

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

IN THE MATTER OF APPLICATIONS)
67666-T AND 68157-T FILED TO)
CHANGE THE PLACE AND MANNER OF)
USE OF DECREED SURFACE WATERS)
WITHIN THE PYRAMID LAKE VALLEY)
HYDROGRAPHIC BASIN (81) AND THE)
TRACY SEGMENT HYDROGRAPHIC BASIN)
(83), WASHOE COUNTY, NEVADA.)

RULING

5185

GENERAL

I.

Application 67666-T was filed on June 12, 2001, by the United States as trustee for the Pyramid Lake Paiute Tribe of Indians, acting through the Bureau of Indian Affairs, and the Pyramid Lake Paiute Tribe of Indians to change the place and manner of use of 15,344.55 acre-feet annually (afa) (2,745 acres @ 5.59 acre-feet per acre) of water as decreed under Claim No. 2 as set forth in the *Orr Ditch Decree*.¹ Application 67666-T proposes to change the manner of use from irrigation to wildlife purposes, including instream flows for fish. There will be no diversion of the water from the Truckee River as it is to remain in the river from Derby Dam to Pyramid Lake. The existing point of diversion is described as being located in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 19, T.20N., R.23E., M.D.B.&M.,² which is Derby Dam. The proposed place of use is described as the Truckee River downstream of Derby Dam to the Pyramid Lake inlet as shown on the map accompanying Application 67182.

¹ Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) ("*Orr Ditch Decree*").

² Exhibit No. 5, public administrative hearing before the State Engineer, June 18-20, 2002, official records in the Office of the State Engineer. Hereinafter, the exhibits will be referred to solely by their exhibit number and the transcript by page number.

The remarks on the application indicate, among other things, that the water will be used during the irrigation season through November 15th, subject to the condition that no more than 25 per cent of the total water right amount will be used in any one month.³ In addition, no more than 68.6 cubic feet per second (cfs) will be used at any one time. The application further provides that the right sought under the temporary change application voluntarily will be exercised in conjunction with other Tribal water rights for wildlife purposes so as to avoid limitations on diversions of Truckee Meadows water rights pursuant to Article VII(B) of the Truckee River Agreement.

Application 67666-T was protested by the City of Fallon,⁴ Churchill County,⁵ the Truckee-Carson Irrigation District⁶ and the Fallon Paiute-Shoshone Tribe of Indians.⁷ The Fallon Paiute Shoshone Tribe subsequently withdrew its protest.

The *Orr Ditch* Decree provides under Claim No. 2 for the diversion, with a priority date of December 8, 1859, of one-fortieth of one cfs per acre for the irrigation of 2,745 acres of bench lands on the Pyramid Lake Indian Reservation.⁸ The water so

³ The general provisions of the *Orr Ditch* Decree provide that "[n]o owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre feet hereby allowed for the land for the season." *Orr Ditch* Decree at 87. The Federal Water Master testified to his belief that this provision would apply to these applications. Transcript, p. 104.

⁴ Exhibit Nos. 6 & 7.

⁵ Exhibit No. 8.

⁶ Exhibit No. 9.

⁷ File No. 67666-T, official records in the Office of the State Engineer.

⁸ The 1/40th of one cfs per acre for the entire 2,745 acres converts to a total diversion rate of 68.63 cfs.

allowed for bench lands is allowed to be diverted through the Truckee Canal or any other ditch now or thereafter constructed as the United States may desire or authorize; provided that the amount of water for bench land shall not exceed during any calendar year 5.59 acre-feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre-feet per acre applied to the lands for the aggregate number of acres of land being irrigated during any calendar year.

II.

Application 68157-T was filed on October 31, 2001, by the United States as trustee for the Pyramid Lake Paiute Tribe of Indians, acting through the Bureau of Indian Affairs, and the Pyramid Lake Paiute Tribe of Indians (PLPT) to change the place and manner of use of 9,914.00 afa (2,105 acres @ 4.71 acre-feet per acre), a portion of the water decreed under Claim No. 1 of the *Orr Ditch Decree*. Application 68157-T proposes to change the manner of use from irrigation to wildlife purposes, including instream flows for fish. There will be no diversion of the water from the Truckee River as it is to remain in the river from Indian Ditch to Pyramid Lake.⁹ The existing point of diversion is Indian Ditch. The proposed place of use is described as the Truckee River downstream of Indian Ditch to the Pyramid Lake inlet as shown on the map accompanying Application 67182.

The remarks on the application indicate, among other things, that the water to be transferred will be used during the irrigation season through November 15th, subject to the condition that no more than 25 per cent of the total water right amount will be used in any one month. In addition, no more than 33.0 cfs will be used at any time. The application further provides that the right sought under the temporary change application voluntarily will be exercised in conjunction with other Tribal water rights

⁹ Exhibit No. 10.

for wildlife purposes so as to avoid limitations on diversions of Truckee Meadows water rights pursuant to Article VII(B) of the Truckee River Agreement.

Application 68157-T was protested by the Truckee Meadows Water Authority,¹⁰ Churchill County,¹¹ the City of Fernley,¹² the Truckee-Carson Irrigation District,¹³ and the City of Fallon.¹⁴

The *Orr Ditch* Decree provides under Claim No. 1 for the diversion, with a priority date of December 8, 1859, through Indian Ditch of not exceeding 58.7 cfs, to an amount not exceeding 14,742 afa of water in any calendar year for the irrigation of 3,130 acres of bottom lands on the Pyramid Lake Indian Reservation, provided that the amount of water so diverted shall not exceed a flow of one-miner's inch, or one-fortieth of one cfs per acre for the aggregate number of acres of land being irrigated during any calendar year,¹⁵ and the amount of water applied to the land after an estimated transportation loss of 15 percent shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cfs per acre for the total number of acres irrigated, and provided that the amount of water diverted during any such year shall not exceed 4.71 acre-feet per acre for the aggregate number of acres of land being irrigated during that year, and further provided

¹⁰ Exhibit No. 11.

¹¹ Exhibit No. 12.

¹² Exhibit No. 13.

¹³ Exhibit No. 14.

¹⁴ Exhibit No. 15.

¹⁵ The 1/40th of one cfs per acre for the entire 3,130 acres converts to a total diversion rate of 78.25; however, the decree provides an upper limit on the diversion rate of 58.7 cfs. If the allowed diversion rate were proportioned by ratio to the authorized acreage, 39.33 cfs would be that portion of the diversion rate assignable to 2,105 acres.

that the amount of water applied to the land shall not exceed 4 acre-feet per acre of the aggregate number of acres of land being irrigated during any calendar year.

III.

Applications 67666-T (Claim No. 2) and 68157-T (Claim No. 1) were protested on various grounds. Like other filings, these protestants included many, many protest issues. In order to address all the issues, the State Engineer has organized them by grouping them into major groups based on the general protest grounds. The groups include issues as to: (1) lack of perfection, forfeiture, abandonment; (2) the Truckee River Agreement; (3) Nevada Revised Statute § 533.325; (4) Public Law 101-618, The Truckee-Carson-Pyramid Lake Water Settlement Act (the Act); (6) settlement in the Indian Claims Commission; (7) defective applications; (8) use of the water would violate the Endangered Species Act; (9) primary purposes of the Reservation; and (10) injury to other users.

PERFECTION, FORFEITURE, ABANDONMENT

- * **Claim Nos. 1 and 2** - The water rights have not been perfected, and thus, have been extinguished because no efforts have even been commenced for initial works of diversion and improvements to place the water to beneficial use demonstrating a chosen lack of diligence.
- * **Claim Nos. 1 and 2** - The water rights have been abandoned, because although provided for in the *Orr Ditch Decree*, they have never been put to beneficial use despite fifty years of opportunity nor has any attempt been made to initiate use of these water rights, and such chosen and conscious neglect demonstrates they have been conclusively abandoned.
- * **Claim Nos. 1 and 2** - If the water rights were vested or initiated after March 22, 1913, they have been forfeited due to their continuous nonuse for five consecutive years.
- * **Claim Nos. 1 and 2** - Because the water rights have been

abandoned, forfeited or never perfected, and thus, extinguished, the granting of the applications with the requested priority date would conflict with, injure and impair existing *Orr Ditch* Decree water rights within the Newlands Project, including those owned by the City of Fallon and others, said water rights being administered by the United States as trustee for the City of Fallon through the United States' agent the Truckee-Carson Irrigation District (TCID), and interfere with the ability of TCID to fulfill its obligations under its contracts with the United States and Newlands Project landowners.

- * **Claim Nos. 1 and 2** - Because the water rights have been abandoned, forfeited or never perfected, and thus, extinguished, the granting of the applications would per se be detrimental to the public interest of the State of Nevada.
- * **Claim Nos. 1 and 2** - The granting of the applications, based on extinguished water rights, is equivalent to approving a new water right, which will reduce water available to the Newlands Project under the *Orr Ditch* Decree, thus, impairing the City of Fallon's Newlands Project water rights, and further impairing the City's permitted groundwater rights.
- * **Claim Nos. 1 and 2** - The granting of the applications would injure existing *Orr Ditch* Decree water rights and the Decree prohibits the transfer of water rights if it will cause injury to existing rights under the Decree. Such injury will occur because the initiation of this purported water right that has never been perfected, or has been abandoned or forfeited, reduces the total amount of water available to be diverted at Derby Dam to the Newlands Project.

- * **Claim Nos. 1 and 2** - State Engineer Ruling No. 4683 granted the Tribe's Applications 48061 and 48494. These applications evidenced the applicant's intent to appropriate all of the unappropriated water in the Truckee River and its tributaries not subject to valid existing water rights. Since Claim No. 2 has never been put to beneficial use or permitted by the State Engineer, it is not clear whether the water falls under the "unappropriated" water category or the "valid existing rights" category. If the Claim No. 2 right was placed in the unappropriated water category they have been granted to the Tribe for the same instream/in situ use for which it applies under the applications with a priority date of 1984 and the applications should be denied.
- * **Claim Nos. 1 and 2** - Because the water rights have been abandoned, forfeited or never perfected, and thus, extinguished, the granting of the applications with the requested priority date, would conflict with, injure and impair existing permitted groundwater rights owned by the City of Fallon, which supply its municipal water system upon which its 8,300 residents rely, specifically Permits 19859, 19860, 26168, 40869 and 55507.
- * **Claim No. 1** - The City of Fernley protested Application 68157-T on the grounds that since the portion of the water right requested to be changed has never been perfected, the application represents the request for a new use and the US' and Tribe's attempt to initiate a new use for such a huge amount of water would have severe detrimental impacts on the existing uses and legal rights on the River, including loss of water from the City of Fernley as a municipal owner of Newlands Project Orr Ditch decreed water rights, representing thousands of community residents who rely in part on the recharge, diversion and other uses and rights regarding the Truckee Canal, and would therefore constitute a detriment to

the public interest as well as interference with the exercise of existing water rights. The City of Fernley also protested on the grounds that it appears that the amount claimed exceeds the legal water duty of 4.00 acre-feet per acre.

TRUCKEE RIVER AGREEMENT

- * **Claim Nos. 1 and 2** - The water rights arise from a compromise in the Truckee River Agreement, to which TCID is a party, and which is incorporated by reference into the *Orr Ditch Decree*, and such rights arise, if at all, based on an express agreement of the parties to the Agreement and not otherwise, and the granting of the applications would violate the compromise reached in the Agreement that allowed the *Orr Ditch Decree* to be entered.
- * **Claim Nos. 1 and 2** - Any change to the compromise reached by the parties to the Truckee River Agreement requires the consent of the parties to that agreement, which consent is withheld by TCID.
- * **Claim Nos. 1 and 2** - The applications, as submitted, appear to violate Article VII(B) of the Truckee River Agreement, insofar as they purport to protect limitations on diversions of Truckee Meadows water rights only. (Attachment B to applications.) The applications should be amended to reflect the intent of the representation set forth in the Tribe's comments of July 20th at page 9, wherein it stated:¹⁶

The last paragraph of Attachment B to the application is a voluntary acceptance by the Tribe and the United States of the condition that deliveries of water for instream flows to the Tribe pursuant to Claim 2 will be reduced to the extent necessary to satisfy any Newlands Project rights under Article VII as opposed to those Newlands rights being met

¹⁶ Exhibit No. 17.

by reduced diversions of Truckee Meadows rights.

