

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

IN THE MATTER OF APPLICATIONS 47809, 47840, 48422, )  
48423, 48424, 48465, 48466, 48467, 48468, 48470, )  
48471, 48647, 48665, 48666, 48667, 48668, 48669, )  
48672, 48673, 48767, 48825, 48827, 48828, 48865, )  
48866 )

(GROUP 3 - "the original 25"); )

47861, 48670, 48826, 49108, 49109, 49110, 49111, )  
49112, 49113, 49114, 49115, 49117, 49118, 49119, )  
49120, 49121, 49122, 49224, 49282, 49283, 49285, )  
49286, 49287, 49288 )

(GROUP 4 - 24 of the "subsequent 190"); )

49116, 49208, 49284, 49393, 49394, 49395, 49396, )  
49397, 49398, 49563, 49564, 49565, 49566, 49567, )  
49568, 49569, 49570, 49638, 49689, 49742, 49880, )  
49998, 49999, 50001, 50002, 50003, 50004, 50005, )  
50006, 50007, 50008, 50009, 50010, 50011, 50012, )  
50013, 50014, 50029, 50333, 50334, 50523, 50524, )  
51037, 51038, 51039, 51040, 51042, 51043, 51044, )  
51046, 51047, 51049 )

(GROUP 5 - 52 of the "subsequent 190"); )

51006, 51041, 51045, 51048, 51050, 51051, 51052, )  
51054, 51055, 51056, 51057, 51058, 51059, 51060, )  
51061, 51082, 51136, 51137, 51138, 51139, 51217, )  
51225, 51226, 51227, 51228, 51229, 51230, 51231, )  
51232, 51233, 51234, 51235, 51236, 51237, 51238, )  
51368, 51369, 51370, 51371, 51372, 51373, 51374, )  
51375, 51376, 51377, 51378, 51379, 51380, 51381, )  
51382, 51384, 51599, 51600, 51601, 51602, 51604, )  
51605, 51606, 51607, 51645, 51732, 51734 )

(GROUP 6 - 62 of the "subsequent 190"); )

51383, 51603, 51608, 51733, 51735, 51736, 51737, )  
51738, 51953, 51954, 51955, 51956, 51957, 51958, )  
51959, 51960, 51961, 51997, 52021, 52252, 52335, )  
52361, 52542, 52543, 52544, 52545, 52546, 52547, )  
52548, 52549, 52550, 52551, 52552, 52553, 52554, )  
52555, 52570, 52668, 52669, 52670, 52843, 53659, )  
53661, 53662, 53910, 54152, 54594, 54595, 54596, )  
54714, 54715, 54882 )

(GROUP 7 - 52 of the "subsequent 190") )

RULING ON  
REMAND

**#5464**

GENERAL

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>1</sup> and *Alpine VI*<sup>2</sup> and the Federal District Court's Order of February 25, 2004,<sup>3</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that an applicant relied on the Federal District Court's prior order to his detriment, that being whether an applicant relied on the exception

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<sup>1</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>2</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>3</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

for intrafarm transfers.

## II.

Various applicants/permittees<sup>4</sup> feel very strongly that they have suffered the consequences of rulings that have tried to identify general broad brush rules for the Newlands Project water rights, and have never had a fair day in court as to the specifics of their individual cases. Therefore, they requested that their application be set aside in a ruling that stands on its own. At the February 25, 2004, status conference, the Federal District Court indicated this would be acceptable. However, the Federal District Court indicated that it wants the State Engineer to present it with an entire package that encompasses everything at issue. In order to do this, the State Engineer is presenting the Federal District Court with one package that addresses all 215 applications under consideration, but within this package there are individual rulings under sub-ruling numbers.

## III.

The Tribe does not agree the protest issues as to some applications/permits should be considered withdrawn. The parties are not disagreeing that when an application/permit is withdrawn that nothing remains pending before the State Engineer as to a particular permit. Rather, the Tribe wants resolution as to the petition case claims pending before the Federal District Court because of the evidence already developed. The court said if the parties could not agree as to the status of any application it was for the State Engineer to consider and make a recommendation to the court. The State Engineer considers once a permit is withdrawn there is nothing pending before him and makes no recommendation as to how the Federal District Court should handle the petition cases

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<sup>4</sup> The State Engineer notes that since the permits were granted under these applications and the State Engineer's decisions were not stayed, the water right holders are actually permittees and no longer applicants. However, for purposes of this ruling the State Engineer is going to use the terms applicant or permittee interchangeably throughout this ruling.

that are pending before it.

#### IV.

The court is going to find in some instances that the State Engineer is going to inform it that particular applicants are pursuing the provisions of the Assembly Bill 380 program (AB 380); therefore, no ruling is made at this time. If the court is not aware, AB 380 was enacted by the Nevada Legislature as a means of trying to bring resolution to these TCID transfer cases. The program enables a water right holder to either sell its water rights into the AB 380 program and withdraw the related pending contested water right permit or request matching water rights in order to allow the transfer application to go forward. The AB 380 program at this time runs through 2006, and therefore, is not completed. The AB 380 program is managed by the Carson Water Subconservancy District (CWSD).

The way the State Engineer determined to handle contested permits in relation to the AB 380 program is as follows. If a permit holder decided to sell all of the water rights under a contested application to the program, that permittee should have withdrawn the permit at the time of the sale to CWSD. If that was not done, the State Engineer by ruling is voiding the permit based on the information that there is no longer a water right that can support the permit. If a permit holder had multiple parcels under consideration and only some of the water rights from particular parcels were sold into the program, the permit holder was required to withdraw those portions of the permit prior to the completion of the sale to CWSD.

If a permit holder decided to match under the program and a match was complete prior to the State Engineer issuing this ruling, the State Engineer is informing the Federal District Court of that fact and that as far as he is concerned that should resolve the contested transfer. If an applicant informed the State Engineer that it had decided to participate in the program and was waiting for match water at the time this ruling was issued, the State

Engineer did not consider the matter as resolved. The matter can only be resolved when an actual match is complete. In those situations, the State Engineer is informing the court that a particular applicant has indicated it hopes to participate in the program, that a match is not complete and the matter will be unresolved until that the time of said match. If a permit holder decided to pursue a partial match under the program (that is a match as to some parcels, but not all), but proceeded with contested issues on another portion of the transfer, the State Engineer is not issuing a ruling until the match is complete.

