.50 of an acre existing place of use (Parcel 4) found in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, T.19N., R.29E., M.D.B. & M., and conceded it has no claim as to a 3.09 acre portion of the 14.20 acre existing place of use (Parcel 6) found in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, T.19N., R.29E., M.D.B. & M.⁸³⁹

FINDINGS OF FACT

I.

CONTRACT DATES 51738

Parcel 1 - Exhibit RRR from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated December 31, 1907, under the name of J.S. Harmon which covers this existing place of use.⁸⁴⁰ At the 1997 administrative hearing, the

⁸³⁷ Exhibit No. 551 public administrative hearing before the State Engineer, October 21, 1997.

⁸³⁸ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

⁸³⁹ File No. 51738, official records in the office of the State Engineer. Exhibit No. 559, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁴⁰ Exhibit No. 553, public administrative hearing before the State Engineer, October 21, 1997.

applicant provided a patent dated February 3, 1906, covering the existing place of use.⁸⁴¹ While the patent indicates activity on the land around 1906, the 1907 certificate does not provide any information as to an earlier water right application or vesting date. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is December 31, 1907.

Parcel 2 - Exhibit RRR from the 1991 administrative hearing contains an "Application for Permanent Water Right" dated June 11, 1951, covering 12.70 irrigable acres in the NE¼ NW¼ of Section 35, T.19N., R.29E., M.D.B.& M.⁸⁴² At the 1997 administrative hearing, the applicant provided a patent dated February 3, 1906, covering the existing place of use.⁸⁴³ While the patent indicates activity on the land around 1906, the 1951 application does not provide any information as to an earlier water right application or vesting date. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds the contract date is June 11, 1951, and that water rights were initiated on this parcel on June 11, 1951.

Parcel 4 - Exhibit RRR from the 1991 administrative hearing contains an "Agreement" dated April 12, 1907, providing for the exchange of pre-Project vested water rights for Project water rights on this existing place of use.⁸⁴⁴ The State Engineer finds the contract date is April 12, 1907, and evidences the water rights on this parcel are based on pre-Project vested water rights.

⁸⁴¹ Exhibit No. 548, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁴² Exhibit No. 553, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁴³ Exhibit No. 549, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁴⁴ Exhibit No. 553, public administrative hearing before the State Engineer, October 21, 1997.

Parcel 6 - Exhibit RRR from the 1991 administrative hearing contains an "Agreement" dated April 25, 1907, under the name of Frank Peterson which covers the existing place of use in the NW¼ NW¼ of Section 36, T.19N., R.29E., M.D.B. & M. and provides for the exchange of pre-Project vested water rights for Project water rights.⁸⁴⁵ Exhibit RRR also contains a June 17, 1915, "Water-right Application for Lands in Private Ownership" filed by George Williams also covering irrigable lands described as being within the W½ NW¼ of said Section 36. Very faintly written on the April 25, 1907, "Agreement" next to the name of Frank Peterson is the name of George Williams which the State Engineer finds ties the two documents together.

The State Engineer finds that in the early 1900's, when horse drawn equipment was used to level the land, 7 years was not an unreasonable amount of time to develop a farm, and the 1915 document merely adds more land under cultivation than covered under the 1907 "Agreement". Both contracts are contained in Exhibit RRR, and the hand written name of George Williams on the 1907 contract ties the two contracts together, therefore, the State Engineer finds that the June 17, 1915, application, was filed to merely expand the size of the farm and was within a reasonable amount of time considering the time period in which these farms were developed. Therefore, the State Engineer finds under the doctrine of relation back the contract date is April 25, 1907, and water rights were initiated on this existing place of use on April 25, 1907.

