

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

IN THE MATTER OF APPLICATIONS )  
65700, 66229, AND 66963 FILED TO )  
CHANGE THE PLACE OF USE )  
OF THE PUBLIC WATERS OF A )  
SURFACE WATER SOURCE WITHIN )  
THE CARSON DESERT HYDROGRAPHIC )  
BASIN (101), CHURCHILL COUNTY, )  
NEVADA. )

RULING

**#5078**

GENERAL

I.

Application 65700 was filed on December 7, 1999, by the United States of America, Fish and Wildlife Service to change the place of use of 2,881.19 acre-feet annually (afa) (963.61 acres at 2.99 acre-feet per acre), a portion of the water previously appropriated under Truckee-Carson Irrigation District ("TCID") Serial Nos. 819-2, 821, 821-6, 824-1, 825, 827, 831, 2169, 2169-A, and 2169-B, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>1</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 35.83 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 04, T.19N., R.31E., M.D.B.&M.  
Parcel 2 - 37.26 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 04, T.19N., R.31E., M.D.B.&M.  
Parcel 3 - 29.47 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 04, T.19N., R.31E., M.D.B.&M.  
Parcel 4 - 8.47 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 05, T.19N., R.31E., M.D.B.&M.  
Parcel 5 - 24.49 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 05, T.19N., R.31E., M.D.B.&M.  
Parcel 6 - 30.61 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 05, T.19N., R.31E., M.D.B.&M.  
Parcel 7 - 37.79 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 05, T.19N., R.31E., M.D.B.&M.  
Parcel 8 - 5.14 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 05, T.19N., R.31E., M.D.B.&M.  
Parcel 9 - 18.31 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.  
Parcel 10 - 33.89 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.  
Parcel 11 - 12.38 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.  
Parcel 12 - 26.45 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.  
Parcel 13 - 36.41 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.  
Parcel 14 - 34.72 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.

<sup>1</sup> Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) ("Orr Ditch Decree"); and Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) ("Alpine Decree").

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Parcel 15 - 3.99 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 07, T.19N., R.31E., M.D.B.&M.  
Parcel 16 - 38.08 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 17 - 34.80 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 18 - 36.64 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 19 - 37.22 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 20 - 23.12 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 21 - 35.73 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 22 - 21.00 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 23 - 25.10 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 24 - 25.00 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 25 - 20.74 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 26 - 36.58 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 27 - 27.73 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 28 - 18.43 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 29 - 25.31 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 08, T.19N., R.31E., M.D.B.&M.  
Parcel 30 - 21.21 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 17, T.19N., R.31E., M.D.B.&M.  
Parcel 31 - 37.29 acres SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 17, T.19N., R.31E., M.D.B.&M.  
Parcel 32 - 37.64 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 17, T.19N., R.31E., M.D.B.&M.  
Parcel 33 - 20.99 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 18, T.19N., R.31E., M.D.B.&M.  
Parcel 34 - 35.79 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 18, T.19N., R.31E., M.D.B.&M.  
Parcel 35 - 30.00 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 18, T.19N., R.31E., M.D.B.&M.

The proposed place of use is described as "all Federally-owned or controlled lands within the approved boundary of Stillwater National Wildlife Refuge, as described in Exhibit "A" and attached map"<sup>2</sup> (and attached as Exhibit 1 to this ruling). The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 963.61 acres from which the 2.99 acre-feet per acre are transferred under this application, and 3.5 acre-feet for the 156.65 water-righted acres remaining at the existing place of use.

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<sup>2</sup> File No. 65700, official records on the office of the State Engineer.

II.

Application 66229 was filed on March 30, 2000, by the United States of America, Fish and Wildlife Service to change the place of use of 1,238.76 afa (414.3 acres at 2.99 acre-feet per acre), a portion of the water previously appropriated under TCID Serial Nos. 6-A-1, 6-A-2, 6-A-3, 6-A-4, 13-1, 13-2, 13-3, 20, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>3</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

Parcel 1 - 37.74 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 12, T.17N., R.28E., M.D.B.&M.  
Parcel 2 - 38.56 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 12, T.17N., R.28E., M.D.B.&M.  
Parcel 3 - 21.91 acres NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 12, T.17N., R.28E., M.D.B.&M.  
Parcel 4 - 23.08 acres NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 12, T.17N., R.28E., M.D.B.&M.  
Parcel 5 - 21.22 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 12, T.17N., R.28E., M.D.B.&M.  
Parcel 6 - 9.58 acres SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 12, T.17N., R.28E., M.D.B.&M.  
Parcel 7 - 16.12 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 8 - 35.48 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 9 - 36.74 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 10 - 16.74 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 11 - 20.00 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 12 - 29.00 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 13 - 37.68 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 14 - 37.34 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 13, T.17N., R.28E., M.D.B.&M.  
Parcel 15 - 21.11 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 24, T.17N., R.28E., M.D.B.&M.  
Parcel 16 - 12.00 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Sec. 24, T.17N., R.28E., M.D.B.&M.

The proposed place of use is described as "all Federally-owned or controlled lands within the approved boundary of Stillwater National Wildlife Refuge, as described in Exhibit "A" [and attached as Exhibit No. 1 to this ruling] and supporting map filed with Serial No. 65700 hereby incorporated by reference and Carson Lake Area, as described in Exhibit "B" and attached map" (attached as Exhibit No. 2 to this ruling). The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed." Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly

<sup>3</sup> File No. 66229, official records in the office of the State Engineer.

reserves the right to transfer in a later proceeding the remaining 0.51 acre-feet per acre for each of the 414.3 acres from which the 2.99 acre-feet per acre are to be transferred by this application, and 3.5 acre-feet for the 54.7 water-righted acres remaining at the existing place of use.

### III.

Application 66963 was filed on November 29, 2000, by the United States of America, Fish and Wildlife Service to change the place of use of 470.81 afa (157.46 acres at 2.99 acre-feet per acre), a portion of the water previously appropriated under TCID Serial No. 23, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>4</sup> The proposed point of diversion is described as being located at Lahontan Dam. The existing places of use are described as:

- Parcel 1 - 40.00 acres NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 35, T.17N., R.28E., M.D.B.&M.
- Parcel 2 - 40.00 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 35, T.17N., R.28E., M.D.B.&M.
- Parcel 3 - 40.00 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 35, T.17N., R.28E., M.D.B.&M.
- Parcel 4 - 37.46 acres SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Sec. 35, T.17N., R.28E., M.D.B.&M.