- * **Claim Nos. 1 and 2** - To the extent Applications 67666-T and 68157-T will reduce diversions to the Newlands Reclamation Project by changing the operation of the Truckee River relative to the Diverted Flow requirements under the Truckee River Agreement or by serving water under the applications from Floriston Rates it threatens to prove detrimental to the public interest of Churchill County by reducing the potential recharge of the underground aquifers upon which thousands of residents of Churchill County rely for domestic water.
- * **Claim No. 1** - The application is made under circumstances where the applicant is in violation of the terms and conditions of the Truckee River Agreement, the *Orr Ditch Decree* and NRS § 533.325 in that TCID is informed and believes that an applicant has diverted water in violation of the Truckee River Agreement and the *Orr Ditch Decree* by diverting in excess of 4.71 acre-feet per acre for the aggregate number of acres of land actually being irrigated or proposed to be irrigated during any given year and has changed the manner of use and/or the place of use of the water; and, accordingly, has attempted to effect a unilateral modification of the *Orr Ditch Decree* by changing the Truckee River Agreement, without consent, approval or notice, and without the approval of the *Orr Ditch Court* or the Nevada State Engineer; and thus, has caused injury to an existing right under the decree.
- * **Claim No. 1** - The actual unauthorized and unpermitted transfer of the proposed place of use and manner of use as well as the proposed change of place of use and manner of use exceeds the 4 acre-feet per acre for the aggregate number of acres of irrigated land in any calendar year in violation of the Truckee River Agreement and the *Orr Ditch Decree* and is detrimental to the public interest.

COMPLIANCE WITH NEVADA REVISED STATUTE § 533.325.

- * **Claim Nos. 1 and 2** - As the Tribe and the United States argued, and the Court agreed, in United States v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1226 (9th Cir. 1989), NRS § 533.325 only authorizes the transfer of water rights that have been put to beneficial use. NRS § 533.325 requires that any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated shall...apply to the state engineer for a permit to do so. The term "persons" as used in NRS § 533.325 has been held to include the United States. Although NRS § 533.324 defines "water already appropriated" in such a manner as to ease the restriction set forth in Alpine regarding the transfer of water that has not been put to beneficial use, there remains the requirement that such water have been permitted by the State Engineer. Contrary to the Tribe's assertions in its comments of July 20, 2001, at page 8, that no permit is required for irrigation, the Court in Carson-Truckee Water Conservancy District, 537 F.Supp. 106 (D.Nev. 1982) held otherwise. The court noted that the United States had conceded "a permit is necessary in order to divert water for...irrigation purposes in the State of Nevada." Because the water sought to be transferred under Applications 67666-T and 68157-T has neither been permitted nor perfected by application to beneficial use it may not be transferred under the provisions of chapter 533 of the NRS.

**PUBLIC LAW 101-618, THE TRUCKEE-CARSON-PYRAMID
LAKE WATER SETTLEMENT ACT**

- * **Claim Nos. 1 and 2** - The granting of the applications would be contrary to and violate federal law, specifically Title II, Public Law 101-618, of the Act, including, but not limited to Section 210(b)(13), because it would initiate or

reinstate a water right that never existed or was abandoned or forfeited, and thereby extinguished; and thus, would impair the remaining vested and decreed water rights under the *Orr Ditch Decree*, specifically, the rights of the City of Fallon and Newlands Reclamation Project water right owners by reducing water appropriated to and necessary under the *Orr Ditch Decree* for diversion to the Newlands Project.

- * **Claim Nos. 1 and 2** - The granting of the applications would violate the Act for the reason that since the water rights have been abandoned, forfeited or never perfected a new permit for those waters with a senior priority date will be spawned from the "unappropriated water" to which the City of Fallon has a pending interest under Application 9330, which is now the subject of litigation.
- * **Claim No. 1** - The granting of the application would violate the Act wherein Congress acknowledged the applicability of Nevada's law of forfeiture and abandonment to any existing water rights under Claim No. 1 and in recognition of the applicability of Nevada law, Congress provided for payment of damages to the PLPT for the failure of the Secretary of the Interior to protect these applicants' purported water rights from cancellation under Nevada law. The Act at Sections 204(c)(4), 204(e), 208, 210(a) and 210(b)(14).
- * **Claim No. 1** - The Truckee Meadows Water Authority (TMWA) protested Application 68157-T to insure that any permit granted is temporary and is not inconsistent with Attachment B to the application, and for the further purpose of TMWA's participation with respect to issues, if any, which may be relevant to the entry into effect of the operating agreement referenced in Section 205(a) of the Act.
- * **Claim No. 2** - The granting of the application would violate the Act, including Section 206, because it would violate the Endangered Species Act.

SETTLEMENT IN THE INDIAN CLAIMS COMMISSION

- * **Claim Nos. 1 and 2** - The PLPT compromised any claim it had to the water rights under Claim Nos. 1 and 2 in the claims it filed with the Indian Claims Commission.

DEFECTIVE APPLICATIONS

- * **Claim Nos. 1 and 2** - The applications are defective because they expressly state (Attachment B to applications) that the applicants intend to effect a unilateral modification of the *Orr Ditch Decree* by changing the Truckee River Agreement without any notice, approval or consent by the *Orr Ditch Court* or all other *Orr Ditch Decree* water right holders.
- * **Claim Nos. 1 and 2** - The applications are defective because their express and specific legal disclaimers (Attachment B to applications) have been repudiated on numerous occasions by the Courts, including the United States Supreme Court in *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906 (1983); the applicants nevertheless maintain that the applications are not made under Nevada law, but rather "in the interest of comity," and further suggest that a decision by the Nevada State Engineer is not "prima facie correct," but rather will be subject to de novo review on appeal.
- * **Claim Nos. 1 and 2** - The applications are defective because they seek to transfer water rights for two distinct purposes, namely instream flows and wildlife, in violation of NRS § 533.330. The State Engineer limits changes in use to a "single major use," otherwise separate applications are required for each intended use. See, State Engineer's letter dated July 24, 2001, re: Applications 67726 and 67727.
- * **Claim No. 1** - The application is defective because it requests a change in place of use of certain unidentified water rights under Claim No. 1 without reference to said water rights present appurtenant place of use and such requested change is therefore defective.

* **Claim No. 1** - The application is defective because it purports to transfer the entire duty of 4.71 acre-feet per acre as opposed to the actual amount the PLPT is entitled to of 4.0 acre-feet per acre duty as applied to the land as allowed for under the *Orr Ditch Decree*. The remaining 0.71 acre-feet per acre represent transportation loss, which State Engineers have not historically approved for transfer in this type of application. See also, Arizona v. California, 439 U.S. 419, 435 (1979) (If all or part of the adjudicated water rights of any of the ...Reservations is used other than for irrigation or other agricultural application, the total consumptive use for said Reservation shall not exceed the consumptive use that would have resulted if the diversions had been used for irrigation of the number of acres specified for the Reservation and the satisfaction of related uses.) Therefore, if the application is granted, it should be limited to 4.0 acre-feet per acre.

* **Claim No. 1** - The application is defective because it purports to "be subject to the condition that no more than the total water right amount will be used in any month. In addition, no more than 33.00 afts¹⁷ will be used at any time." (Attachment B to application), as compared to "...amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate numbers of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cubic foot per second per acre"¹⁸ as allowed under Claim No. 1 of the *Orr Ditch Decree*.

¹⁷ The State Engineer notes there are typographical errors in this listed protest issue.

¹⁸ Exhibit No. 15.

- * **Claim No. 2** - The application is defective because it purports to transfer the entire duty of 5.59 acre-feet per acre as opposed to the actual amount of water the PLPT is entitled to of 4.1 acre-feet per acre duty as applied to the land. The remaining 1.49 acre-feet per acre represent transportation loss, which State Engineers have historically not approved for transfer in this type of application. Therefore, if the application is granted, it should be limited to 4.1 acre-feet per acre.
- * **Claim No. 2** - The application is defective because it purports to allow the diversion of 68.6 cfs (Attachment B to Application) as compared to the one-fortieth of one cubic foot per second per acre as allowed under Claim No. 2 of the *Orr Ditch Decree*.
- * **Claim No. 2** - The application is defective because it requests a change in place of use, which is outside the Pyramid Lake Paiute Indian Reservation, specifically, in the Lower Truckee River between Derby Dam and the boundary of the Reservation, and under the proposed Truckee River Operating Agreement in reservoirs upstream of Derby Dam, uses which are expressly forbidden by the *Orr Ditch Decree* in the restrictions on place of use to reservation lands, and such request is therefore unlawful.

ENDANGERED SPECIES ACT

- * **Claim Nos. 1 and 2** - The granting of the applications would violate the federal Endangered Species Act, because it would reinstate extinguished water rights and reduce water flowing into the Newlands Project, which enhance federally protected species and their habitats in Lahontan Valley and Stillwater National Wildlife Refuge areas, which also have a need for additional water for said threatened and endangered species.

PRIMARY PURPOSES OF RESERVATION

- * **Claim No. 1** - The application should be denied because the use of the water in question is not necessary to fulfill any purpose for which the Pyramid Lake Paiute Indian Reservation was established.

INJURY TO OTHER USERS

- * **Claim Nos. 1 and 2** - The granting of the applications would be detrimental to public interest of the State of Nevada because it would reduce the water available to supply existing *Orr Ditch* Decree water rights, including the City of Fallon's Newlands Project water rights, because the lands upon which those water rights are used are aquifer recharge areas for the City of Fallon's municipal water supply system, consequently depleting the groundwater supply from which it appropriates ground water.
- * **Claim Nos. 1 and 2** - The granting of the applications would present a hazard and danger to the health, safety and welfare of the residents of Fallon and the surrounding community because it would jeopardize the drinking water supply for the City's residents, and therefore, said result being directly contrary to the public interest of the State of Nevada to enhance public municipal drinking water supplies. Pyramid Lake Paiute Tribe of Indians v. Washoe County, 112 Nev. 743, 918 P.2d 699 (1996).

It is noted that the protest issues of injury to other users is found in many of the protest issues listed above; therefore, issues listed under other categories may actually be addressed in the context of injury to other users.

IV.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on June 18-20, 2002, before the State Engineer at Carson City, Nevada.¹⁹

¹⁹ Exhibit Nos. 1-4; Transcript, public administrative hearing

FINDINGS OF FACT
PERFECTION, FORFEITURE, ABANDONMENT

I.

The arguments raised as to perfection, forfeiture and abandonment go in several directions. One is that Claim No. 2 is not a federal Indian reserved water right; and therefore, is subject to all the doctrines of State Water Law, i.e., perfection, forfeiture and abandonment. Two, since the full water right under Claim No. 1 was never developed and no water was ever put to beneficial use under Claim No. 2, there are arguments that those rights should be declared abandoned or forfeited, particularly in the context of applications that request to change the use of the water from their decreed place and manner of use.

A protestant alleges that Claim No. 2 is not a federal Indian reserved water right in that it was not created on December 8, 1859, at the time the PLPT Indian Reservation was established, but rather, it was a creation of compromise as evidenced by the Truckee River Agreement, dated June 13, 1935, between TCID, the United States (and others) with the United States acting on behalf of the PLPT.²⁰ The protestant argues that such right arises, if at all, based on an express agreement of the parties to the Truckee River Agreement and not otherwise, and the granting of the application would violate the compromise reached in the Truckee River Agreement that allowed the *Orr Ditch* Decree to be entered. The prefatory language under Claim No. 1 that makes specific reference to withdrawal from the public domain of the Reservation is not applicable to Claim No. 2. Further, that other evidence indicates that the Truckee Canal, which was built as part of the Newlands Reclamation Project 43 years after the withdrawal of the

before the State Engineer, June 18-20, 2002.

²⁰ Exhibit No. 21 at 2.