Parcel 13 - Exhibit RRR from the 1991 administrative hearing contains an "Agreement" dated April 25, 1907, under the name of Frank Peterson which covers the existing place of use in the SW¼ NW¼ of Section 36, T.19N., R.29E., M.D.B. & M. and provides for the exchange of pre-Project vested water rights for Project water

⁸⁴⁵ Exhibit No. 553, public administrative hearing before the State Engineer, October 21, 1997.

rights.⁸⁴⁶ Exhibit RRR also contains a June 17, 1915, "Water-right Application for Lands in Private Ownership" filed by George Williams also covering irrigable lands described as being within the W½ NW¼ of said Section 36. Very faintly written on the April 25, 1907, "Agreement" next to the name of Frank Peterson is the name of George Williams which the State Engineer finds ties the two documents together.

The State Engineer finds that in the early 1900's, when horse drawn equipment was used to level the land, 7 years was not an unreasonable amount of time to develop a farm, and the 1915 document merely adds more land under cultivation than covered under the 1907 "Agreement". Both contracts are contained in Exhibit RRR, and the hand written name of George Williams on the 1907 contract ties the two contracts together, therefore, the State Engineer finds that the June 17, 1915, application, was filed to merely expand the size of the farm and was within a reasonable amount of time considering the time period in which these farms were developed. Therefore, the State Engineer finds under the doctrine of relation back the contract date is April 25, 1907, and water rights were initiated on this existing place of use on April 25, 1907. The State Engineer finds this determination is supported by the fact that under related Application 47809 for this parcel there is a third document that is relevant, that being an "Agreement" dated December 28, 1907, conveying pre-Project vested water rights for Project water rights on the S½ NW¼ of said Section 36.⁸⁴⁷

⁸⁴⁶ Exhibit No. 553, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁴⁷ Exhibit No. 540, public administrative hearing before the State Engineer, October 21, 1997.

II.

PERFECTION

Parcel 1 - The contract date is December 31, 1907. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸⁴⁸ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. This is true particularly in light of the fact that this application presents the situation in that 1.70 acres of water rights were moved onto this existing place of use under Application 47809, but the December 31, 1907, certificate provides there were water rights on this parcel at an earlier time. The State Engineer finds the protestant's claim of lack of perfection makes no sense in the context of the fact that water was transferred to this existing place of use under Application 47809 granted in 1985, therefore, the protestant's evidence of perfection, or lack thereof, from 1948 through 1984 is irrelevant.⁸⁴⁹ The State Engineer finds that Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁸⁵⁰

⁸⁴⁸ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁴⁹ The State Engineer found the protestant had not proved its sole claim of lack of perfection under Application 47809.

⁸⁵⁰ NRS § 533.325 and 533.324.

Parcel 2 - The contract date is June 11, 1951. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸⁵¹ which indicates from aerial photographs that in 1948 and 1962 the land use on this parcel was described as bare land and structures. The protestant did not provide any evidence other than a 1948 and 1962 photograph as its evidence that a water right was not perfected on this parcel between 1951 and 1962. As with Parcel 1, this application presents the situation that out of the 4.40 acres existing place of use 3.70 acres of water rights were moved on to this existing place of use under Application 47809. The State Engineer finds that Nevada Water Law allows for the filing of a change application based on a permit where the water has not yet been applied to the intended beneficial use before the change application is filed.⁸⁵² The State Engineer finds that a 1962 photograph is not sufficient evidence to prove that a water right was never perfected on that portion of the parcel described as bare land between 1951 and 1962, and no evidence was provided as to the location of the structures to specifically identify and locate that land, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer finds the protestant's claim of lack of perfection makes no sense in the context of the fact that water was transferred to the greater percentage of this existing place of use under Application 47809 granted in 1985, therefore, the protestant's evidence of perfection, or lack thereof, from 1948 through 1984 is mostly irrelevant.

Parcel 4 - The contract date is April 12, 1907, and is based on an exchange of pre-Project vested water rights for Project water rights. The PLPT provided evidence in Table 2A - "Land Use

⁸⁵¹ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁵² NRS § 533.325 and 533.324.