The proposed place of use is described as "all Federally-owned or controlled lands within the approved boundary of Stillwater National Wildlife Refuge, as described in Exhibit "A" [and attached as Exhibit No. 1 to this ruling] and supporting map filed with Serial No. 65700 hereby incorporated by reference and Carson Lake Area, as described in Exhibit "B" and supporting map filed with Serial No. 66229" (attached as Exhibit No. 2 to this ruling). The proposed manner of use is described as the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being "as decreed."

Under the remarks set forth in Item 15 of the application, the applicant indicates that it expressly reserves the right to transfer in a later proceeding 0.51 acre-feet per acre for each of the 157.46 acres from which the 2.99 acre-feet per acre are to be transferred by this application, and 3.5 acre-feet for the 2.54 water-righted acres remaining at the existing place of use.

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<sup>4</sup> File No. 66963, official records in the office of the State Engineer.

IV.

Applications 65700, 66229, and 66963 were timely protested by either Churchill County or the City of Fallon or both on many grounds as summarized below.<sup>5</sup>

1. The application is defective on its face and should be denied or in the alternate amended and republished since it requests a change in the manner of use since the decreed use is for irrigation and the applied use is for the maintenance of wetlands for recreation and wildlife/storage.

2. The attempted reservation of 0.51 acre-feet is precluded under the Alpine Decree since this is a change in manner of use. The State Engineer must determine the return flow requirement at the same time he rules on the consumptive use change.

3. The application, if granted, would reduce return flows (drain flows) of water in the Newlands Project, which historically have provided benefits as inflow to the Stillwater and Carson Lake wetlands areas, said reduction in return flow quantities would also impair the quality of return flow waters reaching said wetlands areas.

4. The application, if granted, would impair the quality of return flows to Lahontan Valley wetlands areas in violation of the federal Clean Water Act and Nevada's water quality regulations promulgated thereunder by the Nevada Division of Environmental Protection.

5. The application fails to specifically identify the proposed place of use, for example, where are the 963.61 acres under Application 65700 located; therefore, the application is defective.

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<sup>5</sup> File Nos. 65700, 66229, and 66963, official records in the office of the State Engineer.

6. The application, if granted, would violate Nevada law, because it would have a detrimental effect on the City of Fallon and other owners of existing water rights within the Newlands Reclamation Project.

7. The application, if granted, would violate Federal Reclamation Law, 43 U.S.C. § 389 by (a) having a detrimental effect on existing water rights in the Newlands Project, and (b) violating the trust and contract obligations of the United States as to Newlands Reclamation Project water-right owners, including the City of Fallon.

8. The application, if granted, would violate the Alpine and Orr Ditch Decrees and Nevada v. US, 463 U.S. 110 (1983).

9. The application, if granted, would threaten to prove detrimental to the public interest because reservation of the 0.51 acre-feet per acre would remove water resources from Lahontan Valley aquifer recharge areas and deplete the ground-water supply from which the City of Fallon's appropriated water rights are drawn.

10. The application, if granted, would conflict with and impair the City of Fallon's existing water rights because the reservation of 0.51 acre-feet per acre would remove water resources from Lahontan Valley aquifer recharge areas and deplete the ground-water supply from which the City of Fallon's appropriated water rights are drawn.

11. The application, if granted, would adversely effect the cost of charges for delivery of water and lessen efficiency in the delivery of water to other Newlands Reclamation Project water right owners in violation of Nevada law found in NRS § 533.370(1)(b).

12. The application, if granted, would have an adverse effect on the tax base of Churchill County and would thereby be detrimental to the public interest.

13. The application, if granted, would create a potential dust hazard and air pollution within the City of Fallon and would thereby be detrimental to the public interest.

14. The application, if granted, would present a hazard and danger to health, safety, and welfare of residents and the community because it would jeopardize many thousands of peoples' drinking-water supply.

15. The application, if granted, would be contrary to and violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4300, because it would implement major federal actions prior to the required environmental analysis of the cumulative and synergistic effects of said action to the human environment by way of a programmatic environmental impact statement.

16. The application, if granted, would violate Title II, Public Law 101-618, the Truckee-Carson Pyramid Lake Water Settlement Act because it would violate NEPA.

17. The application, if granted, would violate the Public Law 101-618 because it would violate the Alpine Decree and the Orr Ditch Decree.

18. The application, if granted, would violate the Public Law 101-618 because it would harm vested and perfected water rights.

19. The application, if granted, would violate the Public Law 101-618 because it is prior to mandated ground-water studies and mitigation agreements, which must determine and mitigate effects of such proposed transfers to the domestic water supply of the City of Fallon.

20. The application, if granted, would be detrimental to the public interest of the State of Nevada because it is prior to mandated ground-water studies and mitigation agreements, which must determine and mitigate effects of such proposed transfers to the domestic water supply of the City of Fallon.

21. The application, if granted, would violate NRS § 533.368 because hydrologic and environmental studies analyzing the effects of the proposed application together with other related actions affecting the City of Fallon's water rights and drinking water supply and to the human environment have not been analyzed in a programmatic environmental impact statement as required by

NEPA and the Truckee-Carson Pyramid Lake Water Settlement Act.

22. The application, if granted, would violate the Truckee-Carson Pyramid Lake Water Settlement Act's mandate that water rights be purchased from willing sellers, when in fact the applicant and other agencies of the United States government have created a noncompetitive water-right market; thus, dictating and deflating the value of water rights in the Newlands Project in violation of the Act, and causing damage to the City of Fallon's existing water rights in violation of the Act.

23. The application, if granted, would violate the federal Safe Drinking Water Act because it would reduce aquifer recharge upon which the City water rights draw with a corresponding negative impact on ground-water quantity.

24. The application, if granted, would violate the Farmland Protection Policy Act, PL 97-98, 7 U.S.C. § 4200.

Therefore, the protestants requested that the applications be denied.

#### FINDINGS OF FACT

##### I.

By letter dated March 6, 2001, protestants Churchill County and the City of Fallon indicated that the protest issues under consideration as to these applications are identical to those decided in State Engineer's Ruling No. 4979 and requested the State Engineer withhold action on the applications under consideration here until the Court action became final as to their appeal of State Engineer's Ruling No. 4979. However, they also indicated that in the alternative the State Engineer could issue a ruling without holding a public administrative hearing.<sup>6</sup> On March 14, 2001, the State Engineer set the matter for public administrative hearing. On April 9, 2001, the applicant filed a Motion to Overrule Protests and Rule on Issues Without a Hearing and Issue Permits.<sup>7</sup> Thereafter, by notice dated April 19, 2001,

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<sup>6</sup> File No. 65700, official records in the office of the State Engineer.