Reservation, was the sole source of supply for the bench lands to be irrigated under Claim No. 2.²¹

The Truckee River Agreement provides that:

Provision shall be made in the Truckee River final decree, for the rights of the United States to the use of water from the Truckee River for the irrigation of Indian lands within the Pyramid Lake Indian Reservation by inserting in the final decree the following language:

Claim No. 1. By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848 and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

For the irrigation of 3130 acres of Pyramid Lake Indian Reservation bottom lands, plaintiff, the United States of America, is entitled and allowed to divert from the Truckee River through Indian Ditch, the intake of which is on the left bank of the river in Section 18, T.22N., R.24E., Mount Diablo Base and Meridian, not exceeding 58.7 cubic feet of water per second to an amount not exceeding 14,742 acre feet of water in any calendar year with a priority of December 8, 1859; provided the amount of water so to be diverted shall not exceed a flow of one miner's inch, or one-fortieth of one cubic foot per second per acre for the aggregate number of acres of this land being irrigated during any calendar year and the amount of water applied to the land after an estimated transportation loss of 15 percent, shall not exceed 85-100 of an inch or 85-100 of one fortieth of one cubic foot per second per acre for the total number of acres irrigated, and provided that the amount of water so diverted during any such year shall not exceed 4.71 acre feet per acre for the

²¹ Exhibit No. 204, Brief of US in Support of Its Claim in the case of U.S. v. Orr Water Ditch Co., TCID0002671-2672.

aggregate number of acres of this land being irrigated during that year, and further provided that the amount of water applied to the land shall not exceed four acre feet per acre for the aggregate number of acres of this land being irrigated during any calendar year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.

Claim No. 2. In addition to water for the above mentioned 3130 acres of Pyramid Lake Indian Reservation bottom lands, the Government is hereby and will be allowed to divert water from the Truckee River, with a priority of December 8, 1859, to the amount of one-fortieth of one cubic foot per second per acre for the irrigation of 2745 acres of Pyramid Lake Indian Reservation bench lands. The water so allowed for bench lands may be diverted from the Truckee River through the Truckee Canal or any other ditch now or hereafter constructed as the plaintiff may desire or authorize; provided that the amount of water for bench lands shall not exceed during any calendar year 5.59 acre feet per acre diverted from the river, nor exceed during any calendar year 4.1 acre feet per acre applied to the lands, for the aggregate number of acres of this land being irrigated during any year.

This water is allowed for the United States and for the Indians belonging on said reservation and for their use and benefit and is not allowed for transfer by the United States to homesteaders, entrymen, settlers or others than the Indians in the event that said lands are released from the reservation or are thrown open to entry or other disposal than assignment or transfer to the Indians.²²

At the administrative hearing, the State Engineer ruled that Claim No. 2 is an Indian reserved water right on the grounds that many court decisions have referred to both Claim Nos. 1 and 2 as

²² Exhibit No. 42, p. 10.

reserved water rights.²³ The citations to case law identified below demonstrate this fact. For example, in the Findings of Fact and Conclusions of Law in the case of United States v. Truckee Carson Irrigation District,²⁴ the following is found:

9. That it was the intention of the plaintiff, by and through its attorneys, the Bureau of Indian Affairs, and the Bureau of Reclamation, to assert as large a water right as possible for the Indian reservation, and to do everything possible to protect the fish for the benefit of the Indians and the white population insofar as it was "consistent with the larger interests involved in the propositions having to do with reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." Prior to the institution of *Orr Ditch*, and during its pendency, a serious and reasonable doubt existed as to whether any *Winters* reserved water right could be claimed at all for an executive order Indian reservation among the attorneys, officers of the several Bureaus, and within the Judiciary itself.

* * *

17. Among other rights decreed, the Pyramid Reservation was awarded a *Winters* reserved water right with a priority date of December 8, 1859, of 14,742 acre feet of water per annum for the irrigation of 3130 acres of bottom lands (Claim No. 1) and to divert 5.59 acre feet per acre for delivery to the land of not to exceed 4.1 acre feet per acre per annum for the irrigation of 2745 acres of bench land (Claim No. 2) with a like priority date.

* * *

23. That the cause of action sought to be asserted in this proceeding by the plaintiff and the Tribe is the same quiet title cause of action asserted by the plaintiff in *Orr Ditch* for and on behalf of the Tribe and its members, that is, a *Winters* implied and reserved water right for the benefit of the reservation, with a priority date of December 8, 1859, from a single source of water supply, i.e., the Truckee Watershed. The plaintiff and the Tribe may not

²³ Transcript, pp. 180-181.

²⁴ 649 F.2d 1286 (9th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, Nevada v. United States, 463 U.S. 110 (1983).

litigate several different types of water use claims, all arising under the *Winters* doctrine and all derived from the same water source in a piecemeal fashion. There was but one cause of action in equity to quiet title in plaintiff and the Tribe based upon the *Winters* reserved right theory.

* * *

30. The Congressional, Executive and Judicial branches of the federal government have recognized, confirmed, and dealt with and recompensed the Tribe for the taking or loss of the alleged fishery purposes water right in many actions taken both before and after entry of the final decree in *Orr Ditch*.²⁵

The Ninth Circuit Court of Appeal's decision in *United States v. Truckee-Carson Irrigation District*,²⁶ indicates the Ninth Circuit believes Claim No. 2 is a reserved right where in its discussion of the 1904 Appropriations Act it references to an assumption providing that disposal of surplus reservation land would have reduced the Tribe's reserved water rights.

The Ninth Circuit continues its discussion by indicating that:

It was more than six years after the complaint was filed that the case reached an evidentiary hearing. During that time, the government's claims for the Reservation took shape. The 1904 Act (authorizing 5-acre Indian allotments, and sale of surplus irrigable land) was a dominant consideration. Two general categories of reservation lands were thought to be irrigable: about 19,000 acres of bench lands, and about 2,400 acres of "delta" or bottom lands lying along the Truckee. The 2,400 acres of bottom lands were already "to a very considerable extent being farmed by the Indians and they also embrace the agency and school property." Under the authority of the 1904 Act, the Reclamation Service planned to include in the Project the 19,000 acres of bench lands. Under the 1904 Act it was

²⁵ Exhibit No. 46, Findings of Fact and Conclusions of Law, *U.S. v. TCID*.

²⁶ Exhibit No. 47, 649 F.2d 1286, 1299 (9th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, *Nevada v. United States*, 463 U.S. 110 (1983).

"of course clear that each Indian belonging on the reservation is to have five acres of this land. It also seems clear that under the doctrine of the Winters case the original Indian withdrawn water right would attach to each of these five acres that the Indians are to have, but the rest of the 19,000 acres which will be irrigated by the works of the project will have to depend for their water right upon the general project water right."

Ex. U-88 at 2.

The claim was discussed with officials in the Indian Service. The government decided to press for a claim for water sufficient to irrigate about 5,400 acres; 3,000 acres of bench lands (to account for 600 5-acre allotments) and 2,400 acres of delta lands. With minor changes, this was the claim asserted at the evidentiary hearing and in the government's post-hearing briefs.

* * *

The Master recommended that a temporary restraining order be entered declaring the parties' water rights for a trial period...The order awarded the Reservation an 1859 priority date for water for 3,130 acres of delta or bottom lands. If 5-acre allotments of bench lands were made under the 1904 Act, the reservation would be entitled to additional water for those lands.²⁷

Finally, the 1984 Order of Judge Craig, which ordered the United States to file the change applications with the State Engineer, provides that the "existing establishment of the reserved right, in this case, distinguishes this case from Caepfert."²⁸

While the lands were never allotted, it appears that everyone to date has believed the water rights decreed under Claim No. 2 were considered to be *Winters* reserved water rights. The State Engineer recognizes there may be an argument that since these

²⁷ Exhibit No. 47. United States v. Truckee-Carson Irrigation District, 649 F.2d, 1286, 1291-1292 (9th Cir. 1981).

²⁸ Exhibit Nos. 5 and 10.

lands were not allotted, Claim No. 2 is not a *Winters* reserved right, that it is more akin to a right agreed to in settlement and like a general project water right. However, the State Engineer finds he affirms his decision that Claim No. 2 is a federal Indian reserved water right. Language from the history of the years of litigation and from the specific 1984 Order of Judge Craig that ordered the United States to file the change applications with the State Engineer clearly indicates the Federal District Court believed the waters under both Claim Nos. 1 and 2 are federal Indian reserved water rights.

II.

Various protest issues are based on arguments relating to whether the Tribe's water rights under Claim Nos. 1 and 2 are subject to the State Water Law doctrines of perfection, forfeiture or abandonment.

A protestant argues, based on its argument that Claim No. 2 is not a reserved water right, that since no works of diversion were ever constructed to deliver Claim No. 2 water, and no water has ever been delivered to the Reservation under Claim No. 2, for irrigation or any other purpose, the water has not been put to beneficial use and is subject to the doctrines of perfection, forfeiture and abandonment. The State Engineer has already addressed the issue of whether Claim No. 2 is a reserved right or not.

The protestant argues that if Claim Nos. 1 and 2 are both recognized as reserved water rights, they lose that status as a result of the pending transfer applications and are subject to all the provisions of Nevada Water Law with respect to perfection, forfeiture and abandonment.²⁹ The protestant argues that the cases relied upon by the applicants to preserve their alleged reserved water rights do not reflect the more recent decisions, nor are

²⁹ Exhibit No. 21.

accurate reflections of the holdings in those cases, and the current line of cases limits the scope of *Winters* reserved rights to the actual water historically beneficially used and limits the reserved right to the original purpose of the reservation. "Once the water rights are individually decreed, the use and transfer of those water rights are subject to state law."³⁰ The protestant cites to the Wyoming Supreme Court case known as Big Horn III³¹ for the proposition that Tribes do not have an unfettered right to change the purpose or manner of use of their water rights, particularly where the court previously decreed that the purpose of the water was for agricultural purposes. The Big Horn III Court held that whether tribes can change their right to divert future project water for agricultural purposes to a right to maintain an instream flow for fishery purposes cannot be done without regard to state (Wyoming) water law, but did not go so far as to say the tribe was limited to actual historical use or to the original purpose(s) of the reservation.

The second part of the protestant's argument focuses on the distinction between primary and secondary purposes of reservations, arguing that the fishery purpose for which the applications were filed is a secondary purpose of the Pyramid Lake Paiute Indian Reservation; and thus, is subject to State Water Law.³² That upon application to change a decreed reserved right to

³⁰ Exhibit No. 21, p. 5.

³¹ In re the General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, 835 P.2d 273 (Wyo. 1992).

³² Citing to United States v. New Mexico, 438 U.S. 696 (1978) (implied reserved water rights do not exist to fulfill secondary purposes of reservation, but rather, water for secondary purposes must be acquired under state law); United States v. Anderson, 736 F.2d 1358, 1361-1363 (9th Cir. 1984) (non-Indian purchaser of an Indian allotment acquired priority date of appurtenant reserved water right, but is subject to state laws of abandonment and forfeiture to extent either applies).

a secondary purpose of the reservation, certain aspects of the federal implied right are lost, specifically, immunity from abandonment or forfeiture.