Descriptions for Existing Place(s) of Use"⁸⁵³ which indicates from aerial photographs that in 1948 the land use on this parcel was described as irrigated and a road. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. In fact, the protestant proved perfection on 0.45 of an acre of the 0.50 of an acre that comprise the existing place of use.⁸⁵⁴ The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of partial perfection on this parcel, and in fact the protestant proved perfection on all but a minute fraction of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

Parcel 13 - The contract date is April 25, 1907, and is based on pre-Project vested water rights under the doctrine of relation back. The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸⁵⁵ which indicates from aerial photographs that in 1948 the land use on this parcel was described as bare land and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1907 and 1948. The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1907 and 1948, therefore, the protestant did not prove its claim of lack of

⁸⁵³ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁵⁴ Exhibit No. 559, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁵⁵ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

perfection on this parcel. The State Engineer specifically adopts and incorporates General Finding of Fact X that pre-Project vested water rights were perfected as a matter of fact and law.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

Parcel 2 - The contract date is June 11, 1951. The applicant provided testimony and evidence⁸⁵⁶ that the transfer from this parcel is an intrafarm transfer. The State Engineer finds this is an intrafarm transfer not subject to the doctrine of forfeiture pursuant to Judge McKibben's Order of September 3, 1998.

Parcels 6 and 13 - The contract date is April 25, 1907, therefore, the water rights are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁸⁵⁷ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the

⁸⁵⁶ Declaration of Louie Guazzini, filed in the office of the State Engineer on February 16, 1999. Exhibit Nos. 934 and 935, public administrative hearing before the State Engineer, January 14, 1999.

⁸⁵⁷ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

surrounding circumstances."⁸⁵⁸ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁸⁵⁹ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Parcels 1 and 2 - The applicant provided testimony and evidence⁸⁶⁰ that the transfer from this parcel is an intrafarm transfer. The State Engineer finds this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

Parcel 4 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸⁶¹ which indicates from aerial photographs that in 1962, 1972, 1973, 1974, 1975, 1977 and 1984 the land use on this parcel was described as a farm yard, road and portion irrigated. In the 1980 land use description was a farm yard, road and irrigated. The protestant's witness provided

⁸⁵⁸ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁸⁵⁹ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁸⁶⁰ Declaration of Louie Guazzini, filed in the office of the State Engineer on February 16, 1999. Exhibit Nos. 934 and 935, public administrative hearing before the State Engineer, January 14, 1999.

⁸⁶¹ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

evidence that 0.45 of an acre of the 0.50 of an acre existing place of use was irrigated.⁸⁶² At the 1991 administrative hearing, the applicant provided evidence that the existing place of use was cultivated land in 1948 and a city lot in 1991.⁸⁶³ The State Engineer finds the protestant did not prove non-use for the statutory period by clear and convincing evidence.

Parcel 6 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸⁶⁴ which indicates from aerial photographs that in 1948 and 1962 the land use on the two parcels comprising this existing place of use was irrigated land. In 1972, 1973, 1974 and 1975, the land use was described as non-irrigated fields and portion irrigated. In 1977 the land use description was non-irrigated fields, structures and portion irrigated. In 1980 the land use description was bare land, natural vegetation and structures, and in 1984 bare land, natural vegetation, structures and portion irrigated. At the 1991 administrative hearing, the applicant provided evidence that the existing place of use was cultivated land in 1948, but had become a mini-market by 1991.⁸⁶⁵ The State Engineer finds the protestant did not prove non-use of the water right by clear and convincing evidence. Even though a structure appeared in 1980, the location of that structure was not identified, therefore, the protestant did not prove non-use on any specifically identifiable part of the existing place of use by clear and convincing evidence. The evidence from Mr. Guazzini was allowed to be in the form of an affidavit, and a portion of that statement was asked to be stricken

⁸⁶² Exhibit No. 559, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁶³ Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁶⁴ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁶⁵ Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

by the protestant.⁸⁶⁶ The State Engineer finds he need not rule on the motion to strike regarding this parcel as he did not address the objectional statement in making his determination.