<sup>7</sup> Ibid.

the State Engineer cancelled the administrative hearing. The State Engineer finds that the Federal District Court by Order dated July 26, 2001,<sup>8</sup> upheld the State Engineer's decision in State Engineer's Ruling No. 4979, and the Court found that the State Engineer was not required to consider individual transfer applications in the context of the overall proposed program of acquiring water rights for wetlands restoration.

**II.**

By letter dated August 2, 2001, the State Engineer requested the applicant provide additional information as to the applications the subject of this ruling. The State Engineer finds on August 27, 2001, the applicant provided additional information for consideration.

**III.**

A public administrative hearing was held on June 27-28, 2000, on Applications 62314, 62315, 62492, 63464, 63546, 63652, 63802, and 63883.<sup>9</sup> Applications 65700, 66229, and 66963 are similar to those considered at the June 2000 administrative hearing and in State Engineer's Ruling No. 4979. As noted above, the applicant and protestants all indicated their belief that the applications and protest issues under consideration here are identical to those previously considered and ruled upon. The State Engineer finds that testimony and evidence from that June 2000 hearing is of value in the consideration of the issues and applications under consideration in this ruling.

**IV.**

At the public administrative hearing on the applications which were considered in State Engineer's Ruling No. 4979, the Hearing Officer dismissed protest claims identical to those found here under protest claims 7, 8, 17, and 24 as identified above.

Item 7 alleges that the applications, if granted, would

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<sup>8</sup> File No. 62314, official records in the office of the State Engineer.

<sup>9</sup> Transcript and Exhibits, public administrative hearing before the State Engineer, June 27-28, 2000, official records in the office of the State Engineer.

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

The Secretary<sup>10</sup> is hereby authorized, in connection with the construction or operation and maintenance of any project, (a) to purchase or condemn suitable lands or interests in lands for relocation of highways, roadways, railroads, telegraph, telephone, or electric transmissions lines, or any other properties whatsoever, the relocation of which in the judgment of the Secretary is necessitated by said construction or operation and maintenance, and to perform any or all work involved in said relocations on said land or interests in land, other lands or interests in lands owned and held by the United States in connection with the construction or operation and maintenance of said project, or properties now owned by the United States; (b) to enter into contracts with the owners of said properties whereby they undertake to acquire any or all property needed for said relocation, or to perform any or all work involved in said relocations; and (c) for the purpose of effecting completely said relocations, to convey or exchange Government properties acquired or improved under (a) above, with or without improvements, or other properties owned and held by the United States in connection with the construction or operation and maintenance of said project, or to grant perpetual easements therein or thereover. Grants or conveyances hereunder shall be by instruments executed by the Secretary without regard to provisions of law governing the patenting of public lands.

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

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<sup>10</sup> Secretary of the United States Department of Interior.

The State Engineer finds that 43 U.S.C. § 389 does not present any issue relevant to the matter of the applications under consideration here; therefore, the claim should be denied.

Item 8 alleges that the applications, if granted, would violate the Alpine and Orr Ditch Decrees and Nevada v. US. Nevada Revised Statute § 533.365 provides that any interested person may file a written protest against the granting of an application by setting forth with reasonable certainty the grounds of such protest. The State Engineer finds he cannot adequately determine the issues raised by this protest claim as it does not set forth with reasonable certainty the grounds of the protest; therefore, the claim should be denied.

Item 17 alleges that the applications, if granted, would violate Public Law 101-618 because they would violate the Alpine and Orr Ditch Decrees. As noted above, NRS § 533.365 requires the setting forth of protest claims with reasonable certainty. The State Engineer finds that he cannot adequately determine the issues raised by this protest claim as it does not set forth with reasonable certainty the grounds of the protest; therefore, should be denied.

Item 24 alleges that the applications, if granted, would violate the Farmland Protection Policy Act, PL 97-98, 7 U.S.C. § 4200. The purpose of the Farmland Protection Policy Act is to minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to non-agricultural uses, and to assure that Federal programs are administered in a manner that, to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland.<sup>11</sup> The Farmland Protection Policy Act further provides that the:

chapter shall not be deemed to provide a basis for any action, either legal or equitable, by any person or class of persons challenging a Federal project, program, or other activity that may affect farmland:

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<sup>11</sup> 7 U.S.C. § 4201(b).

Provided, that the Governor of an affected State where a State policy or program exists to protect farmland may bring an action in the Federal district court of the district where a Federal program is proposed to enforce the requirements of section 4202 of this title and regulations issued pursuant thereto.<sup>12</sup>

The State Engineer finds this protest issue presents no issue relevant to the matters before the State Engineer, and further finds that the protestants do not even have standing to raise the issue of the Farmland Protection Policy Act as that privilege is reserved to the Governor; and therefore, should be denied.

V.

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

The Alpine Decree provides that the net consumptive use of surface water for irrigation on the Newlands Project is 2.99 acre-feet per acre<sup>13</sup> and that changes in manner of use from irrigation to any other use and changes in place of use applications shall be allowed only for the net consumptive use of the water right as determined by the Decree.<sup>14</sup> A witness for the applicants during the administrative hearing, which resulted in State Engineer's Ruling No. 4979, testified that these applications were filed based on a strategy developed in cooperation with the Nevada Division of Water Resources, Nevada Division of State Lands and the Nevada Division of Wildlife as to the complex issue of what was the appropriate duty of water to be used in transfer

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<sup>12</sup> 7 U.S.C. § 4209.

<sup>13</sup> Alpine Decree at 3.

<sup>14</sup> Alpine Decree at 161-162.

applications of this type, that is, from irrigation to wetlands.<sup>15</sup> The witness indicated that the problem arose from the fact that the Alpine Decree was issued in 1980, but the authorization to expand the purposes of the Newlands Reclamation Project to include wildlife purposes and wetlands did not come until 1990.<sup>16</sup> Therefore, there was a consensus that the Alpine Decree did not contemplate an appropriate duty for wetlands because at the time of the decree there was no authorization to create wetlands within the Newlands Project.<sup>17</sup>

The witness testified that at the discussions mentioned, there were two camps: one that says the Alpine Decree provides that for any uses other than irrigation, only the 2.99 acre-feet per acre consumptive use can be moved, and the other camp arguing that it is not really a change in manner of use in that whether one irrigates alfalfa for cows and horses or irrigates grasses for wildlife it is not a change in manner of use that triggers a reduction which only allows changing the 2.99 acre-feet per acre consumptive use.<sup>18</sup>

The applications themselves have left room for interpretation. The applications indicate that they are only filed for a change in place of use. However, they also indicate that the existing manner of use is as decreed, which is irrigation, but then indicate that the proposed use of the water is for the "maintenance of wetlands for recreation and wildlife/storage." On their face, this appears to be a change in manner of use. However, in the remarks section of the application, the applicants indicate that from the 3.50 acre-feet

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<sup>15</sup> Transcript, p. 331, public administrative hearing June 27-28, 2000.