The applicants argue that federal Indian reserved water rights are creatures of federal law, and are not subject to state water law doctrines of perfection, forfeiture and abandonment.³³

The State Engineer notes the protestant did not cite to a line of cases, as it argued, but rather, cited to one case, Big Horn III for the proposition that the change applications subject the federal reserved right to state law. In Big Horn III the tribe was changing the manner of use from a primary purpose. The protestant did not provide citation to any case that specifically provides that *Winters* rights are limited to the actual historical

³³ Winters v. United States, 207 U.S. 564 (1908); United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1298 (9th Cir. 1981), modified 666 F.2d 351, *aff'd in part, rev'd in part on other grounds* United States v. Nevada, 463 U.S. 110 (1983) (federal reserved rights cannot be acquired or extinguished under state water laws); Hackford v. Babbitt, 14 F.3d 1457, 1461 n.3 (10th Cir. 1994) (unlike most other water rights, it is generally accepted that "Winters" rights held by Indians are neither created by use nor lost by nonuse); United States V. Anderson, 591 F.Supp. 1, 5 (E.D. Wash. 1982) *rev'd in part on other grounds*, 736 F.2d, 1358, 1363 (9th Cir. 1984) (In contrast to appropriative rights created under state law, Indian *Winters* rights implicitly reserve to the Tribe a paramount right to the use of as much water which comes in contact with their reservations as is needed to fulfill the *primary* purposes for which the land was reserved. This is so regardless of whether the water was actually used at the time of the creation of the Reservation...Accordingly, actual diversion and beneficial use does not create the Tribe's reserved right and disuse does not destroy it; In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68, 72 (Ariz. 2001) (In this sense, a federally reserved water right is preemptive. Its creation is not dependent on beneficial use, and it retains priority despite nonuse); United States v. City and County of Denver, 656 P.2d 1, 34-35 (Colo. 1982) (federal reserved water rights are immune from Colorado's non-use requirement to the extent necessary to fulfill the purposes of the reservation. Once the federal right has been quantified, that amount is then outside the state appropriative system).

use. The applicants argue by citing to the case of United States v. Anderson,³⁴ that the PLPT is entitled to use its federal reserved water right for any lawful purpose. The State Engineer notes that United States v. Anderson does not appear to stand for as wide of a proposition for which it was cited. The Court, unlike the court in Big Horn III, in United States v. Anderson was addressing a change in use from a primary purpose of the reservation to another primary purpose of the reservation. What the Federal District Court actually said was:

The Department [State Department of Ecology] argues that a reserved water right is limited to only the primary purposes for which a Reservation is created. Although this contention is correct, there is no reason to disturb Judge Neil's appropriate conclusion that maintenance of the creek for fishing was a purpose for creating the Reservation.³⁵

In the Findings of Fact and Conclusions of Law in the case of United States and Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, et al.,³⁶ the federal district court found that:

The Congressional, Executive and Judicial branches of the federal government have recognized, confirmed, dealt with and recompensed the Tribe for the taking or loss of the alleged fishery purposes water right in many actions taken both before and after the entry of the final decree in Orr Ditch. These include, but are not limited to, the following:

* * *

c. The additional sum of \$8,000,000.00 awarded to the Tribe in Docket No. 87-B, on the 23rd day of July, 1975, by the Indian Claims Commission (36 Ind.Cl.Comm. 256) specifically as damages for the loss of the Tribe's alleged (but denied herein) Winters reserved water rights for the Pyramid Lake fishery and other

³⁴ 736 F.2d 1358, 1365 (9th Cir. 1984).

³⁵ United States v. Anderson, 591 F.Supp. at 7.

³⁶ Exhibit No. 46, p. 190a.

alleged water rights.

The Indian Claims Commission held as a matter of law, "that implicit in the creation of the Pyramid Lake Reservation was the reservation of sufficient water from the Truckee River for maintenance and preservation of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish, and for the other needs of the inhabitants of the reservation such as irrigation and domestic uses."³⁷ Judge Craig's Order provides that use of the water for the fishery purposes is consistent with the recent U.S. Supreme Court ruling in Nevada v. United States per Justice Brennan's concurring opinion.³⁸ A footnote to Justice Brennan's concurring opinion indicated that "I also note that the District Court found that one of the purposes for establishment of the Pyramid Lake Reservation was 'to provide the Indians with access to Pyramid Lake...in order that they might obtain their sustenance, at least in part, from these historic fisheries.' (Citation omitted.) As a consequence, the Tribe retains a *Winters* right, at least in theory, to water to maintain the fishery, a right which today's ruling does not question."³⁹

However, in Findings of Fact and Conclusions of Law in United State v. Truckee-Carson Irrigation District, the Federal District Court held:

That the primary purpose for the creation of this Paiute reservation was in furtherance of the then existing national governmental policy of setting apart the various Indian tribes of the West on reservations on the public domain, conforming as nearly as possible to their historic areas of occupancy. That with respect to this Tribe [Pyramid Lake Paiute Tribe] there were several apparent subsidiary purposes for the creation of the reservation reflected in historic

³⁷ 30 Ind.Cl.Comm. 210, 215 (1973) Docket 87-A.

³⁸ Exhibit No. 5.

³⁹ Nevada v. United States, 463 U.S. at n. 2926.

documents. It is not reasonably possible to rank these subsidiary purposes in the order of greatest importance as among them. However, they are found to be (1) to remove tribal members from the emigrant trails to avoid conflict with the White settlers and travelers; (2) to provide agricultural and grazing lands in order to further the policy of teaching the Indians the pursuits of agriculture and animal husbandry, and thereby diverting them from their nomadic habits and customs and their dependence upon hunting and fishing as their sole sources of sustenance, and (3) to provide the Indians with access to Pyramid Lake and at least the lower reaches of the Truckee River in order that they might obtain their sustenance, at least in part, from these historic fisheries.⁴⁰

9. That it was the intention of the plaintiff, by and through its attorneys, the Bureau of Indian Affairs and the Bureau of Reclamation, to assert as large a water right as possible for the Indian reservation, and to do everything possible to protect the fish for the benefit of the Indians and the white population insofar as it was 'consistent with the larger interests involved in the propositions having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole.'⁴¹

The State Engineer finds these citations are weighted in favor of the interpretation that a fishery purpose was a primary purpose for which the Pyramid Lake Indian Reservation was established; therefore, the State Engineer finds the use of water under the change applications is also for a primary purpose of the Reservation. Therefore, the State Engineer finds the protestant's argument that the change applications, because they are filed for a secondary purpose of the Reservation, are subject to the State Water Law doctrines of abandonment and forfeiture does not stand. The State Engineer finds that while no federal Indian reserved water right was established pursuant to the *Orr Ditch Decree* for fishery purposes, and while *Nevada v. U.S.*⁴² precluded on the

⁴⁰ Exhibit No. 46, p. 183a.

⁴¹ *Id.* at 185a.

⁴² 463 U.S. 110, 103 S.Ct. 2906 (1983).

grounds of *res judicata* the assertion of a federal Indian reserved water right for fishery purposes in the *Orr Ditch Decree* case, it does not nullify the fact that one of the purposes for establishment of the Pyramid Lake Reservation was to provide the Indians with access to Pyramid Lake in order that they might obtain their sustenance, at least in part, from these historic fisheries.

III.

Protestants allege that the granting of the applications, based on extinguished water rights, is equivalent to approving a new water right, which will reduce water available to the Newlands Project under the *Orr Ditch Decree*; thus, impairing Newlands Project water rights, and further impairing permitted groundwater rights. It is also argued that the State Engineer's Ruling No. 4683 granted the PLPT's Applications 48061 and 48494, and these applications evidenced the applicant's intent to appropriate all of the unappropriated water in the Truckee River and its tributaries not subject to valid existing water rights. Since some of the water has never been put to beneficial use or permitted by the State Engineer, the protestants argue it is not clear whether the water falls under the "unappropriated" water category or the "valid existing rights" category. If the rights are placed in the unappropriated water category they have been granted to the Tribe for the same instream/in situ use for which it now applies and the applications should be denied.

The State Engineer has found that the water rights represented by Claim Nos. 1 and 2 are not extinguished; therefore, the State Engineer finds the granting of the change applications would not be the equivalent of approving a new water right. The State Engineer finds the unused water under Claim No. 1 and the water right under Claim No. 2 are not part of the unappropriated water discussed in State Engineer's Ruling No. 4683, but rather

were intended to be part of those water rights identified as valid, existing rights under the Orr Ditch Decree.

IV.

TRUCKEE RIVER AGREEMENT

Protestants argue that water rights established under Claim No. 2 arise from a compromise in the Truckee River Agreement, to which TCID is a party, and which is incorporated by reference into the *Orr Ditch Decree*, and such rights arise, if at all, based on an express agreement of the parties to the Agreement and not otherwise, and the granting of the application would violate the compromise reached in the Agreement that allowed the *Orr Ditch Decree* to be entered. They also argue that any change to the compromise reached by the parties to the Truckee River Agreement requires the consent of the parties to that agreement and that consent is withheld by TCID. It is further alleged that the applications are defective because they expressly state (Attachment B to applications) that the applicants intend to affect a unilateral modification of the *Orr Ditch Decree* by changing the Truckee River Agreement without any notice, approval or consent by the *Orr Ditch Court* or all other *Orr Ditch Decree* water right holders; thus, causing injury to existing rights under the decree.

The *Orr Ditch Decree* provides that:

Persons whose rights are adjudicated hereby, their successors or assigns shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.⁴³

⁴³ Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) p. 88.

The State Engineer finds the Truckee River Agreement was incorporated into the *Orr Ditch Decree* and the *Orr Ditch Decree* allows for changes in the point of diversion, place, means, manner or purpose of decreed water rights. The State Engineer finds since the *Orr Ditch Decree* provides for changes said changes must not require the consent of the parties. The State Engineer finds since the changes are being pursued under Nevada's Water Law, which provides the opportunity for protest, the decreed water right holders have an opportunity to object to the changes, thereby, providing them a process to be heard. The issues as to Attachment B are discussed below

v.

Protestants allege that the Application 68157-T is made under circumstances where the applicant PLPT is in violation of the terms and conditions of the Truckee River Agreement, the *Orr Ditch Decree* and NRS § 533.325 in that the protestant is informed and believes that the applicant PLPT has diverted water in violation of the Truckee River Agreement and the *Orr Ditch Decree* by diverting water under Claim No. 1 in excess of 4.71 acre-feet per acre for the aggregate number of acres of land actually being irrigated or proposed to be irrigated during any given year and has changed the manner of use and/or the place of use of the water; and, accordingly has attempted to effect a unilateral modification of the *Orr Ditch Decree* by changing the Truckee River Agreement, without consent, approval or notice, and without the approval of the *Orr Ditch Court* or the Nevada State Engineer; and thus, has caused injury to an existing right under the decree. Further, that the actual unauthorized and unpermitted transfer of the proposed place of use and manner of use as well as the proposed change of place of use and manner of use exceeds the 4 acre-feet per acre for the aggregate number of acres of irrigated land in any calendar year in violation of the Truckee River Agreement and the *Orr Ditch Decree* and is detrimental to the public interest.

The crux of the protestant's argument as to this protest issue is that the PLPT is irrigating lands that have been stripped of their water rights and are now irrigating those lands with Claim No. 1 water without the benefit of having filed a change application, and that water has been diverted in excess of 4.71 acre-feet per acre diversion rate allowed for under the *Orr Ditch Decree* for the aggregate number of acres of land actually being irrigated.

At the administrative hearing, the Federal Water Master testified that he had diverted water under Claim No. 1 in excess of the 4.71 acre-feet per acre, but believes he has the authority to adjust the amount diverted to assure that the water users "do in fact enjoy the delivery to their land of the amount of water that's decreed to them by the *Orr Ditch Decree*." "I take the position that I have the authority to increase the loss or decrease the efficiency, if you will, in order to deliver the amount of water to which they are entitled."⁴⁴ The *Orr Ditch Decree* provides that:

If it shall appear at any time in regard to the actual use and need of water for irrigation that the amount hereinbefore estimated and allowed to be diverted from the river or stream into any ditch or canal is not sufficient after transportation loss to deliver to the land the flow allowed by this decree for application to the land, the allowance or flow as fixed by this decree for application to the land shall control, and there may, and hereby is allowed to be diverted from the stream a larger amount than the amount hereinbefore estimated for diversion from the stream, to the extent necessary to supply to the land, after actual transportation loss, the flow of water allowed by this decree for application to the land. Whether more or less than the amount hereinbefore estimated for diversion from the stream by any ditch, the quantity of water diverted for irrigation shall in every case be only such an amount as will supply to the land, after actual transportation loss, the amount of water allowed

⁴⁴ Transcript, pp. 70-73.

by this decree for application to the land and only the quantity needed for the irrigation thereof.⁴⁵

An employee for the Federal Water Master's Office provided testimony as to the fact that the PLPT is irrigating lands from which water rights have been stripped with water alleged to be Claim No. 1 water, but is doing so without the benefit of having filed change applications, and that the Water Master is aware of this irrigation and provides water for the ditches that are being used.⁴⁶

The *Orr Ditch* Decree provides that "[a]ny person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises."⁴⁷

The State Engineer finds that the matter before him is the applications for the amounts filed, which are for waters that will not be used for irrigation during the period of the temporary applications. The State Engineer finds the protestant's issue as to previous irrigation of lands with water rights under the jurisdiction of the Federal District Court that have been irrigated without the benefit of having filed a change application or using diversion rates they believe are in excess of what the *Orr Ditch* Decree authorizes are to be taken to the Federal District Court which has jurisdiction over those waters. However, the State Engineer finds that in order to assure there is no injury under the change applications, the State Engineer and the public need to know the specific location of the remaining acreage that will be irrigated as authorized under Claim No. 1.