The Tribe's legal counsel suggested the State Engineer and the CWSD set a cutoff date by which an applicant either had to have water available to be matched or had to decide whether to sell its water into the program or proceed to hearing. Since the program runs for approximately another year, the State Engineer does not believe he should force a cutoff date as to do so will defeat the purpose of the program.

#### FINDINGS OF FACT

##### I.

After reviewing Alpine IV, V and VI together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at

the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.

4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.
6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to

transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.

7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.
9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

Other applicants still want to challenge the standards set forth by the Ninth Circuit Court of Appeals arguing that the court established the standard without the relevant evidence that would show it the standard was not based in the realities of the

activities on the Newlands Project. The Ninth Circuit Court of Appeals established a standard that to avoid forfeiture or abandonment the applicant had to show that he or she unsuccessfully attempted to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted. Applicants argue that there basically never were any provisions for filing transfers in the Project and other transfers, such as the "small tract sales," need to be taken into consideration, and since no such thing as a transfer really existed, the Ninth Circuit Court of Appeals' standard is based on a distortion of the real world.

Applicants presented the following information to the State Engineer in support of this argument. While the State Engineer allowed the evidence and testimony to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that if he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the applicants the opportunity to present it to the court, the State Engineer presents a recitation of the applicant's factual summary and argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the evidence and argument before them. The State Engineer provides the argument nearly verbatim.

Said factual summary and argument indicates:

Pursuant to the Reclamation Act of June 17, 1902, the United States Department of Interior withdrew lands in Churchill and Lyon Counties in the State of Nevada, for what is now the Newlands Project.<sup>5</sup> The project purpose was to conserve and divert water from the Truckee and Carson Rivers for flood control and irrigation purposes. In order to initially determine the acreage eligible to

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<sup>5</sup> Exhibit No. 1521, public administrative hearing before the State Engineer, August 9, 2004.

receive water delivery from the Project, the Bureau of Reclamation classified acreage within the Project boundaries within six classes.<sup>6</sup> Class 1-4 lands were considered irrigable and Classes 5 and 6 were considered non-irrigable. However, Class 5 lands were considered to be reclaimable and could be reclassified. The first irrigable classification determinations were documented in a drawing referred to as the 1913 Irrigable Area Map (aka funny papers).<sup>7</sup>

With regard to conserving and efficiency, Reclamation exchanged vested (pre-Project) water rights within the Project boundaries for Project water storage delivery contracts to landowners in the form of "Permanent Water Right Contracts" (hereinafter "vested contracts").<sup>8</sup> Those holding vested contracts were not required to pay construction charges, only the annual operation and maintenance costs for Project deliveries. The first vested contract issued by Reclamation to a Newlands Project landowner was on January 8, 1907, to G.E. Burton and W.F. Kaiser. The last vested contract was signed on July 21, 1919, by J.W. Freeman. In total, the United States exchanged 22,148 acres of vested (pre-Project) water rights for storage delivery contracts from the Project. Most vested contracts had an attached drawing showing generally where the water was used by the landowner at the time of the exchange.<sup>9</sup>

In addition to these first contracts, Reclamation issued 45,207 acres of Permanent Water Right Contracts referred to as "Application Lands" (hereinafter "application contracts") for those willing to pay for the construction, operation and maintenance of

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<sup>6</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

the Project in return for receiving water delivery from the Project onto homestead lands not previously irrigated. These application contracts were issued between 1903 and 1926.<sup>10</sup>

In 1926, Reclamation entered into a repayment contract with the Truckee-Carson Irrigation District (TCID) to take over ownership and management of the Newlands Project pursuant to the contract terms.<sup>11</sup> Once the contract was signed, TCID (instead of Reclamation) began accepting applications for "Non-Application Lands" (hereinafter "non-application contracts").<sup>12</sup> These lands were withdrawn and classified as irrigable by Reclamation but were not homesteaded before 1926.<sup>13</sup> These non-application contracts were first approved by TCID and then forwarded to Reclamation for final approval.<sup>14</sup> The process for issuing water right delivery contracts involved the following steps: (1) Landowner made application to TCID; (2) Application was required to include all lands classified as irrigable by Reclamation in the Lot; (3) TCID referred applications to Reclamation; (4) Reclamation confirmed that all lands applied for were classified irrigable. Lands in the application identified as not irrigable would not receive Reclamation approval. Class 5 lands not approved would be instructed by Reclamation and/or TCID to lease or buy water from TCID so that the Landowner might use the water on the "non-irrigable" classed land to establish actual irrigability. These "reclaimed Class 5 lands" could then be reclassified (Class 1-4)

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<sup>10</sup> *Id.*

<sup>11</sup> Exhibit No. 1518, public administrative hearing before the State Engineer, August 9, 2004.

<sup>12</sup> Exhibit No. 1512, public administrative hearing before the State Engineer, August 9, 2004.

<sup>13</sup> Exhibit No. 1514, public administrative hearing before the State Engineer, August 9, 2004.

<sup>14</sup> Exhibit Nos. 1516, 1517, 1521, 1528, public administrative hearing before the State Engineer, August 9, 2004.

and become eligible to receive a non-application contract; (5) Once approved, TCID recorded the non-application contract at the County Recorders Office. TCID actually issued 9,261 acres of non-application contracts during this period. The last non-application contract was issued on December 8, 1964.

In 1953, Reclamation agreed to sell small land parcels "Small Tract Sales" containing irrigable land within the Project owned by the United States.<sup>15</sup> These were withdrawn lands not yet patented. Contracts for Small Tract Sales provided that the irrigable portions of land sold would be granted a water storage delivery contract upon application to TCID. Even though Reclamation inquired occasionally to TCID regarding the status of various small tract owners, 530 acres of the 1,233 irrigable acres within these small tracts were never granted water storage delivery contracts. Beginning in 1984, the owners of those lands that never received water storage delivery contracts, but for which the landowner (1) had purchased both the land and right to water delivery from the Project and (2) had perfected storage water for irrigation, were informed of a change in procedure. TCID instructed them to obtain recognition of their right to use project storage waters on their purchased lands within the Project by means of a transfer before the Nevada State Engineer instead of through an application to Reclamation or TCID for a contract.