<sup>16</sup> The State Engineer assumes the witness was referring the enactment of Public Law 101-618.

<sup>17</sup> Transcript, pp. 332-333, June 27-28, public administrative hearing before the State Engineer.

<sup>18</sup> Transcript, p. 333, June 27-28, public administrative hearing before the State Engineer.

per acre duty as to these irrigation water rights, it is only requesting to transfer 2.99 acre-feet per acre, and is reserving the right to transfer the remaining 0.51 of an acre-foot per acre in a later proceeding. This appears to indicate that the applicants do not believe these applications are requesting a change in manner of use.

The notices published as to Applications 65700, 66229 and 66963 indicate that the proposed manner of use will be as decreed.<sup>19</sup> The notices published reflect the applicants' filings and indicate these applications were not viewed as being a change in manner of use.

In the original Alpine Decree issued by the Federal District Court, which adjudicated the waters of the Carson River,<sup>20</sup> the Court discussed the water use at Carson Pasture and Stillwater areas in a section of the decision dealing with vested water rights acquired by purchase by the United States. The Court noted that the

United States owns lands within the Newlands Project. Referred to in this case generally as the Carson Pasture area and the Stillwater area, these lands comprise some 17,000 to 20,000 acres. Testimony indicated that these areas receive water largely from drainage or seepage from Project farms and very occasionally from direct flows. The amount of land actually irrigated varies greatly from year to year depending on the available water. (Emphasis added.)<sup>21</sup>

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

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<sup>19</sup> File Nos. 65700, 66229 and 66963, official records in the office of the State Engineer.

<sup>20</sup> U.S. v. Alpine Land and Reservoir Co., 503 F.Supp. 877 (1980).

<sup>21</sup> Id. at 882.

Nevada Revised Statute § 533.023 (enacted in 1989) provides that as used in chapter 533 "'wildlife purposes' includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." However, this statute was actually enacted in conjunction with the establishment of certain fees for the issuance of a water right permits for wildlife purposes and did not contemplate the issue before the State Engineer today.<sup>22</sup> By the way these change applications were filed, the State Engineer is confronted with the issue of whether or not these applications are actually requesting a change in manner of use, and recognizing that the Alpine Decree did not address a duty for the use of water for wetlands.

The protestants' witness at the June 27-28, 2000, administrative hearing, Claire Mahannah, testified that he was involved in the Carson River adjudication, which resulted in the Alpine Decree, regarding the consumptive use issue.<sup>23</sup> Mr. Mahannah indicated the intent of the Alpine Decree allowing the transfer of only the 2.99 acre-feet per acre consumptive use portion of an irrigation water right to another manner and place of use was that the 0.51 of an acre-foot per acre be left in the system for the downstream users on the Carson River.

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

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<sup>22</sup> Act of July 5, 1989, ch. 741 § 1 (1989).

<sup>23</sup> Transcript, pp. 107-111, June 27-28, 2000, public administrative hearing before the State Engineer.

under the definition of wildlife purposes does that mean that lands irrigated for wildlife purposes could not fall under the definition of irrigation.

In South Dakota, the irrigation/wetlands issue seen here was addressed from a slightly different perspective. The USFWS had filed applications to obtain a vested right permit, an amendment to an existing permit, and a new permit.<sup>24</sup> The use of water under the application was to provide a refuge and breeding grounds for migratory birds and wildlife, and one of the applications requested a change in point of diversion and place of use from some irrigated land.<sup>25</sup>

The South Dakota Water Board found that the use in question was an "irrigation use" under statute and regulation,<sup>26</sup> and that the proposed use of water for the provision of habitat for migratory birds and wildlife, and in particular to create marshes, sloughs, wet meadows and small patches of open water was a beneficial use of water.<sup>27</sup> On appeal, the South Dakota Supreme Court<sup>28</sup> indicated that South Dakota has a statute which provides that all streams in South Dakota are assigned the beneficial uses of irrigation and wildlife propagation and stock watering. It was argued that no beneficial use existed because the water used for a wildlife refuge was not irrigation. The Board found and the court agreed that a beneficial use existed even though crops are not

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<sup>24</sup> In the Matter of Application of the United States Fish and Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application of No. 1921-2 to Change the Location of Land and Diversion Point Authorized Under Water Permit No. 265-2; and Water Right Application No. 2191-2.

<sup>25</sup> See, Findings of Fact, Conclusions of Law and Final Decisions, dated January 7, 1993, In the Matter of Application of the United States Fish and Wildlife Service for Vested Water Right No. 1927-2; Water Permit Application of No. 1921-2 to Change the Location of Land and Diversion Point Authorized Under Water Permit No. 265-2; and Water Right Application No. 2191-2, South Dakota Water Management Board.

<sup>26</sup> *Id.* at Finding of Fact XLVII.

<sup>27</sup> *Id.* at Finding of Fact LXI.

<sup>28</sup> DeKay v. U.S. Fish and Wildlife Service, 524 N.W.2d 855 (SD 1994).

harvested by human beings, but by migratory birds and wildlife. The court held that a beneficial use from irrigation is not limited to raising traditional cash crops. Under ARSD 74:02:01:01(4), irrigation is providing moisture for any plant growth. The court concluded that even if it were not an irrigation use, it was a beneficial use. The court held that under ARSD 74:03:04:01, the use of water for aquatic plant growth for wildlife propagation is a beneficial use of water whether or not it constitutes irrigation.

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

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

The State Engineer finds in light of the Alpine Court's description of the use of water on the Carson Lake Pasture and Stillwater areas as a form of irrigation, and the fact that the use is for the plant growth of meadows and marshes, the use is similar enough to the irrigation of crops that these applications

are not requesting a change in manner of use.

**VI.**

The protestants allege that the attempted reservation of 0.51 of acre-foot per acre is precluded under the Alpine Decree since this is a change in manner of use, and that the State Engineer must determine the return flow requirement at the same time he rules on the consumptive use change. The State Engineer has already found these applications are not requesting a change in manner of use.

**VII.**

The protestants allege that the applications, if granted, would reduce return flows (drain flows) of water in the Newlands Project, which historically have provided benefits as inflow to the Stillwater and Carson Lake wetlands areas, and said reduction in return flow quantities would also impair the quality of return flow waters reaching said wetlands areas. The State Engineer finds the purpose of these applications is to get direct flows to serve the Stillwater and Carson Lake areas, and since drain flows often are not the best quality water, the mixing of direct flows will improve the quality of water flowing to these areas not impair it.