Parcel 13 - The PLPT provided evidence in Table 2A - "Land Use Descriptions for Existing Place(s) of Use"⁸⁶⁷ which indicates from aerial photographs that in 1948 the land use was described as bare land and natural vegetation. The 1962 and 1972 land use description was bare land, and from 1973 through 1984 the land use description was bare land and natural vegetation. At the 1991 administrative hearing, the applicant provided evidence that the existing place of use was barren land in 1948 and 1991.⁸⁶⁸ The State Engineer finds that no water was placed to beneficial use on Parcel 13 for the 36 year period from 1948 through 1984. The applicant provided testimony that the transfer from Parcel 13 is an intrafarm transfer.⁸⁶⁹ The State Engineer finds this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸⁷⁰

⁸⁶⁶ Declaration of Louie Guazzini, filed in the office of the State Engineer on February 16, 1999, and Protestant's Motion to Strike, filed in the office of the State Engineer on February 22, 1999,

⁸⁶⁷ Exhibit No. 558, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁶⁸ Exhibit No. 563, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁶⁹ Declaration of Louie Guazzini, filed in the office of the State Engineer on February 16, 1999. The protestant moved to strike the deed attached to Mr. Guazzini's affidavit and said motion is granted. The applicant's legal counsel was well aware that all documentary evidence was to be provided to the protestant prior to the time of the administrative hearing and was not to be part of the affidavit allowed.

⁸⁷⁰ NRS Chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

As to Parcels 1, 2, 4, 6 and 13 the State Engineer concludes that the protestant did not prove its claim of lack of perfection.

III.

FORFEITURE

The State Engineer concludes that the transfers from Parcel 2 and 13 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further concludes as to Parcels 6 and 13 the contracts themselves show the water rights were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer concludes that the transfers from Parcels 1, 2 and 13 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer concludes that the protestant did not prove its claim of abandonment as to Parcels 4, 6 and 7.

RULING

The protest to Application 51738 is hereby overruled. The water rights appurtenant to Parcels 1, 2 and 13 are intrafarm transfers and the State Engineer's decision granting Application 51738 as to those parcels is hereby affirmed with the following clarification. After the State Engineer's decision under Application 47809, only 3.10 acres remains, therefore, the 5.40 acres requested for transfer under this application cannot be supported by Application 47809. The State Engineer's decision granting the transfer of water rights appurtenant to Parcels 4 and 6 is hereby affirmed. Due to the withdrawals requested by the applicant, the permit granted under Application 51738 is amended to allow the transfer of water rights appurtenant to 21.45 acres from

Ruling
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Parcel 4 totalling 93.53 acre-feet to be perfected at the proposed place of use.

APPLICATION 53661

GENERAL

I.

Application 53661 was filed on June 30, 1989, by Virgil Getto to change the place of use of 25.43 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Numbers 630⁸⁷¹ and 652-1-A, Claim No. 3 Orr Ditch Decree, and Alpine Decree.⁸⁷² The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 0.55 acres NE¼ SE¼, Sec. 18, T.19N., R.29E., M.D.B.&M.

Parcel 2 - 1.10 acres NW¼ NE¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

Parcel 3 - 1.35 acres NE¼ NE¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

Parcel 4 - 2.65 acres NW¼ SE¼, Sec. 19, T.19N., R.29E., M.D.B.&M.

The proposed places of use are described as 1.65 acres in the NW¼ SE¼, and 1.50 acres in the NE¼ SE¼, both in Section 18, T.19N., R.29E., M.D.B.& M. and 0.58 of an acre in the NW¼ SE¼, 1.35 acres in the NE¼ SE¼, and 0.57 of an acre in the SW¼ SE¼, all in Section 7, T.19N., R.29E. M.D.B. & M.

II.