This change in procedure for obtaining storage water delivery from the Project likely occurred for financial reasons. As a result of an amendment dated June 14, 1944, to the 1926 contract between the U.S. and TCID, provision for repayment of the then \$500,000 deficit portion on the construction obligation was computed on the basis of \$54 an acre. By 1964, Reclamation and TCID had issued approximately 54,471 acres of application and non-application contracts which produced sufficient revenue to repay

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<sup>15</sup> Exhibit Nos. 1512, 1513, 1514, 1525, 1539, public administrative hearing before the State Engineer, August 9, 2004.

the construction charges against the Project. The last \$3,291.64 was satisfied by issuing only 61 acres of the 86 acres on the application of Charles F. McCuskey.<sup>16</sup>

Because sufficient water storage delivery contracts had been sold to repay the construction obligation to the United States, Reclamation took the position that no new water delivery contracts could be issued. However, this position failed to take into account the following facts: (1) TCID had available for reissuance about 1,500 acres of storage water delivery contracts returned to it by reason of foreclosures on unpaid assessments; (2) many acres previously receiving water storage delivery were now replaced by roads, corrals, and buildings; (3) the United States Navy was enlarging its base and purchasing large tracts of land within the Project some holding water delivery contracts; and (4) some storage water delivery contracts were placed in a suspended or non-pay class because the landowners were not able to increase crop production on these lands to make them profitable. Reclamation suggested that these storage water right contracts could be transferred to other irrigable lands within the Project.<sup>17</sup>

At that time, Reclamation and TCID began negotiating on various items including the problem of "irrigated, non-water righted lands" within the Project. "Irrigated, non-water righted lands" were lands receiving storage water delivery from TCID for which a storage water contract had not been issued. The negotiated agreement later became known as the "9 Point Agreement." This was a global settlement, but as it pertained to "transfer" of water (amending storage water delivery contracts to describe different lands) it was negotiated (1) to allow TCID to sell 1,000 acres of new water storage delivery contracts; and (2) to allow TCID to

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<sup>16</sup> Exhibit No. 1519, public administrative hearing before the State Engineer, August 9, 2004.

<sup>17</sup> Exhibit Nos. 1519, 1522-24, 1526-28, 1531-32, 1543, 1545, 1547-48, 1550-52, 1572-82, public administrative hearing before the State Engineer, August 9, 2004.

"transfer" (more appropriately to amend existing water storage delivery contracts) from those 1,500 acres of described storage water delivery contracts to other irrigable and productive lands. Issuance of the new contracts and amending ("transferring") other contracts for storage water delivery to 2,500 acres would have covered the lands of farmers who had requested new storage water right contracts since the United States moratorium on the issuance of new water right contracts on December 11, 1964. This list of landowners was attached to the "9 Point Agreement" as Appendix A. It later became known as the "A List."<sup>18</sup>

Because the federal district court has assumed jurisdiction of the Carson River for purposes of adjudicating the rights therein under the Alpine Decree, the State continued to abstain from exercising jurisdiction within the Newlands Project to issue or transfer water rights.<sup>19</sup>

In 1972, after 8 years of negotiations on the "9 Point Agreement," rules were finally approved by TCID and Reclamation to process the issuance of new storage water delivery contracts and the storage water delivery contract amendments (aka "transfers"). Before any storage water delivery could occur under these new and amended contracts, the landowner was required to use water delivery from any described lands under his existing storage water delivery contracts that he was either not irrigating on his farm unit (intrafarm), that was associated with less productive lands, or that was associated with lands left idle or lands under improvement such as corrals, homes, and stack yards.<sup>20</sup> If the Landowner still did not have sufficient storage water delivery contracts to cover his irrigated acreage after amending his existing storage water

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<sup>18</sup> *Id.*

<sup>19</sup> Testimony of Peter Morros, public administrative hearing before the State Engineer, August 9, 2004.

<sup>20</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

delivery contracts intrafarm, he was eligible to buy additional storage water delivery contracts through TCID (authorized new or reissued). These "transfer" applications required Reclamation's approval. The "A List" provided the priority in making the few "transfers" that occurred.

In 1972, the Operating Criteria and Procedures ("OCAP") for Federal Facilities in the Truckee-Carson River Basins was modified by the District of Columbia and forwarded to the Department of Interior to establish the operating criteria and procedures for TCID.<sup>21</sup>

Pursuant to the "9 Point Agreement," TCID processed and sent to Reclamation "transfer" applications for many Landowners. Between April 27, 1973, and May 15, 1973, a twenty-day period, Reclamation approved 29 individual "transfer" applications for approximately 850 acres of land.<sup>22</sup> On May 22, 1973, Reclamation suspended approval of any "transfer" applications.<sup>23</sup> TCID continued to accept "transfer" applications for the purpose of amending storage water delivery contracts and forwarded them to Reclamation for a period of time. However, Reclamation refused approval.<sup>24</sup>

In September 1973, Reclamation sent TCID notice that it was terminating the 1926 contract. The Secretary of Interior's letter canceling the 1926 contract and taking over supervisory management of the Project was published in the local paper. Therefore, the information that no "transfers" (amendments to storage water

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<sup>21</sup> Exhibit Nos. 1553-54, public administrative hearing before the State Engineer, August 10, 2004.

<sup>22</sup> Testimony of Ernest Shank and Exhibit Nos. 1529-30, 1555-56, public administrative hearing before the State Engineer, August 9 and 10, 2004.

<sup>23</sup> Exhibit Nos. 1534, 1557-58, public administrative hearing before the State Engineer, August 10, 2004.

<sup>24</sup> Exhibit Nos. 1534-45, 1541, 1558, 1561, public administrative hearing before the State Engineer, August 10, 2004.

delivery contracts) would be allowed in the Project was disseminated to the public at large.<sup>25</sup> In 1975, TCID received a letter from Reclamation notifying it that "Interior was no longer considering the "9 Point Agreement."<sup>26</sup>

In 1980, Reclamation hired an engineering firm to study and determine which lands within the Project were receiving storage water delivery. Available irrigability classification maps, original applications for storage water delivery, and ledger cards noting water delivery as they existing in TCID's files were used in this process. Clyde-Criddle-Woodland, Inc. verified water delivery and use within each quarter/quarter section of the Project ("Criddle Report") using this method.<sup>27</sup> Chilton Engineering issued a report verifying that 73,672 acres were deemed to be the total water right contracts issued within the Newlands Project.