**VIII.**

The protestants allege that the applications, if granted, would impair the quality of return flows to Lahontan Valley wetlands areas in violation of the federal Clean Water Act and Nevada's quality regulations promulgated thereunder by the Nevada Division of Environmental Protection. The State Engineer finds just because there may be less return flows that does not necessarily mean the quality of those waters will change, particularly when they will be replaced with direct flows of better quality water.

**IX.**

The protestants allege that Application 65700 fails to specifically identify the proposed place of use, i.e., where is the 963.61 acres under Application 65700 located; therefore, the application is defective. The State Engineer finds the proposed

place of use is identified in the application.

**X.**

The protestants allege that the applications, if granted, would violate Nevada law, because they would have a detrimental effect on the City of Fallon and other owners of existing water rights within the Newlands Reclamation Project. The State Engineer finds there is no information to support this protest claim, and as discussed later in this ruling, these water rights are being moved from areas not considered substantially important areas of aquifer recharge.

**XI.**

The protestants alleges that approval of the applications would violate the Safe Drinking Water Act because it would reduce aquifer recharge upon which the residents draw with a corresponding negative impact in ground-water quality. At the June 27-28, 2000, administrative hearing, the only evidence these same protestants provided in support of this protest claim was to cite to p. 88 in Exhibit No. 44 which indicates that irrigation has resulted in decreased concentrations of sulfate, chloride and dissolved solids beneath irrigated lands and removing land from irrigation could cause a change in the concentration of these constituents.<sup>29</sup>

The protestants previously alleged in the applications relevant to the June 27-28, 2000, administrative hearings that the applications, if granted, would threaten to prove detrimental to the public interest because they would remove water resources from lands within aquifer recharge areas and deplete the ground-water supply from which the City of Fallon's appropriated water rights are drawn.

Nevada Revised Statute § 533.370 provides that if the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, the State Engineer shall reject the application. Further, Nevada Revised Statute § 533.040

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<sup>29</sup> Transcript, pp. 72-73, June 27-28, 2000, public administrative hearing before the State Engineer.

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

In this case, neither the City of Fallon nor Churchill County specifically identified which water rights they were in fact concerned about in relation to these change applications, but it is safe to assume they are junior in priority to the surface-water rights decreed for the Newlands Project, which have a 1902 priority date,<sup>30</sup> even without addressing the question that one is a surface-water source and the other a ground-water source. In Nevada, surface water and ground water sources are regulated independently, a fact which was admitted to by the protestants' witness.<sup>31</sup> But note that in the United States Supreme Court case of Cappaert v. U.S.<sup>32</sup>, a junior ground-water right was restricted from pumping in order to protect a senior surface-water right being impacted by said pumping. It was the senior surface-water right which restricted the junior ground-water right. In this case we have the opposite. It is a junior ground-water right which attempts to restrict the change in use of a senior surface-water right. These protestants are arguing that a senior surface-water appropriator must continue to irrigate his land because a junior ground-water appropriator has come to rely on that senior surface-water irrigator applying water to his land which in some fashion may recharge the ground-water source. If this were true, this argument could be extended so far so as to say that a farmer

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<sup>30</sup> The City of Fallon holds municipal water right Permits 19859 and 19860, which have a priority date of 1961, and Permit 26168, which has a priority date of 1971.

<sup>31</sup> See, Nevada Revised Statutes chapters 533 and 534; Transcript, pp. 162, 382, June 27-28, 2000, public administrative hearing before the State Engineer, testimony of applicant's witness.

<sup>32</sup> 426 U.S. 128, 48 L.Ed.2d 523, 96 S.Ct. 2062 (1976).

may never abandon his surface-water right and give up farming because someone else drilled a ground-water well which depends on the farmer applying water to his land. The State Engineer does not believe this position can be supported in law.

The State Engineer in Order No. 1116 recognized the fact that the recharge experienced from surface-water irrigation was declining in the Carson Desert ground-water basin and that existing ground-water permits and certificates exceeded the perennial yield of the ground-water basin, and he thereby restricted further ground-water development in the area.<sup>33</sup> Ground-water development was restricted based on the fact that application of surface water was disappearing, but the order did not restrict the surface water use.

The influence of surface-water irrigation on the ground-water basin has been noted by researchers in the area.

Surface-water irrigation in the Newlands Project has changed the depth to water over large areas of the valley floor since the turn of the century....In 1904, the depth to water increased with distance from the natural channels of the Carson River. Depth to water was less than 10 ft below land surface within 1 to 2 mi of the channels and generally increased to at least 25 ft in areas more than 2 mi from the channels north of Fallon and ranged from 10-25 ft more than 2 mi from the channels south of Fallon. In 1992, the water table had risen more than 15 ft over large areas northeast of Fallon and, near Soda Lake, 25 to 40 ft. Also, a few areas had water levels less than 5 ft below land surface in 1992. The distribution of surface water over irrigated areas of the valley floor has decreased the depth to water in large areas, and installation of drains has increased the depth to water near old channels of the Carson River. Both processes made the depth to water more uniform, ranging from 5 ft to 10 ft below land surface over much of the valley floor.<sup>34</sup>

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<sup>33</sup> State Engineer's Order No. 1116, dated August 22, 1995, official records in the office of the State Engineer.

<sup>34</sup> Exhibit No. 44, p. 32, June 27-28, 2000, public administrative hearing before the State Engineer.

The publication just quoted, Hydrogeology and Potential Effects of Changes in Water Use, Carson Desert Agricultural Area, Churchill County, Nevada<sup>35</sup> described the various ground-water aquifers in the relevant area, including: the shallow aquifer, which is generally less than 10 feet below land surface to a depth of 50 feet; the intermediate aquifer, which is from 50 feet to somewhere between 500-1,000 feet;<sup>36</sup> the deep aquifer, which is somewhere between 500-1,000 feet to bedrock, and the basalt aquifer, which is the main source of water for municipal wells in Fallon and the Fallon Naval Air Station.<sup>37</sup> The description of the various aquifers in Exhibit No. 44 is too lengthy to repeat here, but notes how specialized aquifer characteristics are based on the region where they are located, and how the shallow aquifer is characterized by abrupt changes in lithology and water quality, both horizontally and vertically.<sup>38</sup> "However, detailed studies have shown that directions of shallow ground-water flow vary greatly and are controlled locally by the presence of canals and drains and by irrigation practices on individual fields."<sup>39</sup> "Water-level fluctuations show that the shallow aquifer is recharged by surface-water seepage during the irrigation season...[and] even near areas of ground-water discharge, canals and drains recharge the shallow aquifer. Water-level fluctuations in the shallow aquifer closely match the seasonal fluctuation in

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<sup>35</sup> Exhibit No. 44, June 27-28, 2000, public administrative hearing before the State Engineer, D.K. Maurer, A.K. Johnson, A.H. Welch, Hydrogeology and Potential Effects of Changes in Water Use, Carson Desert Agricultural Area, Churchill County, Nevada, U.S.G.S. Open-File Report 93-463, pp. 33-47 (1994).