Application 53661 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁸⁷³ and more specifically on the grounds as follows:⁸⁷⁴

⁸⁷¹ The State Engineer notes that this serial number when compared to the application map entered as Exhibit 289 is for the proposed place of use and not the serial number identified on the application map for the existing place of use for several parcels. The State Engineer notes that the application map identifies serial numbers 662, 662-1 and 652-1-A as the relevant serial numbers for existing places of use under this application.

⁸⁷² Exhibit No. 287, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁷³ Exhibit No. 288 public administrative hearing before the State Engineer, April 16, 1997.

⁸⁷⁴ Exhibit No. 259, public administrative hearing before the State Engineer, April 15-18, 1997.

- Parcel 1** - Forfeiture, abandonment
Parcel 2 - Lack of perfection, forfeiture, abandonment
Parcel 3 - Partial lack of perfection, partial forfeiture, partial abandonment
Parcel 4 - Partial lack of perfection, abandonment.

By letter dated January 6, 1999, the protestant conceded it has no claim as to a 0.11 of an acre portion of the existing place of use (Parcel 3) found in the NE¼ NE¼ of Section 19, T.19N., R.29E., M.D.B.& M.⁸⁷⁵

FINDINGS OF FACT

I.

CONTRACT DATES 53661

Parcel 1 - The map which accompanied Application 53661 indicates that the water rights on this parcel are found under Serial No. 652-1-A. Exhibit XXX from the 1991 administrative hearing contains several documents covering this parcel of land.⁸⁷⁶

The first, an "Application for Permanent Water Right" dated May 20, 1949, under Serial Numbers 652-1 and 652-4 shows that some of the water rights in the NE¼ SE¼ of Section 18 were initiated under the 1949 contract, and others were initiated under contracts dated 1932 and 1943. The 1932 and 1943 contracts are also included in Exhibit XXX.

The applicant submitted into evidence an October 13, 1913, "Water-right Application for Lands in Private Ownership" which also covers the land described as the Parcel 1 existing place of use.⁸⁷⁷ This contract identifies Serial Number 235, a serial number not identified under either the application or the application map, but as serial numbers changed over time that is not determinative of whether this is the relevant contract document

⁸⁷⁵ File No. 53661, official records in the office of the State Engineer.

⁸⁷⁶ Exhibit No. 290, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁷⁷ Exhibit No. 298, public administrative hearing before the State Engineer, October 20, 1997.

or not. However, the 1949 "Application for Permanent Water Right" makes no mention of the 1913 application.

The State Engineer finds the 1913 contract demonstrates that a water right was initiated on the $\frac{1}{4}$ $\frac{1}{4}$ section of land that encompasses the existing place of use, but nothing in this record sufficiently ties it to the exact existing place of use under consideration here, and in light of the fact that it is not mentioned in the 1949 application while the 1932 and 1943 applications are mentioned draws into question whether the 1913 document is the appropriate document for the State Engineer's consideration.

The State Engineer finds he is not sufficiently convinced that the 1913 document presented by the applicant is a contract covering this parcel of land. While evidence demonstrates that water rights were developed within this $\frac{1}{4}$ $\frac{1}{4}$ section of land around 1911-1913,⁸⁷⁸ no sufficient connection was made to that 1913 document from the 1932, 1943 and 1949 documents accepted as the relevant contract documents during the 1991 administrative hearing. The State Engineer specifically adopts and incorporates General Finding of Fact VIII and finds that the contracts in Exhibit No. 290 are the relevant contract documents. The State Engineer finds he cannot determine from the evidence before him whether the relevant date for the initiation of a water right on this existing place of use is either the 1932, 1943 or 1949 contract.

Parcel 2 - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application" dated July 11, 1918, in the name of Caroline Getto covering the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19, T.19N., R.29E., M.D.B. & M. which is described as Farm Unit "A" and includes Parcel 2.⁸⁷⁹ Exhibit XXX also includes a "Certificate of Filing

⁸⁷⁸ Exhibit Nos. 296 and 297, public administrative hearing before the State Engineer, October 21, 1997.