Through the decades between 1970 and 1980 and into the 1980's after the *Alpine*<sup>28</sup> decision and *Nevada v. U.S.*,<sup>29</sup> the "A List" grew to about 4,000 acres requiring changes in the described areas requiring storage water delivery. The final Decree issued in *Alpine* finally secured the Nevada State Engineer's jurisdiction to process transfers for changes in place of use within the Project.

On March 13, 1984, TCID held a lottery to prioritize 135 individuals on the "A List" who were seeking storage water delivery contracts. TCID sold storage water delivery contracts that had

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<sup>25</sup> Exhibit Nos. 1537-38, public administrative hearing before the State Engineer, August 10, 2004.

<sup>26</sup> Exhibit Nos. 1539, 1540, 1561-62, 1564-65, public administrative hearing before the State Engineer, August 10, 2004.

<sup>27</sup> Exhibit Nos. 1567, 1570, public administrative hearing before the State Engineer, August 10, 2004.

<sup>28</sup> *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (1983), cert. denied, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

<sup>29</sup> *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983).

been authorized or returned to approximately the first 60 individuals on the list. Many individuals purchased storage water delivery contracts from neighbors.<sup>30</sup>

Between 1980-84, due to the existing subdivisions of the farms, it became increasingly difficult for engineering staff at TCID to divide storage water delivery contracts among parceled lands. Thus, TCID commenced to make storage water delivery drawings match the 1:400 scale of Reclamation's Property and Structures maps. Revisions were done using the 1913 Irrigable Area maps, 1972 revisions of water right drawings, 1948 and 1974 photographs, and 1903-64 water right applications.<sup>31</sup> There were no field investigations or physical surveys used as a basis for these maps. They were drawn only for purposes of allocating storage water delivery contracts between properties that were divided. These drawings were later taken and copied by Reclamation. Never intended to become such, they are now referred to as "water rights maps."

In order to decide who ought to file transfers with the Nevada State Engineer, TCID took these "water right maps" and overlaid them with the Bureau of Reclamation's annual aerial photographs. When these two did not match, it was assumed that a transfer needed to be filed. From these drawings, TCID and private engineering firms prepared transfer maps for the landowners to accompany transfer applications filed with the Nevada State Engineer.

The applicants argue that because jurisdiction did not lie with the Nevada State Engineer to make transfers within the Newlands Project until the final decree in *Alpine*, relevant attempts to transfer as required by the 9th Circuit are those that were attempted after the date of *Alpine*, in 1983. The applicants

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<sup>30</sup> Exhibit Nos. 1542, 1549, public administrative hearing before the State Engineer, August 10, 2004.

<sup>31</sup> Exhibit Nos. 1501, 156768, 15709, public administrative hearing before the State Engineer, August 10, 2004.

argue that "water rights maps" in this proceeding shall be considered drawings and not the best evidence of the existing and proposed places of use, rather the applicant's testimony shall be the best evidence.

The State Engineer finds that the rule of the case dictates his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world. The State Engineer finds the "water rights maps" were not used to indicate the proposed places of use and are the best evidence of the existing places of use.

III.

**GROUP 3**

APPLICATIONS 47809 AND 51738

The court is hereby informed that State Engineer's Ruling No. 4798 granted the applicants the right to change water rights off of 3.10 acres of land and declared the water rights as to 1.53 acres of land abandoned. These applicants later filed change Application 51738 which moved the 3.10 acres of water rights thereby abrogating 47809. When the applicants decided to participate in the AB 380 program, they withdrew Permit 51738 and the water did not revert back to Permit 47809, but rather was sold into the AB 380 program. To the State Engineer's knowledge on February 29, 2003, all parties stipulated that settlement had been consummated and the permits were withdrawn. Therefore, as far as this litigation is concerned as to Application 47809 the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 47840

The court is hereby informed that the protest to Application 47840 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 1, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48422

The court is hereby informed that Permit 48422 was cancelled by the State Engineer on March 29, 1990. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48423

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling Nos. 4591 and 4750 as to Application 48423 was affirmed by the Federal District Court in *Alpine IV* as to Parcels 2 and 3, and the Applicant withdrew the request for change for Parcel 1. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of on-farm, dirt-lined ditches. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48424

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4591 as to Application 48424 that the Tribe did not prove its protest claims was affirmed by the Federal District Court on September 3, 1998. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48465

The court is hereby informed that the protest to Application 48465 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 26, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48466

The court is hereby informed that the protest to Application 48466 was withdrawn by the Pyramid Lake Paiute Tribe on or about

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July 26, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48467

The court is hereby informed that Permit 48467 was withdrawn by the permittee on or about January 19, 1998. However, the Federal District Court remanded the matter to the State Engineer for reinstatement, but the permittee then again withdrew the permit on or about November 3, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48468

Permit 48468 was before the Federal District Court for decision. Document 942 was filed as supplemental evidence and documents 952, 953 were responses to said supplemental evidence filed by the Pyramid Lake Paiute Tribe and the United States, and document 956 was the Applicant's reply to the United States' and Pyramid Lake Paiute Tribe's responses to the supplemental evidence. By the Federal District Court's Order of February 25, 2004, the court ordered Permit 48468 be remanded to the State Engineer for findings and recommendations based on these documents. The court is hereby informed that Permit 48468 was withdrawn by the permittee on or about December 5, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to the matters before the State Engineer.

APPLICATION 48470

The court is hereby informed that Permit 48470 was withdrawn by the permittee on or about November 7, 1988. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48471

The court is hereby informed that Permit 48471 was withdrawn

by the permittee on or about February 6, 1996. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48647

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling Nos. 4591 and 4750 as to Application 48647, that the water rights requested for transfer from Parcel 1 was declared forfeited and from Parcel 2 was not subject to forfeiture due to a pre-1913 contract date and that the Applicant had demonstrated a lack of intent to abandon, was held by the Federal District Court by Minute Order dated January 29, 2003, to be final. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48665

The court is hereby informed that Permit 48665 was withdrawn by the permittee on or about March 18, 1996. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48666

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling Nos. 4591 and 4750 as to Application 48666 that the water rights requested for transfer were declared forfeited and abandoned was not challenged on appeal. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48667

The court is hereby informed that the protest to Application 48667 was withdrawn by the Pyramid Lake Paiute Tribe on or about

July 20, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48668

Permit 48668 was before the Federal District Court for decision. Document 942 was filed as supplemental evidence and documents 952, 953 were responses to said supplemental evidence filed by the Pyramid Lake Paiute Tribe and the United States, and document 956 was the Applicant's reply to the United States' and Pyramid Lake Paiute Tribe's responses to the supplemental evidence. By the Federal District Court's Order of February 25, 2004, the court ordered Permit 48668 be remanded to the State Engineer for findings and recommendations based on these documents. The court is hereby informed that Permit 48668 was withdrawn by the permittee on or about April 7, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to the matters before the State Engineer.