<sup>36</sup> Transcript, p. 186, June 27-28, 2000, public administrative hearing before the State Engineer.

<sup>37</sup> Exhibit No. 44, p. 45, June 27-28, 2000, public administrative hearing before the State Engineer.

<sup>38</sup> Exhibit No. 44, p. 37, June 27-28, 2000, public administrative hearing before the State Engineer.

<sup>39</sup> Ibid.

surface-water flow for irrigation, but decrease in amplitude and lag behind fluctuations in surface-water flow with increasing distance from distribution channels and irrigated lands."<sup>40</sup>

It has been demonstrated that there is a potential for downward ground-water flow from the shallow to the intermediate aquifer in the western part of the basin, and the potential for upward ground-water flow from the intermediate aquifer to the shallow aquifer in the remainder of the basin.<sup>41</sup> Areas which have the potential for upward and downward flow between the shallow and intermediate aquifers are shown on Figure 12 in Exhibit No. 44.

The State Engineer finds this is not substantial evidence to prove that these change applications threaten to prove detrimental to the public interest. The State Engineer further finds he does not believe he can force a farmer to continue to irrigate lands with a surface-water source in order to protect the water quality of a junior ground-water user.

As to Application 65700, the existing place of use is already located within or very close to the boundaries of the Stillwater National Wildlife Refuge, and was not irrigated during the 2001 season.<sup>42</sup> As to Application 66229, the existing place of use lies near to Carson Lake and Pasture and most of the land was fallow during the 2001 season.<sup>43</sup> As to Application 66963, the existing place of use lies near to Carson Lake and Pasture and has not been irrigated since the 1998 season.<sup>44</sup> The State Engineer finds there is little recharge going on now as to the existing places of use

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<sup>40</sup> Id. at 39.

<sup>41</sup> Exhibit No. 44, p. 41, June 27-28, 2000, public administrative hearing before the State Engineer.

<sup>42</sup> Declaration of Richard Grimes. File No. 65700, official records in the office of the State Engineer.

<sup>43</sup> Declaration of Richard Grimes. File No. 66269, official records in the office of the State Engineer.

<sup>44</sup> Declaration of Richard Grimes. File No. 66963, official records in the office of the State Engineer.

because the lands have been laying fallow. The State Engineer finds that by just reviewing the applications one can determine that the existing places of use are presently located very close to the wetlands areas where they will be used; therefore, recharge to the ground-water basin should not be really any different under the changes as proposed than it was when these lands were being irrigated, which they are not at the present. As demonstrated by Figure 12 in Exhibit No. 44 from the June 27-28, 2000, administrative hearing, and in the Declaration of Douglas Maurer provided in response to the State Engineer's request for additional information as to these applications, the existing places of use under these applications are outside the area of downward ground-water flow which may affect the recharge to the intermediate or basalt aquifer from which the City of Fallon draws its water. The ground-water gradient of the shallow and intermediate aquifers flows from west to northeast towards the Stillwater wetlands area<sup>45</sup> and the existing places of use under Applications 65700, 66229 and 66963 are in areas where there is upward ground-water flow and recharge to the shallow aquifer from the intermediate aquifer,<sup>46</sup> and where the shallow aquifer is primarily lateral with little connection to the intermediate or basalt aquifer. Previous testimony provided in the administrative hearings resulting in State Engineer's Ruling No. 4979, indicated that in the discharge zone where there is an upward gradient the land use could minimally affect the shallow aquifer, but would have no effect on the intermediate or basalt aquifer.<sup>47</sup>

Nevada Revised Statute § 534.110(4) provides that a condition

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<sup>45</sup> Exhibit No. 44, Figure 10; Transcript, pp. 185-186, June 27-28, 2000, public administrative hearing before the State Engineer.

<sup>46</sup> Exhibit No. 44, Declaration of Douglas Maurer and Declaration of David Prudic, File Nos. 65770, 66229 and 66963, official records in the office of the State Engineer.

<sup>47</sup> Transcript, p. 192, June 27-28, 2000, public administrative hearing before the State Engineer. Declaration of Douglas Maurer and Declaration of David Prudic, File Nos. 65700, 66229 and 66963, official records in the office of the State Engineer.

of each appropriation of ground water acquired pursuant to NRS chapter 534 must allow for a reasonable lowering of the static water level. If another ground-water appropriator were allowed to come into the area, he would not be precluded by the fact that the static water level may drop somewhat. The domestic well owner must expect that there could be a reasonable lowering of the ground-water table based on other uses of the water whether they be new ground-water uses or a change in a surface water use.

Administrative notice was taken during the June 27-28, 2000, administrative hearing of a U.S. Geological Survey Water-Resources Investigation Report 99-4191<sup>48</sup> which examined the responses of shallow ground-water flow within the sedimentary aquifer to possible changes in irrigation practices.<sup>49</sup> Two representative areas were chosen to be modeled each containing about 5,760 acres.

The second area chosen for study is near Stillwater where vertical gradients indicate upward flow through the sedimentary aquifers.<sup>50</sup> The report concludes that in this area water-level declines would average 1.40 feet or less, up to a maximum of 4 feet in the Stillwater area. The greatest water-level declines up to 10 feet were simulated near canals.<sup>51</sup> The State Engineer finds as to Applications 65700, 66229 and 66963 that the areas are not important recharge areas for any of the aquifers and the potential drop in water level in the shallow aquifer in response to the removal of irrigation within the area is reasonable.

The State Engineer understands that as land goes out of agricultural production ground-water recharge may decline, but he does not believe he has the authority to require farming to

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<sup>48</sup> N.B. Herrera, R.L. Seiler, D.E. Prudic, Conceptual Evaluation of Ground-Water Flow and Simulated Effects of Changing Irrigation Practices on the Shallow Aquifer in the Fallon and Stillwater Areas, Churchill County, Nevada, Water-Resources Investigation Report 99-4191, U.S.G.S. 2000.

<sup>49</sup> Id. at 4.

<sup>50</sup> Ibid.