⁴⁵ *Orr Ditch* Decree at 87.

⁴⁶ See, Transcript, pp. 128-145.

⁴⁷ *Orr Ditch* Decree at 87.

Therefore, before permits will be issued the State Engineer orders the applicants to file a map specifically identifying the lands that will be irrigated as allowed under Claim 1. The State Engineer finds by splitting Claim No. 1 into uses for irrigation and instream flow, the PLPT cannot then claim it needs additional diversion to achieve the necessary duty for those lands that remain irrigated under Claim No.1. The State Engineer finds that by splitting the uses under Claim No. 1 the Applicants are limited to the total diversion rate of 58.7 cfs as set forth in the Orr Ditch decree in order to avoid injury to other uses.

VI.

Applications 67666-T and 68157-T indicate in Attachment B that "[t]he right sought under this temporary change application voluntarily will be exercised in conjunction with other Tribal water rights used for wildlife purposes so as to avoid limitations on diversions of Truckee Meadows water rights pursuant to Article VII(B) of the Truckee River Agreement."

Protestants allege that the applications intend to effect a unilateral modification of the *Orr Ditch* Decree by changing the Truckee River Agreement without notice, approval or consent by the *Orr Ditch* Court or all other *Orr Ditch* decreed water right holders; thus, causing injury to existing water rights under the decree. Further, the applications, as submitted, appear to violate Article VII(B) of the Truckee River Agreement, insofar as they purport to protect limitations on diversions of Truckee Meadows water rights only (Attachment B to applications), and that the applications should be amended to reflect the intent of the representation as set forth in the PLPT's comments of July 20th at page 9,⁴⁸ wherein it stated:

The last paragraph of Attachment B to the application is a voluntary acceptance by the Tribe and the United States of the condition that deliveries of water for

⁴⁸ Exhibit No. 17.

instream flows to the Tribe pursuant to Claim 2 will be reduced to the extent necessary to satisfy any Newlands Project rights under Article VII as opposed to those Newlands rights being met by reduced diversions of Truckee Meadows rights.

Article VII of the Truckee River Agreement addresses the allocation of Diverted Flow of the Truckee River. Paragraph (A) provides for the allocation the Diverted Flow to TCID, and Sierra Pacific Power Company (now the Truckee Meadows Water Authority) on the one hand and Washoe County Water Conservation District and the owners of rights to divert water from the Truckee River between Iceland Gage and Derby Dam (subject to the 40 cfs right of the Sierra Pacific Power Company for municipal and domestic uses) on the other hand. Subparagraph (2) of Paragraph (A) provides that 31 percent of the Diverted Flow is allocated to TCID, and Sierra Pacific Power Company (now the Truckee Meadows Water Authority), and the remaining 69 percent of the Diverted Flow is allocated to the Washoe County Water Conservation District and the owners of rights to divert water from the Truckee River between Iceland Gage and Derby Dam (subject to the 40 cfs right of the Sierra Pacific Power Company for municipal and domestic uses), "provided, always, that at any time when the right to use any portion of the sixty-nine (69) percent of the DIVERTED FLOW is not being fully exercised for the uses provided in subparagraph (2) of this paragraph (A), and by reason of such fact there shall exist a flow of water available for diversion at Derby Dam in excess of the amount to which the Irrigation District is entitled at such time under the provisions of the TRUCKEE RIVER FINAL DECREE and/or this agreement, the Irrigation District shall have the right to divert and use such excess for its own purposes."⁴⁹

Subsection (B) of Article VII addresses priorities, and provides that:

⁴⁹ Exhibit No. 42, p. 9.

Whenever, in order to carry out and effect the allocation provided for in Paragraph (A) of this Article VII, it shall be necessary that any limitation be made upon the quantity of water which any of the parties may divert, such limitation shall be made upon the quantities of water which the parties of the fifth part may divert and in the order of the priorities of said parties of the fifth part as such priorities are defined in the TRUCKEE RIVER FINAL DECREE and in such case a quantity of water equal to the amount of such limitation shall accrue and be applied to the uses of the Irrigation District and the Power Company, as provided in subparagraph (1) of Paragraph (A) of this Article VII.

A witness for the applicants testified as to the intent of Attachment B to the applications, and indicated:

In terms of the agreement, at least the provision attached to these applications worked out with the Truckee Meadows' interests and the Tribe is that by the Tribe exercising claims 1 and 2, then the water at the Derby Dam available to be diverted by TCID, let's say, to the Newlands Project, plus 40 cfs, you may not have 31 percent of the total divertable flows upstream of Derby Dam. If that happens, then the arrangement is that the Tribe's call, I want to call it relaxed. Therefore, you don't trigger that imbalance between 31 and 69 percent.....The Truckee Meadows in fact would be getting what they will be getting, they won't necessarily do anything. In fact, this way it would make sure that TCID would get its 31 percent plus 40 cfs. That's more of an assurance for TCID. Q: But the document doesn't mention anything about not affecting diversions for the Newlands Project? A: It may not mention it, but that's the way the mechanics work.⁵⁰

The State Engineer finds the provision in Attachment B does not and cannot affect any of the rights of the TCID under Article VII.

VII.

COMPLIANCE WITH NEVADA REVISED STATUTE § 533.325

Protestants argue that the Tribe and the United States argued, and the Court agreed, in U.S. v. Alpine Land & Reservoir

⁵⁰ Transcript, p. 511.

Co., 878 F.2d 1217, 1226 (9th Cir. 1989), that NRS § 533.325 only authorizes the transfer of water rights that have been put to beneficial use. Nevada Revised Statute § 533.325 requires that "[A]ny person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated shall...apply to the state engineer for a permit to do so." The term "persons" as used in NRS § 533.325 has been held to include the United States. Although NRS § 533.324 defines "water already appropriated" in such a manner as to ease the restriction set forth in Alpine regarding the transfer of water, which has not been put to beneficial use, there remains the requirement that such water have been permitted by the State Engineer. Contrary to the Tribe's assertions in its comments of July 20, 2001, at page 8, that no permit is required for irrigation, protestants argue the Court in Carson-Truckee Water Conservancy District, 537 F.Supp. 106 (D.Nev. 1982) held otherwise. The court noted that the United States had conceded that "a permit is necessary in order to divert water for...irrigation purposes in the State of Nevada." Therefore, protestants argue that because the water sought to be transferred under Applications 67666-T and 68157-T has neither been permitted nor perfected by application to beneficial use it may not be transferred under the provisions of chapter 533 of the NRS.

The State Engineer finds the water rights at issue here were established pursuant to a decree; therefore, there would be no permit for them. The State Engineer finds that federal Indian reserved water rights are not required to be perfected to be decreed. The State Engineer finds the Orr Ditch Decree specifically provides for the filing of change applications. The State Engineer finds the decreed water rights sought to be transferred under Applications 67666-T and 68157-T are not required to be perfected or permitted before a change application can be acted upon.

VIII.
PUBLIC LAW 101-618
THE TRUCKEE-CARSON-PYRAMID LAKE SETTLEMENT ACT

Protestants argue that the granting of the applications would be contrary to and violate federal law, specifically Title II, Public Law 101-618, The Truckee-Carson-Pyramid Lake Water Settlement Act (the Act), including, but not limited to Section 210(b)(13), because it would initiate or reinstate a water right that never existed or was abandoned or forfeited, and thereby extinguished; and thus, impair the remaining vested and decreed water rights under the *Orr Ditch* Decree. Specifically, the rights of the City of Fallon and Newlands Reclamation Project water right owners by reducing water appropriated to and necessary under the *Orr Ditch* Decree for diversion to the Newlands Project.

Section 210(b)(13) of Public Law 101-618 provides that:

Nothing in this title is intended to affect the power of the *Orr Ditch* court or the *Alpine* court to ensure that the owners of vested and perfected Truckee River water rights receive the amount of water to which they are entitled under the *Orr Ditch* decree or the *Alpine* decree. Nothing in this title is intended to alter or conflict with any vested and perfected right of any person or entity to use the water of the Truckee River or its tributaries, including, but not limited to, the rights of landowners within the Newlands Project for delivery of the water of the Truckee River to Derby Dam and for the diversion of such waters at Derby Dam pursuant to the *Orr Ditch* decree or any applicable law.

Moreover, the Act confirmed Claim Nos. 1 and 2 and the United States' right to change points of diversion, place, means, manner or purpose of use of the water.⁵¹ Section 204(c)(4) of the Act provides:

The right to water for use on the Pyramid Lake Indian Reservation in the amounts provided in Claim Nos. 1 and 2 of the Orr Ditch decree is recognized and confirmed. In accordance with and subject to the terms of the Orr

⁵¹ Section 204(c), Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Public Law 101-618, 104 Stat. 3294 (1990).

Ditch decree and applicable law, the United States, acting for and on behalf of the Pyramid Lake Tribe, and with the agreement of the Pyramid Lake Tribe, or the Pyramid Lake Tribe shall have the right to change points of diversion, place, means, manner, or purpose of use of the water so decreed on the reservation.

The State Engineer has found that Claim Nos. 1 and 2 are not subject to the State Water Law doctrines of perfection, forfeiture and abandonment under these circumstances; therefore, there is no initiation or reinstatement of a water right. The State Engineer finds that just because Claim Nos. 1 and 2 are found to be valid, existing, water rights does not mean by their very existence they alter or conflict with any vested and perfected water rights under the *Orr Ditch Decree*. The State Engineer finds the water rights under Claim Nos. 1 and 2 are not contrary to or violate Title II of Public Law 101-618, because that very same act recognizes and confirms the water rights these applications seek to change, and addresses the right to file change applications on those water rights.

IX.

Protestants allege that the granting of Application 68157-T would violate Public Law 101-618 wherein Congress acknowledged the applicability of Nevada's law of forfeiture and abandonment to any existing water rights under Claim No. 1 and in recognition of the applicability of Nevada law, Congress provided for payment of damages to the PLPT for the failure of the Secretary of the Interior to protect these purported water rights from cancellation under Nevada law. The Act at Sections 204(c)(4), 204(e), 208, 210(a) and 210(b)(14).

The State Engineer finds the provisions of Public Law 101-618 in Sections 204(c)(4), 204(e), 208, 210(a) and 210(b)(14) in no way support the protestant's argument, particularly in light of the fact that the Public Law 101-618 specifically recognizes the validity of Claim Nos. 1 and 2.

X.

SETTLEMENT IN THE INDIAN CLAIMS COMMISSION

A protestant alleges that the PLPT compromised any claim it had to the water rights purported to be transferred in the claims filed with the Indian Claims Commission. The protestant argues in its pre-hearing brief⁵² that, pursuant to Indian Claims Commission Case No. 87, several Indian tribes sued the government for damages including a claim for compensation for the fact that the United States failed to appropriate necessary funds or to otherwise construct works of diversion or other infrastructure necessary to deliver decreed water rights to portions of the reservation for agricultural irrigation. It argues that while the PLPT in that litigation did not specifically seek compensation or specific performance against the United States, those issues were clearly before the Court and were fully litigated and ultimately resolved by way of settlement, and by doing so the PLPT effectively abandoned its water rights, particularly since the PLPT failed to pursue the installation of the necessary works of improvement to divert the water and place it to beneficial use. It also argues that by the fact that the PLPT had the opportunity to assert such claims and in fact was a party to the actual complaints setting forth such causes of action is, in and of itself, a bar under the concept of res judicata, which precludes the PLPT from asserting such claims in the future.

In 1951, pursuant to the Indians Claims Commission Act, 25 U.S.C. § 70 et seq., the Tribe sued the government for damage to the fishery.⁵³ "The said 'water' claim, which was previously presented in Docket No. 87-A, was separated from all other claims in Docket 87-A and assigned to Docket No. 87-B..."⁵⁴

⁵² Exhibit No. 21.

⁵³ Exhibit No. 47; United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1295 (9th Cir. 1981).

⁵⁴ Findings of Fact on Compromise Settlement, 36 Ind.Cl.Comm.