APPLICATION 48669

The court is informed that the protest to Application 48669 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48672

Application 48672 consisted of two parcels of land from which the Applicant requested to transfer water rights. As to these two parcels, the Tribe alleged partial lack of perfection and abandonment. In State Engineer's Ruling No. 4591, the State Engineer found that the Tribe did not prove its claim of lack of perfection, and this decision was affirmed by the Federal District

Court in *Alpine IV* and said decision was not challenged on appeal.<sup>32</sup> As the Tribe's claim of abandonment with regard to Parcel 1, the State Engineer found that the Tribe had not proved its claim of abandonment and that decision was affirmed the Federal District Court in *Alpine IV* and said decision was not challenged on appeal. In the Federal District Court's Order of January 29, 2003, the court found that the ruling as to Parcel 1 is final.

As to the Tribe's claim of abandonment with regard to Parcel 2, in State Engineer's Ruling No. 4591, the State Engineer noted that the Tribe described the land use on Parcel 2 from 1962 through 1984 as portion possibly irrigated, road and canal. At the 1985 administrative hearing, the Applicant described the land use as Upper Soda Lake Drain, road and drain. The State Engineer found that taking the Applicant's land use description that no water was placed to beneficial use on Parcel 2 for the 36 year period from 1948 through 1984. On remand, in State Engineer's Ruling No. 4750, the State Engineer found that Parcel 2 was an intrafarm transfer not subject to the doctrine of abandonment based on the Federal District Court's Order of September 3, 1998.

At the time of this present remand to the State Engineer, Permit 48672 was before the Federal District Court for decision as it had been fully briefed and supplemental evidence had been provided to the Federal District Court. The Applicant had filed Document 940, which was its brief on remand in support of the application, and which provided supplemental evidence. Document 941 was filed by the Applicant as an errata to the brief on remand, documents 952 and 953 were responses to said supplemental evidence filed by the Pyramid Lake Paiute Tribe and the United States, and document 957 was the Applicant's reply to the United States' and Pyramid Lake Paiute Tribe's responses to the supplemental evidence.

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<sup>32</sup> Order, pp. 11-13, *U.S. v. Alpine Land and Reservoir, Co.*, D-184 HDM, dated September 2, 1998. See also, State Engineer's Ruling No. 4750, pp. 34-35, dated July 21, 1999, official records in the Office of the State Engineer.

By the Federal District Court's Order of February 25, 2004, the Court ordered that Permit 48672 be remanded to the State Engineer for findings and recommendations based on these documents.

In the Applicant's Brief on Remand (document 940), the Affidavit presented as Exhibit A indicates that the existing place of use is roads, ditches or canals, drains and portions adjacent thereto in some cases appeared to be irrigated. The State Engineer is not in this instance reconsidering his land use determinations. Therefore, the finding that he accepted the Applicant's description of the land use from the 1985 hearing, that is that the existing place of use is covered by the Upper Soda Lake Drain, a road and a drain stands as the State Engineer's land use determination. The State Engineer finds these uses are inconsistent with irrigation. In the Affidavit, it is indicated that the Applicant continued to use the water from and after 1948, although the precise location of beneficial use changed. (Document 940, Exhibit A, p. 2.)

The Applicant's briefs presents the arguments that the Applicant should not be required to prove the futile act of filing for a transfer, and that the water rights are appurtenant to the entire farm unit and can be used on any portion of the farm unit. The brief notes that this applicant is now deceased, and there is no witness or evidence of whether or not the Applicant attempted to transfer his water right by filing an application prior to the one under issue here or whether he made inquiry to either the Truckee-Carson Irrigation District or the Bureau of Reclamation with respect to whether or not he should formally attempt to transfer his water rights. The brief notes it is virtually impossible in many instances to ascertain whether or not inquiry was made, particularly with respect to the moratorium period beginning in the early 1970s, and the Applicant should not be required to prove a futile act, that is, that he tried to file a water right transfer when there was a moratorium on said transfers imposed by the Bureau of Reclamation from 1973 to 1984.

The Applicant also argues, citing to NRS § 533.075, that

rotation of the use of water on different parcels of land within any given farm is an accepted agricultural practice and authorized by Nevada law. NRS § 533.075 provides that a single water user having lands to which water rights of a different priority attach, may rotate the use of those water rights to the different lands if it can be done so without injury to lands enjoying an earlier priority.

In response, the Protestant argues that the State Engineer should reject the Applicant's argument that he should not be required to prove a futile act, because the argument is inconsistent with *Alpine V*, which held that the existence of the moratorium did not support the "blanket application of an equitable exemption from forfeiture or abandonment." The Protestant also argues that the Federal District Court's Order of January 29, 2003, allowed the applicants only to supplement the record to demonstrate specially what steps were taken to attempt to transfer water rights and how these efforts may have been thwarted by the government or TCID. The applicants were to designate what portion of the record the court should examine in determining the issue of abandonment or lack of intent to abandon and were to append copies of the record, transcripts, decisions of the State Engineer, etc. No cross-reference was to be made to trial testimony in other proceedings. The Protestant argues that this applicant went far beyond the scope of that order and the submittal and new arguments should be disregarded. Further, evidence in the Applicant's brief (Exhibit D) indicates that the Bureau of Reclamation would continue to accept a transfer application and process it up to the point of approval even though a moratorium on approvals was in place.

The Protestant and the United States argue that the period of non-use is far greater than the period of time the moratorium was in place.

The State Engineer finds the provisions of NRS § 533.075 concerning rotation are inapplicable to the situation under consideration here as there are not collective users rotating among

themselves nor does this applicant have water-righted lands with different priority rights attached. The State Engineer has already found accepting the Applicant's land use description that the land use was Upper Soda Lake Drain, a road and a drain, and that no water was placed to beneficial use on Parcel 2 for the 36 year period from 1948 through 1984. The State Engineer finds the Ninth Circuit Court of Appeals has already rejected the futility argument or the argument that water rights are appurtenant to the entire farm. The State Engineer finds there is no evidence in this record that the Applicant unsuccessfully filed for a change in place of use or at least inquired about the possibility.