<sup>51</sup> Id. at 68.

continue to support said recharge.

**XII.**

The protestants alleged that if the applications are granted it would adversely affect the cost of charges for delivery of water and lessen efficiency in the delivery of water to other Newlands Reclamation Project water right owners. At the June 27-28, 2000, administrative hearing, the protestants did not provide any testimony or evidence in support of this protest claim. The applicant provided a declaration<sup>52</sup> that the USFWS has agreed to pay the operation and maintenance charges for the water rights being sought to be transferred to the wetlands for the next 40 years. The applicant further provided a declaration that the transfer of water rights to the wetlands would have a negligible effect on project efficiencies.<sup>53</sup>

The State Engineer finds there is no support for the protestants' allegations that these change applications will adversely affect the cost of charges for the delivery of water and lessen efficiency.

**XIII.**

The protestants alleged that if the applications are granted they would have an adverse effect on the tax base and would thereby be detrimental to the public interest. The protestants have raised this argument several times in proceedings before the State Engineer and specifically raised it again as to the applications under consideration in State Engineer's Ruling No. 4979, and at that time did not provide any testimony or evidence in support of this protest claim. The State Engineer finds there is no information that supports this protest claim.

**XIV.**

The protestants alleged that if the applications are granted they would create a potential dust hazard and air pollution within

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<sup>52</sup> Declaration of Richard Grimes, Files Nos. 65700, 66229 and 66963, official records in the office of the State Engineer.

<sup>53</sup> Declaration of Carol Grenier, File Nos. 65700, 66229 and 66963, official records in the office of the State Engineer.

the City of Fallon and would thereby be detrimental to the public interest. As above, the protestants have raised this protest issue at various previous hearings, and did not provide any testimony or evidence at the June 27-28, 2000, administrative hearing in support of this protest claim other than referring to notations in the wetlands environmental impact statement.<sup>54</sup> At the June 27-28, 2000, administrative hearing, the applicants provided evidence that in an area that was previously irrigated once irrigation stops it is likely that native vegetation or some type of groundcover will reestablish itself.<sup>55</sup>

The State Engineer finds there is no information to support this claim and in fact these places are essentially not being irrigated now. The State Engineer believes the dirt roads in Nevada in areas like this are more likely to create a larger dust problem than fields left to go fallow. The State Engineer finds that whether a piece of land presents dust issues after water is removed is not within the purview of his review as to whether a change application should be granted. It is not a question of water law or hydrology and other agencies are designated the responsibility for air quality issues in Nevada.

**XV.**

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

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<sup>54</sup> Final Environmental Impact Statement Water Rights Acquisition for Lahontan Valley Wetlands, Churchill County, Nevada, U.S. Dept. of Interior, Fish and Wildlife Service, September 1996.

<sup>55</sup> Transcript, p. 368; Exhibit Nos. 70, 71, 72, 73, 74, June 27-28, 2000, public administrative hearing before the State Engineer.

**XVI.**

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

**XVII.**

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

**XVIII.**

The protestants allege that the applications, if granted, would violate the Public Law 101-618 because they would harm vested and perfected water rights. The State Engineer found in

State Engineer's Ruling No. 4979 in relation to the protest claim that approval of the applications would violate Public Law 101-618 because they would impair existing water rights that the protestants did not prove impairment of existing water rights. The State Engineer finds the allegation as to these applications to be the same and without proof.

**XIX.**

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

**XX.**

The protestants alleged that the applications, if granted, would violate NRS § 533.368 because hydrologic and environmental studies analyzing the effects of the proposed application together with other related actions effecting the City of Fallon's water rights and drinking water supply and to the human environment have not been analyzed in a programmatic environmental impact statement as required by NEPA and the Truckee-Carson Pyramid Lake Water Settlement Act. Nevada Revised Statute § 533.368 provides the State Engineer with the discretionary authority to determine whether a study is required, but does not mandate one be conducted under NRS § 533.368 when a protestant perceives studies have not

been conducted as required under other federal laws. The State Engineer finds there is no violation of NRS § 533.368.

**XXI.**

The protestants alleged that the applications, if granted, would violate the Truckee-Carson Pyramid Lake Water Settlement Act's mandate that water rights be purchased from willing sellers, when in fact the applicant and other agencies of the United States government have created a non-competitive water-right market; thus, dictating and deflating the value of water rights in the Newlands Project in violation of the Act, and causing damage to the City of Fallon's existing water rights in violation of the Act. The State Engineer finds this protest claim presents no relevant issue of Nevada water law for the State Engineer to consider and is without merit as to his decision making as the State Engineer has no position as to the pricing of water rights.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>56</sup>

**II.**

The State Engineer is prohibited by law from granting a permit under an application to change the public waters where<sup>57</sup>:

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

**III.**

The State Engineer concludes that protest claims identified above as Items 7, 8, 17 and 24 are irrelevant to any issues before the State Engineer or were not plead with reasonable certainty in order for the State Engineer to be able to adequately determine

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<sup>56</sup> NRS chapters 533 and 534.

<sup>57</sup> NRS 533.370(3).

the issues raised by them.

**IV.**

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

**V.**

The State Engineer concludes that the protest claim that the applications would reduce drain flows and impair the water quality of return flows to wetland areas or that by reducing the quality of return flows to Lahontan Valley wetlands areas there will be a violation of the federal Clean Water Act and Nevada's water quality regulations promulgated thereunder by the Nevada Division of Environmental Protection is not established, particularly since the very purpose of these change applications is to move more water to the wetlands areas. The State Engineer concludes that the issue as to whether there is a violation of the federal Clean Water Act or Nevada water quality regulations is not within the areas the State Engineer has been given jurisdiction over under Nevada law. The State Engineer concludes there is nothing that supports this protest allegation and finds just because there may be less return flows that does not necessarily mean the quality of those waters will change, particularly when they will be replaced with direct flows of better quality water.

**VI.**

The State Engineer concludes the proposed place of use is adequately identified under the applications.

**VII.**

The State Engineer concludes the protestants claims that these specific change applications will have a detrimental affect on the City of Fallon or other water right owners in the Newlands Project is not supported by the evidence.