In 1973 the Commission found the government liable. *Northern Paiute Tribe v. United States*, 30 Ind.Cl.Comm. 210 (1973). In 1975 the Claims Commission approved a compromised settlement of \$8,000,000 in the Tribe's favor "on its claim for damages suffered as the result of its not having received all of the water to which it was entitled under rights reserved for the Pyramid Lake Indian Reservation." *Pyramid Lake Paiute Tribe v. United States*, 36 Ind.Cl.Comm. 256 (1975). The parties stipulated their belief that the Tribe's water rights themselves were undiminished, and the award of damages did not represent compensation for "the loss, diminution, or taking of any water rights."⁵⁵

[C]oincident with the filing of the stipulation [which settled Docket No. 87-B] for entry of final judgment, the plaintiffs shall file with the Commission, and, coincident with the entry of final judgment on the settlement, the Commission shall accept, an amended and supplemental petition in Docket No. 87-A, in which plaintiff shall restate and set forth the remaining claims in Docket 87-A, which claims shall expressly exclude any claim for damages or compensation based upon acts or omissions of the United States prior to the date or execution of such stipulation that allegedly resulted in the loss of fish or fisheries, water or water rights reserved to or owned by the Pyramid Lake Indian Reservation.⁵⁶

A review of the Amended and Supplemental Petition filed in Docket 87-A⁵⁷ indicates that it specifically excludes any action or claim as to fish or fisheries, water or water rights, but rather only addresses the claims for damages for uses of ancestral lands, misrepresentations made by the Federal Government, failure to

256, July 23, 1975.

⁵⁵ *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1295 (9th Cir. 1981); Exhibit No. 47.

⁵⁶ Findings of Fact on Compromise Settlement, 36 Ind.Cl.Comm. 256, July 23, 1975.

⁵⁷ Exhibit No. 21, Attachment A to Brief of the Truckee-Carson Irrigation District in Opposition to Transfer Application Nos. 67666-T and 68157-T.

remove trespassers or protect the PLPT from unlawful activities, for taking of the Mill and Timber Reserve, and lands disposed of by the Government.

Public Law 101-618⁵⁸ provides that "[t]he right to water for use on the Pyramid Lake Indian Reservation in the amounts provided in Claim Nos. 1 and 2 of the *Orr Ditch* Decree is recognized and confirmed."

The State Engineer finds the PLPT did not effectively abandoned its water rights pursuant to the Indian Claims Commission proceedings, particularly since the Amended and Supplemental Petition filed in Docket 87-A indicates that it specifically excludes any action or claim as to fish or fisheries, water or water rights. The State Engineer finds recognition and confirmation of the water rights in Public Law 101-618 enacted in 1990 further refutes this allegation. The State Engineer finds the PLPT's failure to pursue the installation of the necessary works of improvement to divert the water and place Claim No. 2 water to beneficial use does not constitute an abandonment of the water right, since the reserved water rights are not subject to the State Water Law doctrine of abandonment for the use as decreed.

XI.

DEFECTIVE APPLICATIONS

The protestants argue that the applications are defective because of their attempt to effect a unilateral modification of the *Orr Ditch* Decree by changing the Truckee River Agreement without any notice, approval or consent by the *Orr Ditch* Court or all other *Orr Ditch* Decree water right holders. The State Engineer finds he has already addressed this issue in Finding of Fact IV in the discussion of the provisions of the *Orr Ditch* Decree that provide for the filing of change applications.

⁵⁸ 104 Stat. 3294 (1990), Section 204(c)(4).

XII.

Protestants allege that the applications are defective because, the express and specific legal disclaimers (Attachment B to applications) have been repudiated on numerous occasions by the Courts, including the United States Supreme Court in Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906 (1983); the applicants nonetheless maintain that the application is not made under Nevada law, but rather "in the interest of comity," and further suggest that a decision by the Nevada State Engineer is not "prima facie correct," but rather will be subject to *de novo* review on appeal.

Attachment B to the applications⁵⁹ indicates that:

This application is filed pursuant to the attached Order dated February 28, 1984, in the case of United States v. Orr Water Ditch Co., Equity No. A-3, in the United States District Court for the District of Nevada and in the interest of comity among the United States, the Pyramid Lake Paiute Tribe of Indians and the State of Nevada. The applicants specifically reserve all of their rights, interests and authorities pertaining to this matter including, without limitation, all rights and authorities asserted in arguments previously made to the Orr Ditch Court in connection with the above referenced February 28, 1984 Order and the rights to contest the jurisdiction of the Nevada State Engineer and to seek *de novo* review in the Orr Ditch Court of any orders, decisions, rulings or other actions of the Nevada State Engineer.

The State Engineer finds the disclaimer does not make the applications defective. The applications are before him pursuant to an order of the Federal District Court, which found that change applications for *Orr Ditch* decreed water rights are allowed in the manner provided by law and the Court interpreted that manner to mean in accordance with Nevada state procedure for filing change applications. The State Engineer finds the Federal District Court has already held that it retains jurisdiction to entertain an appeal from the decision of the State Engineer and to conduct a *de*

⁵⁹ Exhibit Nos. 5 and 10.

de novo review, if necessary. The State Engineer finds the issue of whether *de novo* review is appropriate is not ripe.

XIII.

Protestants allege that Application 68157-T is defective because it requests a change in place of use of certain unidentified water rights under Claim No. 1 without reference to said water rights present appurtenant place of use and such requested change is, therefore, defective. The protestants argue that the applications are defective because they do not depict the location of the existing place of use or the proposed place of use on the reservation as required by NRS §§ 533.345 and 533.350.

Nevada Revised Statute § 533.345 says every application for a permit to change the place of diversion, manner of use or place of use of water already appropriated must contain such information as may be necessary to a full understanding of the proposed change, as may be required by the state engineer. Nevada Revised Statute § 533.350 provides that all applications for permits shall be accompanied or followed by such maps and drawings and such other data as may be prescribed by the state engineer.

To the State Engineer's knowledge no map exists that exactly identifies the location of the lands that were to be irrigated under Claim Nos. 1 and 2. To the State Engineer's knowledge, the water identified under Claim No. 1 was for bottom lands that were mostly under irrigation at the time of the decree. To the State Engineer's knowledge, the water identified under Claim No. 2 was for a certain number of acres that were to be allotted to Indians, but were never allotted; therefore, were never specifically identified as to location.

The State Engineer finds no *Orr Ditch* Decree maps were presented in evidence and most likely do not exist that specifically locate the acreages to which Claim Nos. 1 or 2 water rights are appurtenant, other than to say the Reservation. The State Engineer finds this does not make the requested changes

defective. The State Engineer finds he has sufficient information to understand the proposed changes, and the maps filed were as required by the State Engineer. The State Engineer finds the applications are for changes in place and manner of use; therefore, as to Claim No. 1 the place of use is downstream of the point of diversion at Indian Ditch, and as to Claim No. 2 the place of use is downstream on the Reservation from a point of diversion at Derby Dam.

XIV.

Protestants alleged that the applications are defective because they seek to transfer water rights for two distinct purposes, namely instream flows and wildlife, in violation of NRS § 533.330. They argue, citing to a letter from the State Engineer dated July 24, 2001, in Application File Nos. 67726 and 67727, that the State Engineer limits changes in use to a "single major use," otherwise separate applications are required for each intended use. Applications 67726 and 67727 were filed for "public recreation and wildlife purposes." By letter dated July 24, 2001, the applications were returned for amendment with an indication that public recreation and wildlife purposes are each considered major uses and the applications must be limited to a single-major use. Upon review of these application files, it is apparent that after the applications were initially reviewed, and moved up through the chain of authority, the State Engineer did not consider these two separate uses. Rather they were considered to only be for wildlife purposes, because no corrected application was required prior to issuance of the permits, which were issued solely for wildlife purposes. The recreational pursuits of hunting and bird watching were subsumed into the wildlife purpose.

In 1988, the Nevada Supreme Court held that wildlife watering is encompassed in the NRS § 533.030 definition of recreation as a beneficial use of water.⁶⁰ Then in 1989 NRS § 533.023 was enacted

⁶⁰ State v. Morros, 104 Nev. 709 (1988).

and provided that wildlife includes the establishment and maintenance of fisheries and other wildlife habitats.

The State Engineer finds the use of water for instream flow purposes is not a major separate use than that for wildlife purposes, since the definition of wildlife includes the maintenance of a fishery, which is the purpose of instream flow.

XV.

Protestants allege that Application 67666-T is defective because it requests a change in place of use, which is outside the Pyramid Lake Paiute Indian Reservation, specifically in the Lower Truckee River between Derby Dam and the boundary of the Reservation. They also allege that use of the water under the applications and the proposed Truckee River Operating Agreement may be in reservoirs upstream of Derby Dam, and such uses, which are expressly forbidden by the *Orr Ditch Decree* in the restrictions on place of use to reservation lands. Therefore, such request is unlawful.

The State Engineer finds while the application indicates that the use is below Derby Dam, the use is in reality only within the Reservation boundaries, because that is the land over which the United States and the PLPT exercise jurisdiction. The water must pass down the Truckee River in order to reach the Reservation boundaries. The State Engineer finds these applications were not filed for storage purposes in reservoirs upstream of Derby Dam; therefore, there is no authorization under any permits granted to use the water in that manner. The State Engineer finds no support for the argument that the *Orr Ditch Decree* forbids use of the water rights represented by Claim Nos. 1 and 2 outside the Reservation, but rather one must look to the relevant law on the subject and that is a controversial question not settled in law.

XVI.

ENDANGERED SPECIES ACT

Protestants allege that the granting of the applications would violate the federal Endangered Species Act, because it would reinstate extinguished water rights and reduce water flowing into the Newlands Project, which enhance federally protected species and their habitats in Lahontan Valley and Stillwater National Wildlife Refuge areas, which also have a need for additional water for said threatened and endangered species. The State Engineer has found these applications are not reinstating extinguished water rights; therefore, he does not find merit in this argument.

XVII.

INJURY TO OTHER USERS

The PLPT argues that although the Tribe's reserved water rights were established and awarded for irrigation, their use is not limited to that purpose. The PLPT argues that in Arizona v. California, the Supreme Court issued a Supplemental Decree pursuant to a stipulation among the United States and the States of Arizona, California and Nevada. That Stipulation and Supplemental Decree addresses in part the Indian reserved water rights previously awarded to five Indian tribes along the Colorado River, including the agricultural water rights for the practically irrigable lands of the Fort Mojave Indian Reservation in Nevada.

The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and ... shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction on the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the five Indian Reservations is used other than for irrigation or other agricultural application, the total consumptive use ... for said Reservation shall not exceed the consumptive use that would have resulted if the diversions ... had been used for irrigation of the

number of acres specified for that Reservation ... and the satisfaction of related uses.⁶¹

The Tribe and the United States argue that Indian reserved water rights may be used on the Reservation for any lawful purpose.⁶² The State Engineer has already noted that the reference to United States v. Anderson is limited in that the applicants' citation did not appear to stand for as wide of a proposition for which it was cited. The Court in that case was addressing a change in use from a primary purpose of the reservation to another primary purpose of the reservation, and that Court agreed with the position taken by the State Department of Ecology when it argued that a reserved water right is limited to only the primary purposes for which a Reservation is created. When the Court in Colville Confederated Tribes v. Walton,⁶³ indicated that "[w]hen the Tribe has a vested property right in reserved water, it may use it in any lawful manner" the Court was again discussing use for a primary purpose of the reservation with the intended use of the water within the boundaries of the Reservation.

Nevada Revised Statute § 533.023 provides that use of water for wildlife purposes is a beneficial use of water, and the "establishment and maintenance of wetlands, fisheries and other wildlife habitats" is included within the wildlife purposes.⁶⁴ The State Engineer finds the PLPT's applications for use of its water rights for wildlife purposes, including instream flows for fish,

⁶¹ 439 U.S. 419, 58 L.Ed 2d 627, 628 (1979).

⁶² Exhibit No. 23, p. 11; See, Arizona v. California, 439 U.S. 419, 422 (1979); United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984); Coleville Confederated Tribes v. Walton, 647 F.2d 42, 48-49 (9th Cir. 1981).

⁶³ Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981).

⁶⁴ See also, State Bd. of Agriculture v. Morros, 104 Nev. 709, 760 P.2d 263 (1988).

is consistent with Nevada Water Law and a primary purpose for which the Pyramid Lake Indian Reservation was reserved.