Therefore, the State Engineer recommends the Federal District Court declare the water right appurtenant to Parcel 2 as abandoned.

APPLICATION 48673

In State Engineer's Ruling No. 4591, the State Engineer was considering one parcel of land and protest issues of partial lack of perfection, forfeiture and abandonment. The Federal District Court in *Alpine IV* affirmed the State Engineer's decision that the Tribe did not prove partial lack of perfection and did not prove its claims of forfeiture or abandonment. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue as to an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48767

The court is hereby informed that the protest to Application 48767 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 16, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48825

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4591, that the Tribe did

not prove its claims of lack of perfection, forfeiture or abandonment, was affirmed by the Federal District Court in *Alpine IV*. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue as to an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48827

The court is hereby informed that Permit 48827 was withdrawn by the permittee on or about December 12, 1990. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48828

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4591 as to Application 48828, that the Tribe did not prove its protest claims, was affirmed by the Federal District Court in *Alpine IV*. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue as to an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48865

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4591 as to Application 48865 was affirmed by the Ninth Circuit Court of Appeals in *Alpine V*. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 48866

The court is hereby informed that the protest to Application 48866 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 16, 1996. Therefore, as far as this litigation is concerned

the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

#### **GROUP 4**

##### APPLICATION 47861

The court is hereby informed that Permit 47861 was withdrawn by the permittee on or about May 23, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

##### APPLICATION 48670

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

##### APPLICATION 48826

The court is hereby informed that Permit 48826 was withdrawn by the permittee on or about September 23, 1994. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

##### APPLICATION 49108

The court is hereby informed that the protest to Application 49108 was withdrawn by the Pyramid Lake Paiute Tribe on or about April 16, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

##### APPLICATION 49109

The court is hereby informed that the Ninth Circuit Court of Appeals in *Alpine VI* affirmed the State Engineer's decision in State Engineer's Ruling No. 4798 that the Protestant had not provided clear and convincing evidence of non-use or an intent to abandon the water right. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. Therefore, as far as this litigation

is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49110

The court is hereby informed that the Ninth Circuit Court of Appeals in *Alpine VI* affirmed the State Engineer's decision in State Engineer's Ruling No. 4798 that the Protestant had not provided clear and convincing evidence of non-use or an intent to abandon the water right as to Parcel 1 and that Parcels 2 & 3 were declared abandoned. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49111

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4798 declaring the water right abandoned was affirmed by the Federal District Court on February 20, 2001, and by the Ninth Circuit Court of Appeals in *Alpine VI*. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49112

The court is hereby informed that the protest to Application 49112 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 15, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49113

The court is hereby informed that Permit 49113 was withdrawn by the permittee on or about September 23, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49114

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49115

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49117

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49118

The court is hereby informed that the protest to Application 49118 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 9, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49119

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program and has obtained matching water. Therefore, as far as the State Engineer is concerned the matter should be fully resolved and the State Engineer recommends the Federal District Court dismiss the protest and affirm the transfer.

APPLICATION 49120

The court is hereby informed that Permit 49120 was withdrawn by the permittee on or about March 14, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49121

The court is hereby informed that the protest to Application 49121 was withdrawn by the Pyramid Lake Paiute Tribe on or about

July 7, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49122

The court is hereby informed that the Ninth Circuit Court of Appeals in *Alpine VI* affirmed the State Engineer's decision in State Engineer's Ruling No. 4798 as to Parcels 3, 4 & 5 that the protestant had not provided clear and convincing evidence of non-use or an intent to abandon the water right. There was no protest claim as to Parcel 2.

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water as to Parcel 1. Therefore, no recommendation is made at this time.

APPLICATION 49224

The court is hereby informed that the protest to Application 49224 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 12, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49282

The court is hereby informed that the protest to Application 49282 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 7, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49283

The court is hereby informed that the protest to Application 49283 was withdrawn by the Pyramid Lake Paiute Tribe on or about September 1, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49285

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4798 as to Application 49285 declaring the water right abandoned was affirmed by the Federal District Court on February 20, 2001, and by the Ninth Circuit Court of Appeals in *Alpine VI*. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49286

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49287

The court is hereby informed that Permit 49287 was withdrawn by the permittee on or about September 18, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49288

The court is hereby informed that the protest to Application 49288 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 26, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

**GROUP 5**

APPLICATION 49116

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49208

The State Engineer has been informed that the permittee's successor-in-interest has chosen to participate in the AB 380

program by selling the water from the proposed place of use into the AB 380 program and the water right was retired. In light of that fact, there is no water right to support the proposed place of use under Permit 49208, the State Engineer hereby voids Permit 49208.

APPLICATION 49284

The court is hereby informed that the protest to Application 49284 was withdrawn by the Pyramid Lake Paiute Tribe on or about March 25, 1996. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49393

The court is hereby informed that the protest to Application 49393 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49394

The court is hereby informed that Permit 49394 was withdrawn by the permittee on or about August 26, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49395

The court is hereby informed that the protest to Application 49395 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 14, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49396

In State Engineer's Ruling No. 5005, the State Engineer had four parcels of land under consideration, and concluded that the Tribe did not prove its claims of abandonment as to Parcels 1, 2, and 4 by clear and convincing evidence. The State Engineer has

been informed that the permittee has chosen to participate in the AB 380 program as to Parcel 3 and has obtained matching water. Therefore, as far as the State Engineer is concerned the matter should be fully resolved and recommends the Federal District Court dismiss protest dismissed and affirm the transfer.

APPLICATION 49397

The court is hereby informed that the protest to Application 49397 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 21, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49398

The court is hereby informed that the protest to Application 49398 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 21, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49563

The court is hereby informed that Permit 49563 was withdrawn by the permittee on or about November 10, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49564

The court is hereby informed that as to Permit 49564 no person specifically appealed State Engineer's Ruling No. 4798 that declared the water right forfeited. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49565

The court is hereby informed that Permit 49565 was withdrawn by the permittee on or about July 11, 1995. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49566

The court is hereby informed that Permit 49566 was cancelled by the State Engineer on March 31, 1993. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49567

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49568

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49569

The court is hereby informed that as to Permit 49569 no person specifically appealed State Engineer's Ruling No. 5005 that declared the water rights forfeited and abandoned. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49570

The court is hereby informed that Permit 49570 was withdrawn by the permittee on or about January 13, 1998. Therefore, as far as this litigation is concerned the matter is concluded and nothing

remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49638

The court is hereby informed that the protest to Application 49638 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 21, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49689

The court is hereby informed that as to Permit 49689 no person specifically appealed State Engineer's Ruling No. 5005 that found the Tribe did not prove non-use by clear and convincing evidence and that the Protestant did not prove its case. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49742

The court is hereby informed that the protest to Application 49742 was withdrawn by the Pyramid Lake Paiute Tribe on or about March 25, 1996. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 49880

The court is informed that the ruling on remand as to Application 49880 is addressed in a separate sub-ruling to this ruling.