⁸⁷⁹ Exhibit No. 290, public administrative hearing before the State Engineer, April 16, 1997.

Water Right Application" dated February 24, 1908, under the name of Charles Hoover covering 76 acres of irrigable land within the 80 acres described as Farm Unit "A". The State Engineer finds that the February 24, 1908, "Certificate of Filing Water Right Application" shows that water was first applied for use on this parcel on February 24, 1908, and the 1918 contract evidences an assignment of the 1908 water right to Caroline Getto. The State Engineer finds the contract date for this parcel is February 24, 1908.

Parcel 3 - Exhibit XXX from the 1991 administrative hearing contains a "Water-right Application" dated July 11, 1918, in the name of Caroline Getto covering the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19, T.19N., R.29E., M.D.B. & M. which is described as Farm Unit "A" and includes Parcel 3.⁸⁸⁰ Exhibit XXX also includes a "Certificate of Filing Water Right Application" dated February 24, 1908, under the name of Charles Hoover covering 76 acres of irrigable land within the 80 acres described as Farm Unit "A". The State Engineer finds that the February 24, 1908, "Certificate of Filing Water Right Application" shows that water was first applied for use on this parcel on February 24, 1908, and the 1918 contract evidences an assignment of the 1908 water right to Caroline Getto. The State Engineer finds the contract date for this parcel is February 24, 1908.

Parcel 4 - Exhibit XXX from the 1991 administrative hearing contains a "Certificate of Filing Water Right Application" dated November 12, 1908.⁸⁸¹ There is no dispute that this is the correct contract date, therefore, the State Engineer finds that the contract date for this parcel is November 12, 1908.

⁸⁸⁰ Exhibit No. 290, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁸¹ Exhibit No. 290, public administrative hearing before the State Engineer, April 16, 1997.

II.

PERFECTION

Parcel 2 - The contract date is February 24, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place of Use"⁸⁸² which indicates from aerial photographs that in 1948 the land use on Parcel 2 was described as a road, canal, bare land, and natural vegetation. The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 3 - The contract date is February 24, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place of Use"⁸⁸³ which indicates from aerial photographs that in 1948 the land use on Parcel 3 was described as a canal and adjacent land, and natural vegetation. The protestant conceded that in 1984 0.11 of an acre was irrigated.⁸⁸⁴ At the 1997 administrative hearing, testimony presented on behalf of the applicant indicated that the road was not part of the existing place of use.⁸⁸⁵

The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not

⁸⁸² Exhibit No. 293, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁸³ Exhibit No. 293, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁸⁴ File No. 53661, official records in the office of the State Engineer. Letter dated January 6, 1999.

⁸⁸⁵ Transcript, p. 3359, public administrative hearing before the State Engineer, October 20, 1997.

prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

Parcel 4 - The contract date is November 12, 1908. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place of Use"⁸⁸⁶ which indicates from aerial photographs that in 1948 the land use on Parcel 4 was described as a ditch, bare land, and irrigated. The State Engineer finds a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1908 and 1948, therefore, the protestant did not prove its claim of lack of perfection on this parcel. In fact, the protestant conceded that 2.19 acres of this parcel was irrigated.⁸⁸⁷ The State Engineer specifically adopts and incorporates General Conclusion of Law II which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

III.

FORFEITURE

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrines of forfeiture or abandonment.

Evidence was introduced in the form of deeds covering most of the proposed places of use and the existing places of use and

⁸⁸⁶ Exhibit No. 293, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁸⁷ Transcript, p. 3313, public administrative hearing before the State Engineer, October 20, 1997

testimony was presented that showed that the transfer requests in Parcels 1, 2 and 3 are intrafarm transfers,⁸⁸⁸ not subject to the forfeiture provisions of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998.