XVIII.

The *Orr Ditch* Decree provides that:

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.⁶⁵

Because of the potential to impair existing rights, and due to the fact that the changes raised significant factual and legal issues, the State Engineer required notice of the applications be published and held a public administrative hearing. The State Engineer finds the question of injury is one of the significant issues for consideration as to these applications.

XIX.

One of the central concerns to protestants in this matter is that if the State Engineer grants the change applications they should at least be limited to the duty of water allowed to be applied to each acre of land versus allowing the change of the amount requested, which is the diversion rate allowed at the point of diversion.

As noted early in this ruling, Claim No. 1 provides for the diversion through Indian Ditch of not exceeding 58.7 cfs, to an amount not exceeding 14,742 afa of water in any calendar year for the irrigation of 3,130 acres of bottom lands on the Pyramid Lake Indian Reservation; provided that the amount of water so diverted shall not exceed a flow of one-miner's inch, or one-fortieth of one cfs per acre for the aggregate number of acres of land being

⁶⁵ Final Decree, U.S. v. Orr Water Ditch Co.; In Equity A-3 (D.Nev. 1944) p. 88.

irrigated during the year, and the amount of water applied to the land after an estimated transportation loss of 15 percent shall not exceed 85-100 of an inch or 85-100 of one-fortieth of one cfs per acre for the total number of acres irrigated, and provided that the amount of water diverted during any such year shall not exceed 4.71 acre-feet per acre for the aggregate number of acres of land being irrigated during any calendar year, and further provided that the amount of water applied to the land shall not exceed 4 acre-feet per acre.

The general provisions of the *Orr Ditch Decree* provide that "[n]o owner or person or party entitled to the use of water under this decree shall be allowed to use for irrigation during any calendar month more than twenty-five per cent of the quantity of direct water in acre feet hereby allowed for the land for the season."⁶⁶ There is no provision in the *Orr Ditch Decree* that indicates the applicants can or cannot take 25 percent of the water granted for instream flow during any calendar month, but the Federal Water Master testified that he believes the 25 percent limitation would apply under the change applications.⁶⁷

One of the first points of confusion is that Claim No. 1 provides for the diversion through Indian Ditch of not exceeding 58.7 cfs; however, it also provides that the amount of water so diverted shall not exceed a flow of one-miner's inch, or one-fortieth of one cfs per acre for the aggregate number of acres of land being irrigated during the year. If one-fortieth of one cfs per acre were allowed for the total 3,130 acres of land, that allows for a total diversion rate of 78.25 cfs. However, the Decree Court capped the diversion rate at 58.7 cfs. Under Application 68157-T, the applicants are requesting to change the place and manner of use for 2,105 acres of land. If one-fortieth

⁶⁶ *Orr Ditch Decree* at 87.

⁶⁷ Transcript, p. 104.

of one cfs per acre were allowed for those 2,105 acres of land, that would provide for a diversion rate of 52.63 cfs, thereby leaving very little diversion rate left to irrigate the remaining 1,025 acres of land. Therefore, what the applicants appear to have done is to prorate the 58.7 cfs diversion rate for the 2,105 acres requested to be transferred. The 2,105 acres from the total 3,130 acres found under Claim No. 1 represents 67 percent of the land under that claim. If 67 percent of the 58.7 diversion rate were requested to be change that would equate to 39.33 cfs of diversion rate.

The State Engineer finds nothing was provided to clarify the protestant's issue with the requested diversion rate, and no evidence supports the protest claim as to the diversion rate requested. The State Engineer finds that regardless of the diversion rate there is still a maximum duty allowed under the Decree.

XX.

A similar issue was raised as to the diversion rate under Application 67666-T. In that application, the applicants indicated that no more than 68.6 cfs would be used at any one time.

The *Orr Ditch Decree* provides under Claim No. 2 for the diversion of one-fortieth of one cfs per acre for the irrigation of 2,745 acres of bench lands on the Pyramid Lake Indian Reservation. Protestants allege that Application 67666-T is defective because it purports to allow the diversion of 68.6 cfs as compared to the one-fortieth of one cubic foot per second per acre as allowed under Claim No. 2 of the *Orr Ditch Decree*. If 2,745 acres is divided by 40 that converts to 68.63, which is the cfs requested under the application. The State Engineer sees no merit as to this protest claim, and nothing was provided by the protestants to clarify their issues with regard to the diversion rate.

XXI.

The applicants' request to change the diversion rate of 4.71 acre-feet per acre for the aggregate number of acres as opposed to the duty of water allowed to be applied to the land of 4.0 acre-feet per acre. Many of the protestants object to the applicants being allowed to take the diversion rate as opposed to being limited by the duty. The Federal Water Master takes the position that the 4.71 acre-feet diversion rate is not subject to transfer, that only the allocated duty of 4.0 acre-feet per acre is the amount actually decreed for use, and the loss in the various canals is not subject to transfer, and if it is allowed there may be injury to other parties.⁶⁸

The *Alpine Decree*⁶⁹ provides that "[c]hange of manner of use applications from use for irrigation to any other use and changes in place of use applications shall be allowed only for the net consumptive use of the water rights as determined by this Decree."

In *Arizona v. California*,⁷⁰ the Supreme Court held that "present perfected rights so adjudicated ...shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres..." that "the foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation...shall constitute the means of determining quantity of adjudicated water rights, but shall not constitute a restriction of the usage of them to irrigation or other agricultural application," and "[i]f all or part of the adjudicated water rights of any of the five Indian Reservations is used other than for irrigation or other agricultural application,

⁶⁸ Transcript, pp. 73-74, 109-110.

⁶⁹ Final Decree, *U.S. v. Alpine Land and Reservoir Co.*, Civil No. D-183 (D.Nev. 1980) at 162.

⁷⁰ 439 U.S. 419, 435, 58 L.Ed.2d at 628 (1979).

the total consumptive use... for said Reservation shall not exceed the consumptive use that would have resulted if the diversions...had been used for irrigation of the number of acres specified for the Reservation...and for the satisfaction of related uses."

The applicants here argue⁷¹ the *Orr Ditch Decree* is governed by the no injury rule and because of the location of Indian Ditch, which is the most downstream diversion on the Truckee River, there are no persons relying on the transportation losses or return flows that could be affected; therefore, no one would be injured if the applicants were allowed to take the diversion rate of 4.71 acre-feet per acre. A witness for the applicant testified that the transportation loss is part of the Claim Nos. 1 and 2 water rights because the transportation loss is required to exercise the water right. Therefore, there would be injury to the PLPT if the transportation loss were not included, because that would be an abridgment of the PLPT's water right.⁷² This injury would be because, the water that would be used to convey the headgate delivery to the land would wind up as part of the return flow and seepage back to the river, which would impact the PLPT's claim to the unappropriated water.⁷³ If the transportation loss is included, more water has to pass over Derby Dam to meet that amount, leaving less water available to divert to satisfy Claim No. 3. Therefore, the State Engineer is not clear how the no injury argument could be made as to why the diversion rate should be allowed under Claim No. 2.

The State Engineer finds the evidence indicates there is the potential of impact to storage and consequently injury to other water right holders, as discussed below, and the *Orr Ditch Decree*

⁷¹ Transcript, pp. 111-113.

⁷² Transcript, p. 482.

⁷³ Transcript, pp. 483-484.

requires there be no injury to other water right holders. The State Engineer finds there is a dispute between the Federal Water Master and the PLPT as to whether the transportation loss is part of the water right, or whether the water right is limited to the actual duty that is applied to the land, as it appears the Supreme Court held in Arizona v. California. The State Engineer finds, because this is only a temporary transfer for one year, and no substantial harm will come by not allowing for the transfer of the transportation loss, and because there is insufficient information on this record to allow for the transfer of the ditch loss, he will not allow the transfer of the ditch loss at this time under these applications. Rather, the State Engineer will only consider the duty of water of 4.0 acre-feet per acre under Claim No. 1 and 4.1 acre-feet per acre under Claim No. 2 as subject to consideration for change. The State Engineer finds this ruling is not prejudicial to consideration of the issue on future applications.

XXII.

Protestants allege the granting of the applications would injure existing *Orr Ditch* Decree water rights and the Decree prohibits the transfer of water rights if it will cause injury to existing rights under the Decree. One argument is based on the grounds that since most of Claim No. 1 and all of Claim No. 2 have never been used, the use of the water will reduce the total amount of water available to be diverted at Derby Dam to the Newlands Project. Based on the State Engineer's findings that the federal Indian reserved water rights at issue are not under these circumstances subject to the State Water Law doctrines of perfection, forfeiture and abandonment, he ruled at the public administrative hearing that whether there is injury to protestants water rights must be the judgment between the use of water for

wildlife as filed for under the change applications and the full exercise of the water rights for irrigation as decreed.⁷⁴

The State Engineer believes the crux of the issue before him is whether these changes as filed will cause injury to other users, more specifically, the protestants. He has already ruled that under these temporary change applications he will not allow the transportation losses to be transferred for many reasons. The analysis discussed here goes to the impact to storage in Lahontan Reservoir.

Protestants presented expert testimony regarding the model prepared by the U.S. Bureau of Indian Affairs that addressed the impacts in the context of various alternatives as to how and when the water rights might be used.⁷⁵ Their witness, Mr. Binder, was provided with and reviewed the input and output files for the modeling that was conducted for the environmental assessment for these proposed transfers,⁷⁶ and performed an analysis of the input and output product from the model, and reviewed the Environmental Assessment (EA) prepared by the U.S. Bureau of Indian Affairs for the temporary transfers pursuant to the National Environmental Policy Act.⁷⁷

The model used is known as the Truckee River Operations Model, which Mr. Binder testified could be referred to as a hydrologic accounting model. The model uses historical hydrology and the accounting rules of the Truckee River outlined in decrees and operating agreements to provide a tool by which input can be varied to calculate flows in the system, discharge at various

⁷⁴ Transcript, p. 239.

⁷⁵ See generally, testimony of Charles Binder, Transcript, pp. 212-318.

⁷⁶ Exhibit No. 45.

⁷⁷ Transcript, pp. 223-224.

points or water surface elevations in reservoirs.⁷⁸ However, he does not believe the model can be used to predict actual impacts that are anticipated from changes in river operation, since it was developed as a planning tool, and cannot be used to quantify the impacts on the water rights associated with the Truckee Canal diversion.⁷⁹ In Mr. Binder's opinion, the model runs help gain some insight into the relative difference between the calculated results for each alternative; however, the conclusions oversimplify the relative differences or the impacts between the alternatives and essentially masks some of the impacts that would actually occur under the alternatives.⁸⁰ This masking is due to the fact that the model uses 95 year averages.⁸¹

A witness for the applicants who drafted the EA agrees that the Operations Model is not predictive,⁸² but that the results are considered a reasonable estimate of conditions that might be observed within circumstances defined by the alternatives evaluated in the document. The EA described 4 action alternatives, but found that only Alternative 4 - exercise of the subject water rights according to a uniform demand schedule during June-September - provided no evidence of significant impact.⁸³ The State Engineer notes that "no significant impact" is not the same as no impact.

⁷⁸ Transcript, pp. 225-227.

⁷⁹ Transcript, pp. 227-232.

⁸⁰ Transcript, p. 233.

⁸¹ Transcript, p. 234.

⁸² Testimony from another witness for the applicants indicated that just because a model is predictive, does not mean the model is going to provide an accurate answer. Transcript, p. 566.

⁸³ Exhibit No. 45, front cover.

Table 2.2 of the EA provides a summary of the model results for selected parameters that used a March-July 2002 forecast for 50% exceedence for the Truckee and Carson Rivers.⁸⁴ The State Engineer notes the applications indicate the water will be used during the irrigation season through November 15th, subject to the condition that no more than 25 percent of the total water right will be used in any one month. The applications appear to want complete flexibility in when and what quantities of water are taken; however, the State Engineer notes the alternatives addressed in the EA provide specific scenarios. For a first attempt at allowing these temporary transfers, the State Engineer believes it would assist the Federal Water Master in management of the river, and in determining if there are any impacts, if the flows were to be continuous over a certain number of days.