**VIII.**

The State Engineer concludes there is no information or evidence to support the protest claims that these change applications would threaten to prove detrimental to the public interest or conflict with or impair existing water rights by removing water resources from lands within aquifer recharge areas or that these applications would present a hazard to the health, safety and welfare of the community. The State Engineer concludes the applicants proved that the lands at the existing places of use as to Application 65700 are within a discharge not a recharge area, and are already mainly within the boundaries of the wildlife refuge, and are not being irrigated at this time. The State Engineer concludes as to Applications 66229 and 66963 that the existing places of use are outside the area of downward groundwater movement, but rather are in areas where the recharge moves upward from the intermediate aquifer to the shallow aquifer; therefore, impacts to water levels, if any, will be minimal, particularly since the lands are not presently being irrigated. The State Engineer concludes as to these change applications the evidence does not support that these existing places of use are within a significant areas of recharge particularly as to water rights held by the City of Fallon, and Churchill County.

**IX.**

The State Engineer concludes there is no information to support the protest claim that the applications if granted would adversely affect costs of charges for delivery of water or lessen the efficiency in delivery of water to other Newlands Reclamation Project water right holders.

**X.**

The State Engineer concludes there is no information to support the protest claim that the applications if granted would adversely affect the tax base.

**XI.**

The State Engineer concludes there is no information to support the protest claim that the applications if granted would create a potential dust hazard and air pollution, particularly since it is quite likely that some sort of native vegetation will cover these lands, and in light of the State Engineer's conclusion in a similar ruling that the dirt roads in the area have more likelihood of causing dust and air pollution issues than the stripping off water rights of the lands at issue here. The State Engineer concludes that issues as to air quality resulting from water rights being removed are not within the jurisdiction of the State Engineer under Nevada water law.

**XII.**

The State Engineer concludes violations of the National Environmental Policy Act are not within his review under Nevada water law. The State Engineer concludes whether the provisions of Public Law 101-618 are violated because either NEPA is violated or the mandated and prerequisite ground-water studies and mitigation agreements have not been done is for another forum.

**XIII.**

The State Engineer concludes there is no violation of NRS § 533.368 by the fact that the entire water rights acquisition program has not been analyzed in a programmatic environmental impact statement. The State Engineer concludes his job is to review these change applications independently as they are filed and not in consideration of some future unknown change application that might be filed.

**XIV.**

The State Engineer concludes that the issues of market price as to sellers of water rights is not within his jurisdiction and should not be part of his deliberation as to a change application.

**XV.**

The State Engineer concludes there is no information to support the allegation that reduced aquifer recharge would change ground-water quality significantly or that these change

applications will cause violations of the Safe Drinking Water Act. The State Engineer further concludes that violations under the Safe Drinking Water Act are for another forum.

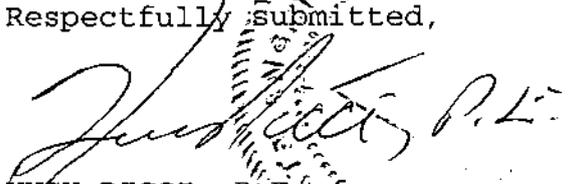
**RULING**

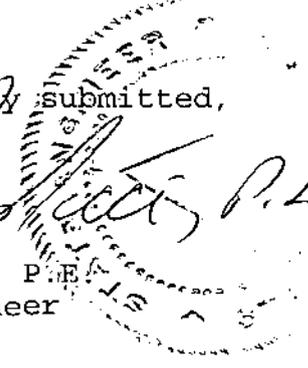
The protests to Applications 65700, 66229 and 66963 are hereby overruled and the applications granted for the 2.99 acre-foot per acre requested for transfer and subject to:

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

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

Respectfully submitted,

  
HUGH RICCI, P.E.  
State Engineer



HR/SJT/hf

Dated this 26th day of  
September, 2001.

**EXHIBIT No. 1**

Exhibit A to the Application 65700 describes the proposed place of use as the following:

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

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

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

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

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

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

**Exhibit No. 2**

Exhibit B to Application 66229 describes the proposed place of use in Carson Lake Area as the following:

In T.16N., R.29E., M.D.B.& M. - tract 37; Section 1 lots 3 to 6, inclusive, S $\frac{1}{2}$  SW $\frac{1}{4}$  and SE $\frac{1}{4}$ ; Section 2 lots 1, 2 and 5 to 10, inclusive, S $\frac{1}{2}$  SE $\frac{1}{4}$ ; Section 3 lots 3, 4, and 6 to 9, inclusive, S $\frac{1}{2}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  and SE $\frac{1}{4}$ ; Section 4 lots 1, 2 and 5 to 7, inclusive, NE $\frac{1}{4}$  SW $\frac{1}{4}$ , S $\frac{1}{2}$  SW $\frac{1}{4}$  and SE $\frac{1}{4}$ ; Section 5 lots 1 to 4, inclusive, S $\frac{1}{2}$  SW $\frac{1}{4}$  and S $\frac{1}{2}$  SE $\frac{1}{4}$ ; Section 6 lots 1 to 3, inclusive, and lots 8, 11, 12, 14 and 17, S $\frac{1}{2}$  SE $\frac{1}{4}$ .

In T.17N., R.29E., M.D.B.& M. - tract 37; tract 38; tract 40; Section 9 lots 4, 6, 8 and 10; Section 19 lots 1 to 4, inclusive.

In T.18N., R.29E., M.D.B.& M. - Section 35, S $\frac{1}{2}$  SE $\frac{1}{4}$ .

In T.16N., R.30E., M.D.B.& M. - Section 5 lots 3 to 6, inclusive, and lots 11 and 12, SW $\frac{1}{4}$ ; Section 6, Lots 1 to 21, inclusive, and SE $\frac{1}{4}$ .

In T.17N., R.30E., M.D.B.& M. - tract 37; Section 5 lots 3 and 4, S $\frac{1}{2}$  NW $\frac{1}{4}$  and SW $\frac{1}{4}$ ; Section 6 lots 1 to 5, inclusive, and lots 9 to 12, inclusive, S $\frac{1}{2}$  NE $\frac{1}{4}$  and SE $\frac{1}{4}$ ; Section 7 lot 4, and lots 7 to 12, inclusive, NW $\frac{1}{4}$  NE $\frac{1}{4}$  and E $\frac{1}{2}$  NE $\frac{1}{4}$ ; Section 8 W $\frac{1}{2}$ ; Section 17 W $\frac{1}{2}$ ; Section 18 lots 1 to 4, inclusive; Section 19 lot 1; Section 20 lots 1 to 4, inclusive; E $\frac{1}{2}$  NW $\frac{1}{4}$  and E $\frac{1}{2}$  SW $\frac{1}{4}$ ; Section 29 lots 1 to 4, inclusive, E $\frac{1}{2}$  NW $\frac{1}{4}$  and E $\frac{1}{2}$  SW $\frac{1}{4}$ ; Section 30 lot 1; Section 31 lots 1, 2, and 6 to 9, inclusive; Section 32 W $\frac{1}{2}$ .