The State Engineer further finds as to Parcels 2 and 3 the contracts are dated 1908, evidencing the water rights were initiated prior to March 22, 1913, and are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.⁸⁸⁹ "Abandonment, requiring a union of acts and intent is a question of fact to be determined from all the surrounding circumstances."⁸⁹⁰ Non-use for a period of time may inferentially be some evidence of intent to abandon,⁸⁹¹ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land use is inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to

⁸⁸⁸ Exhibit Nos. 896, 899, 900, 901, 902, 906, 910, 911, 912, 913, 914, 916, 917, 918, 924; Transcript, pp. 4770-4475, public administrative hearing before the State Engineer, January 13, 1999.

⁸⁸⁹ State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁸⁹⁰ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁸⁹¹ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

Testimony and evidence in the form of deeds covering the proposed places of use and the existing places of use showed that the transfer requests in Parcels 1, 2, 3 and 4 are intrafarm transfers,⁸⁹² not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

Testimony was provided at the 1985 and the 1996 hearings that the owner of the water right under Application 48465 had continually paid the assessments and taxes due on these water rights and that none were delinquent.⁸⁹³ Further, the applicant testified that he never intended to abandon any of the water rights,⁸⁹⁴ and in fact, the water was being used on the farm precluding a claim of intent to abandon the water rights, and he was given instructions to apply for the transfer to properly indicate where he was irrigating his property.⁸⁹⁵

⁸⁹² Exhibit Nos. 896, 899, 900, 901, 902, 906, 910, 911, 912, 913, 914, 916, 917, 918, 924; Transcript, pp. 4770-4775, public administrative hearing before the State Engineer, January 13, 1999.

⁸⁹³ Exhibit No 24, public administrative hearing before the State Engineer, October 15-18, 1996. Transcript p. 71, public administrative hearing before the State Engineer, June 24, 1985. Exhibit No. 49, public administrative hearing before the State Engineer, November 12-15, 1996.

⁸⁹⁴ Transcript, pp. 2243-2244, public administrative hearing before the State Engineer, April 16, 1997.

⁸⁹⁵ Transcript, pp. 4771-4772, public administrative hearing before the State Engineer, January 13, 1999.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸⁹⁶

II.

PERFECTION

As to Parcels 2, 3 and 4 the State Engineer concludes that the protestant did not prove its claim of lack of perfection.

III.

FORFEITURE

The State Engineer concludes that the transfers from Parcels 1, 2 and 3 are intrafarm transfers not subject to the forfeiture provision of NRS § 533.060 pursuant to Judge McKibben's Order of September 3, 1998. The State Engineer further concludes as to Parcels 2 and 3 that since the contract date is 1908 the water rights were initiated in accordance with the law in effect prior to March 22, 1913, and therefore, are not subject to the forfeiture provision of NRS § 533.060.

IV.

ABANDONMENT

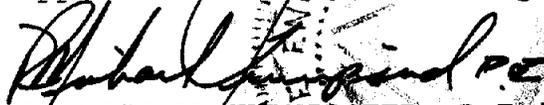
The State Engineer concludes that the transfers from Parcels 1, 2, 3 and 4 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and the water rights were being used on the farm precluding an intent to abandon the water rights.

⁸⁹⁶ NRS Chapter 533 and Order of Remand from Federal District Court.

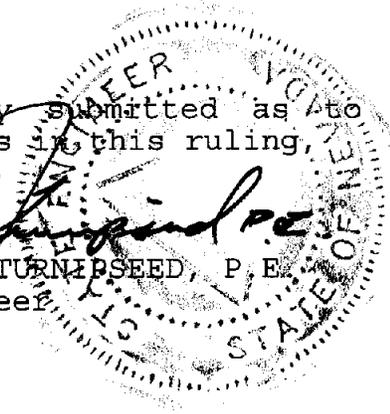
RULING

The protest to Application 53661 is hereby overruled and the State Engineer's decision granting Application 53661 is hereby affirmed.

Respectfully submitted as to all applications in this ruling,



R. MICHAEL TURNIPSEED, P. E.
State Engineer



RMT/SJT/cl

Dated this 24th day of
September, 1999.