APPLICATION 49998

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 49999

This application involved three parcels of land, with the Tribe only protesting the transfer from Parcel 3 alleging forfeiture and abandonment. There are no protest claims as to Parcels 1 and 2. In State Engineer's Ruling No. 5005, the State Engineer found the contract date was December 30, 1907; therefore, the forfeiture claims was without merit and only the abandonment claim remained. The State Engineer recommends that the Federal District Court affirm the State Engineer's decision in State Engineer's Ruling No. 5005 that there was sufficient evidence of a lack of intent to abandon the water right on Parcel 3 and affirm the transfer.

APPLICATION 50001

The court is hereby informed that Permit 50001 was withdrawn by the permittee on or about November 19, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50002

The court is hereby informed that the protest to Application 50002 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50003

The court is hereby informed that the protest to Application 50003 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 14, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50004

The court is hereby informed that the Permit 50004 was withdrawn by the permittee on or about January 30, 2004. Therefore, as far as this litigation is concerned the matter is

concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50005

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 50006

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 50007

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 50008

The court is informed that the ruling on remand as to Application 50008 is addressed in a separate sub-ruling to this ruling.

APPLICATION 50009

The court is hereby informed that the protest to Application 50009 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 30, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50010

The court is hereby informed that the Permit 50010 was withdrawn by the permittee on or about January 28, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50011

The court is hereby informed that the protest to Application 50011 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 13, 2001. Therefore, as far as this litigation is concerned

the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50012

The court is hereby informed that the protest to Application 50012 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 12, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50013

The court is hereby informed that the protest to Application 50013 was withdrawn by the Pyramid Lake Paiute Tribe on or about June 28, 1995. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50014

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 50029

The court is hereby informed that the protest to Application 50029 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 21, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50333

The court is hereby informed that the protest to Application 50333 was withdrawn by the Pyramid Lake Paiute Tribe on or about April 16, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50334

The court is hereby informed that the protest to Application 50334 was withdrawn by the Pyramid Lake Paiute Tribe on or about April 27, 2001. Therefore, as far as this litigation is concerned

the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50523

The court is hereby informed that the protest to Application 50523 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 3, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 50524

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51037

The court is hereby informed that the protest to Application 51037 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 1, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51038

In State Engineer's Ruling No. 4798, the State Engineer was addressing 10 parcels of land under Application 51038. As to Parcels 1, 2, 7, 8, 9, and 10, the appurtenant water rights were declared either forfeited or abandoned in their entirety. As to Parcel 3, the State Engineer declared the water rights appurtenant to 3.4 acres abandoned, and since no contract was provided covering the remaining 0.90 acres of that parcel, the State Engineer did not allow the transfer of water rights from that 0.90 of an acre. The water rights appurtenant to Parcels 4 and 5 were allowed to be transferred based on the State Engineer's finding that these parcels were covered by on-farm, dirt-lined ditches. As to Parcel 6, the Tribe conceded that 1.40 acres of the 2.56 acre parcel were irrigated and the State Engineer declared the water rights appurtenant to 1.16 acres forfeited.

The only thing remaining for additional consideration by the

State Engineer under this ruling is whether the water rights appurtenant to Parcels 4 and 5 are subject to forfeiture or abandonment. The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water for these parcels. Therefore, no recommendation is made at this time.

APPLICATION 51039

The court is hereby informed that the protest to Application 51039 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51040

The court is hereby informed that the protest to Application 51040 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 2, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51042

The court is hereby informed that Permit 51042 was withdrawn by the permittee on or about June 26, 1990. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51043

The court is informed that the ruling on remand as to Application 51043 is addressed in a separate sub-ruling to this ruling.

APPLICATION 51044

The court is hereby informed that Permit 51044 was cancelled by the State Engineer on August 22, 1995. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51046

The court is hereby informed that the protest to Application 51046 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51047

The court is hereby informed that the protest to Application 51047 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 9, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51049

The court is hereby informed that Permit 51049 was withdrawn by the permittee on or about September 28, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

**GROUP 6**

APPLICATION 51006

The court is hereby informed that the protest to Application 51006 was withdrawn by the Pyramid Lake Paiute Tribe on or about September 19, 1996. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51041

In State Engineer's Ruling No. 5005, the State Engineer was addressing 8 parcels of land under Application 51041 and granted the transfer based on the intrafarm exemption.

The remaining protest issues are as follows:

- Parcel 1** - Partial forfeiture, partial abandonment
- Parcel 2** - Forfeiture, abandonment
- Parcel 3** - Partial forfeiture, partial abandonment

- Parcel 4 - None
- Parcel 5 - Partial forfeiture, partial abandonment
- Parcel 6 - Forfeiture, abandonment
- Parcel 7 - Forfeiture, abandonment
- Parcel 8 - Partial forfeiture, partial abandonment.

Parcel 1 - The State Engineer's Ruling No. 5005 covers the contract date analysis and on this parcel there is a 1943 contract, but the evidence indicates that the portion of the existing place of use in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  was developed under a vested water right. Therefore, only that portion of the existing place of use in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  is subject to a claim of forfeiture. The Tribe claims partial forfeiture and partial abandonment as to Parcel 1, and provided evidence that 1.20 acres of the 2.37 acres in Parcel 1 were irrigated from 1948 through 1985.<sup>33</sup> In State Engineer's Ruling No. 5005, he indicated that the Tribe's contention as to this parcel goes to the area it describes as a canal, and found that no water was placed to beneficial use on that area described from 1948 through 1987.