Alternative 4, the proposed action, provides the most inflow to Pyramid Lake and the least diversion to the Truckee Canal and Lahontan Reservoir. Alternative 3 provides the least inflow to Pyramid Lake and the most diversion to the Truckee Canal and Lahontan Reservoir.⁸⁵ The EA indicates that the range of reduction in end-of-September Lahontan Reservoir storage is approximately 1,000-15,000 acre-feet between the no action and the action alternatives for the forecasted runoff conditions. The 15,000 acre-feet represent the proposed action under drier conditions (70% exceedence).⁸⁶

Mr. Binder concluded that it appeared based on the forecasts for the remainder of 2002 that the Newlands Project would still be able to deliver a 100 percent allocation year to its water users. Although there would be reductions in diversions at the Truckee Canal, those would translate into reduction in the storage at

⁸⁴ Exhibit No. 45, p. 7.

⁸⁵ Exhibit No. 45, p. 35.

⁸⁶ Exhibit No. 45, p. 33.

Lahontan Reservoir due to the dry year cycle that we appear to be in, and that could exacerbate shortages next year. There could be a reduction in storage of 15,000 acre-feet if the comparison is between the status quo and exercise of the rights under the change applications, and a reduction in storage of 6,000 acre-feet if Claim Nos. 1 and 2 were fully utilized as decreed. If the next year was a less than 100 percent allocation then essentially all of the reduction in storage, minus any losses, could translate into a shortage next year.⁸⁷ However, in his opinion there is really no way to know with the information available at the hearing.⁸⁸ For example, it is unclear in the modeling exercise relative to the full utilization of Claim Nos. 1 and 2 for irrigation purposes as to how the exercise of the right was modeled, i.e., where was the irrigated land and how were return flows returned to the river.⁸⁹

A witness for the applicants discussed how the 10 percent probability figure that the 15,000 acre-foot reduction in storage would not be made up in the next year was derived. Mr. Shahroody indicated that the reduction could be made up by having the mechanism of the Operating Criteria and Procedures (OCAP)⁹⁰ in place. He looked at the 95 years of hydrologic record, which includes extreme drought to wet years, and tested each water year to see what the probability would be to make the targets in

⁸⁷ Transcript, pp. 268-272, 298-301.

⁸⁸ Transcript, pp. 272-273.

⁸⁹ Transcript, pp. 286-288.

⁹⁰ Exhibit No. 224. Transcript, p. 498. Under OCAP additional diversions are allowed from the Truckee River at the Truckee Canal if the predicted storage content in Lahontan is below the target storage content. To make up for the 6,000 acre-foot reduction in storage found at the end of September under Alternative 4, it depends on factors such as the targets in Lahontan and available flow.

Lahontan Reservoir for the coming year within the first three months of the water year (which is September through October of the following year). Mr. Shahroody determined that if there were a repeat of 1976 (one of the driest years) the target would be met in one of the months of October, November or December. He opined that the 10 percent probability that the 15,000 acre-feet would not be made up would be reduced if using the 6,000 acre-foot reduction in storage.⁹¹

Mr. Shahroody testified to the specifics of the water years being addressed at the time of the administrative hearing in June 2002. At that time, the storage in Lahontan Reservoir was above the projected target levels and the TCID had been asked by the U.S. Bureau of Reclamation to reduce diversions from the Truckee River, and he believed the target storage quantities were going to easily be met under the present operation.⁹² Thus, there was more water in Lahontan Reservoir in June 2002 than the model predicted under proposed action Alternative 4, and "carrying that 25,000 to the end of September, that means that should compensate for the difference or at least aid and help to meet the OCAP targets in October, November and December much easier, even under the drier condition as compared to 1976."⁹³ However, this analysis does not appear to account for additional water use for irrigation during the rest of the irrigation season.⁹⁴

The EA indicates that:

The provisions of the OCAP allow the Newlands Project to divert water from the Truckee River to Lahontan Reservoir to meet storage targets in the next water year (October 2002-September 2003), which could readily

⁹¹ Transcript, pp. 497-503.

⁹² Transcript, pp. 504-505.

⁹³ Transcript, p. 506.

⁹⁴ Transcript, pp. 568-569.

make up for this relatively small difference in supply. Based on analysis of hydrologic data for the 1901-1995 periods, there is only about a 10% probability that the 15,000 acre-foot difference would not be made up in the next water year.

Given the wide range of hydrologic variables and possible water management decisions that could affect resources next year, it is not possible to predict accurately if, or to quantify to what extent, such a shortage condition would occur. The low probability of such occurrence and the relatively short duration and small reduction in water supply for any of the action alternatives suggest that the possible effects of implementing the proposed action are not significant.⁹⁵

Whether there will be impacts is highly dependent on the water year.⁹⁶

Claim No. 3 under the *Orr Ditch Decree* provides that "[s]ubject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for storage in Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes...."⁹⁷ Testimony was provided by a witness for protestant TCID as to the fact that Claim No. 3 included a right for storage.⁹⁸

The State Engineer finds there is a right to storage in Lahontan Reservoir under Claim No. 3 that cannot be injured by the changes requested under Applications 67666-T and 68157-T. The State Engineer finds if the changes included the transportation loss there may be a reduction in storage that cannot be assured

⁹⁵ Exhibit No. 45, p. 33.

⁹⁶ Transcript, pp. 443-444.

⁹⁷ *Orr Ditch Decree*.

⁹⁸ Transcript, p. 282.

will be made up during the remainder of the calendar year for the next irrigation season. While the probability that it will be made up is relatively high, if it is a dry year, it cannot be assured. The State Engineer finds by not allowing the transportation loss and by requiring the applicants to chose to exercise the rights either under Alternative 3 or 4 as described in the EA, existing rights will be protected.

XXIII.

Protestants allege the granting of the applications would be detrimental to the public interest of the State of Nevada because it would reduce the water available to supply existing *Orr Ditch* Decree water rights, including the City of Fallon's Newlands Project water rights, because the lands upon which those water rights are used are aquifer recharge areas for the City of Fallon's municipal water supply system, consequently depleting the groundwater supply from which it appropriates water. The City of Fernley argued that the PLPT's initiation of use of its Claim No. 1 water right would have severe detrimental impacts on the existing uses and legal rights it has on the River, including the loss of water from the City of Fernley as a municipal owner of Newlands Project *Orr Ditch* decreed water rights, representing thousands of community residents who rely in part on the recharge, diversion and other uses and rights regarding the Truckee Canal, and would therefore constitute a detriment to the public interest as well as an interference with the exercise of existing rights. And finally, that the granting of the application would present a hazard and danger to the health, safety and welfare of the residents of Fallon and the surrounding community, because it would jeopardize the drinking water supply for the City's residents, and therefore, said result being directly contrary to the public interest of the State of Nevada to enhance public municipal drinking water supplies.

The State Engineer finds all these protest claims are premised on the protestants' claims that they should be allowed to use someone else's water right, because they have done so for a long time. The State Engineer has found that the PLPT's water rights are not extinguished and were not abandoned or forfeited in favor of the next senior water right holder on the system. While it may leave less water for the users under Claim No. 3 to utilize, the water under Claim Nos. 1 and 2 is as a matter of the law established under the *Orr Ditch Decree*.

XXIV.

Protestants allege that to the extent the applications will reduce diversions to the Newlands Reclamation Project by changing the operation of the Truckee River relative to the Diverted Flow requirements under the Truckee River Agreement (Article VII) or by serving water under the applications from Floriston Rates they threaten to prove detrimental to the public interest of Churchill County by reducing the potential recharge of the underground aquifers upon which thousands of residents of Churchill County rely for domestic water.

The State Engineer finds the applications do not and cannot deprive the Newlands Project of any water to which it is entitled by virtue of that or any other provision of the *Orr Ditch Decree*.

XXV.

Assertion of federal reserved rights for instream flows can often cause state-granted diversionary rights, usually for irrigation, to lose gallon for gallon.⁹⁹ The Court in Big Horn III noted;¹⁰⁰ therefore, a primary concern is that the change must be orderly and gradual so as to minimize the devastating effect of an enormous dedication to instream flow of water that has never been

⁹⁹ United States v. New Mexico, 438 U.S. 696, 705 (1978).

¹⁰⁰ Cardine, concurring in part and dissenting in part, 835 P.2d at 287.

used for that purpose. The Federal Water Master testified that if the changes are allowed it will be critical when and how the water is taken. The State Engineer finds, because of the potential of injury to the TCID water right users as to storage, the change applications are being limited, and the State Engineer leaves it to the Federal Water Master to regulate the rights in order to assure no injury to other water users.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁰¹

II.

The *Orr Ditch* Decree provides that:

Persons whose rights are adjudicated hereby, their successors or assigns shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree.¹⁰²

III.

Nevada Revised Statute § 533.345(2) provides that:

2. If an applicant is seeking a temporary change of place of diversion, manner of use or place of use of water already appropriated, the state engineer shall approve the application if:
 - (a) The application is accompanied by the prescribed fees;

¹⁰¹ NRS chapter 533 and Final Order Granting the State of Nevada's Motion for Summary Judgment on the Issue of the United States' Application for Change in Use and Change of Purpose, dated February 25, 1984, U.S. v. Orr Water Ditch Company, In Equity No. A-3. Exhibit Nos. 5 and 10.

¹⁰² Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) p. 88.

- (b) The temporary change is in the public interest; and
- (c) The temporary change does not impair the water rights held by other persons.

Unlike the standards set forth in NRS § 533.370(3), which require the State Engineer to reject an application if it threatens to prove detrimental to the public interest, NRS § 533.345 requires the State Engineer to approve a temporary application if the temporary change is in the public interest. In State Engineer's Ruling No. 4683,¹⁰³ the State Engineer considered applications filed by the Pyramid Lake Paiute Tribe for the unappropriated waters of the Truckee River for the recreational purpose of natural spawning of Lahontan cutthroat trout and cui-ui fish in the Truckee River below Derby Dam, to prevent the loss of and to conserve the endangered cui-ui and threatened cutthroat trout, for operation of the Marble Bluff Dam and the Pyramid Lake Fishway in support of the fishery, and to maintain Pyramid Lake at a stable level to support the use of the lake for recreation. In the Ruling, the State Engineer found the applications were filed for a beneficial use of water and did not threaten to prove detrimental to the public interest. The State Engineer noted that the use of water for the fishery purpose was necessary to maintain the threatened and endangered species in Pyramid Lake, but that the amount of unappropriated water could vary from zero to a significant amount depending on the water year. The State Engineer concludes it is in the public interest to allow the use of water under these temporary change applications in support of the fishery.

IV.

The State Engineer concludes that any conclusions of law that may appear in the foregoing findings of fact are herein incorporated by reference.

¹⁰³ State Engineer's Ruling No. 4683, dated November 24, 1998, official records in the Office of the State Engineer.

v.

Junior appropriators are entitled to the maintenance of the conditions substantially as they existed on the date they first exercised their rights, and this standard is what is commonly known as the no injury rule. Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217 (Colo. 1988). Significant injury to the rights of other users could occur if changes of use of reserved rights are not subject to similar conditions; however, direct authority on this issue is rare. The no injury rule requires that junior users can be no worse off than they would have been if the water subject to the reserved right had been used for the primary purpose it was established. Therefore, the State Engineer concludes the limitations placed on the transfers under these applications protect the junior users from injury to their existing rights.

RULING

The protests to Applications 67666-T and 68157-T are hereby upheld in part and denied in part. Application 67666-T is granted in the amount of 11,254.5 acre-feet annually. Application 68157-T is granted in the amount of 8,420 acre-feet annually for a total under the two applications of 19,674.5 acre-feet annually. The water rights shall be exercised as set forth in either proposed Alternative 3 or 4 as described in the Environmental Assessment, that is the water will be taken in equal amounts over a certain number of months. Applications 67666-T and 68157-T are hereby granted in the amounts identified subject to:

1. Existing rights;
2. Payment of the statutory fees; and

Ruling
Page 65

3. Continuing jurisdiction and regulation by the Orr Ditch Decree Court and the Federal Watermaster.
4. Applications 67666-T and 68157-T expire one year from date of the issuance of the permit.
5. Filing of the map required in order to show what lands under Claim No. 1 will remain in irrigation.

Respectfully submitted,


HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 6th day of

December, 2002.