The Applicant did not provide any additional evidence in support of its claim that the water right was not forfeited or abandoned. Not changing any of the State Engineer's findings from State Engineer's Ruling No. 5005, without the additional evidence as ordered by the Ninth Circuit Court of Appeals, the State Engineer recommends that the Federal District Court follow the directions of the Ninth Circuit Court of Appeals, which appear to require the court declare for that portion not shown as irrigated that the water right appurtenant to the NE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  forfeited and abandoned and the water right appurtenant to the SE $\frac{1}{4}$  NE $\frac{1}{4}$  NW $\frac{1}{4}$  abandoned.

Parcel 2 - The State Engineer's Ruling No. 5005 covers the contract date analysis and on this parcel there is a 1943 contract,

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<sup>33</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

but the evidence indicates that the portion of the existing place of use in the NE¼ SE¼ NW¼ was developed under a vested water right. Therefore, only that portion of the existing place of use in the SE¼ SE¼ NW¼ is subject to a claim of forfeiture. The Tribe claims forfeiture and abandonment as to Parcel 2. In State Engineer's Ruling No. 5005, he indicated that the Tribe's contention as to this parcel goes to the area it describes as a canal, and found that no water was placed to beneficial use on the area described as the canal from 1948 through 1987.

The Applicant did not provide any additional evidence in support of its claim that the water right was not forfeited or abandoned. Not changing any of the State Engineer's findings from State Engineer's Ruling No. 5005, without the additional evidence as ordered by the Ninth Circuit Court of Appeals, the State Engineer recommends that the Federal District Court follow the directions of the Ninth Circuit Court of Appeals, which appear to require the court declare the water right appurtenant to the SE¼ SE¼ NW¼ forfeited and abandoned and the water right appurtenant to the NE¼ SE¼ NW¼ abandoned.

Parcel 3 - The State Engineer's Ruling No. 5005 covers the contract date analysis and on this parcel there is a 1943 contract, but the evidence indicates that the existing place of use was developed under a vested water right. Therefore, the water right is not subject to the forfeiture provision of NRS § 533.060. The Tribe claims partial forfeiture and partial abandonment as to Parcel 3, and provided evidence that 2.09 acres of the 5.27 acres in Parcel 3 was irrigated from 1962 through 1987.<sup>34</sup> In State Engineer's Ruling No. 5005, he indicated that the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s)

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<sup>34</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

of Use"<sup>35</sup> which indicates from aerial photographs that in 1975 and 1980 the existing place of use was fully irrigated. In 1984, 1985, 1986 and 1987, the land use on this parcel was described as bare land and portion irrigated. The Tribe provided further evidence that from 1962 through 1987 2.09 acres of the existing place of use were irrigated.<sup>36</sup> By review of the 1986 aerial photograph #65 found in Exhibit No. 1096; the State Engineer found that he did not agree that a portion of this parcel was bare ground,<sup>37</sup> but rather found the parcel was fully irrigated thereby precluding any claim of forfeiture. The State Engineer found there was not clear and convincing evidence of non-use for the statutory 5-year period.

The Applicant did not provide any additional evidence in support of its claim that the water right was not forfeited or abandoned. The State Engineer recommends the Federal District Court affirm his finding from State Engineer's Ruling No. 5005, that the Tribe did not provide clear and convincing evidence of non-use of the water right appurtenant to Parcel 3; therefore, it did not prove either its claim of forfeiture or abandonment and the water right is subject to transfer.

Parcel 5 - The State Engineer's Ruling No. 5005 covers the contract date analysis and on this parcel there is a 1943 contract, but the evidence indicates that the existing place of use was developed under a vested water right and is not subject to the forfeiture provision of NRS § 533.060. The Tribe claims partial forfeiture and partial abandonment as to Parcel 5, and provided evidence that 0.21 acres of the 0.21 acres in Parcel 5 was covered

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<sup>35</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>36</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

<sup>37</sup> Exhibit No. 1096, public administrative hearing before the State Engineer, March 7, 2000.

by an on-farm, supply ditch from 1977 through 1987.<sup>38</sup>

As to the abandonment claim, the Ninth Circuit Court of Appeals in *Alpine VI* ordered that on remand the State Engineer was required to make individual findings as to beneficial use as it relates to all parcels where the transfer applicant was claiming an appurtenant water right due to the passage of water through a ditch. The State Engineer made multiple attempts to provide the Applicant the opportunity to present additional evidence as to the use of water in the ditch on Parcel 5; however, the Applicant never made any request to have that opportunity.

In State Engineer's Ruling No. 5005, as to Parcel 5, the ruling indicates that the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>39</sup> which indicates from aerial photographs that from 1948 through 1975 the land use on this parcel was described as irrigated. In 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a lined, on-farm supply ditch. The Tribe provided evidence that the on-farm supply ditch covers 0.21 of an acre.<sup>40</sup> The State Engineer found since this was an on-farm supply ditch there was not clear and convincing evidence of non-use for the statutory 5 year period.

Not changing any of the State Engineer's findings from State Engineer's Ruling No. 4798, without the additional evidence as ordered by the Ninth Circuit Court of Appeals as to actual beneficial use of water in this ditch, the State Engineer recommends that the Federal District Court follow the directions of the Ninth Circuit Court of Appeals, which appear to require the

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<sup>38</sup> Exhibit No. 1098, public administrative hearing before the State Engineer, March 7, 2000.

<sup>39</sup> Exhibit No. 1095, public administrative hearing before the State Engineer, March 7, 2000.

<sup>40</sup> Exhibit No. 1098, public administrative hearing before the State Engineer, March 7, 2000.

court declare the water right appurtenant to Parcel 5 as abandoned.

Parcel 6 - The State Engineer's Ruling No. 5005 covers the contract date analysis and as to this parcel the State Engineer found the contract date was October 1, 1943. Therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The Tribe claims forfeiture and abandonment as to Parcel 6. In State Engineer's Ruling No. 5005, the State Engineer found that no water was placed to beneficial use on the existing place of use, which was described as a drain ditch, for the 39 year period from 1948 through 1987.

The Applicant did not provide any additional evidence in support of its claim that the water right was not forfeited or abandoned. Not changing any of the State Engineer's findings from State Engineer's Ruling No. 5005, without the additional evidence as ordered by the Ninth Circuit Court of Appeals, the State Engineer recommends that the Federal District Court follow the directions of the Ninth Circuit Court of Appeals, which appear to require the court declare the water right appurtenant to Parcel 6 forfeited and abandoned.

Parcel 7 - The State Engineer's Ruling No. 5005 covers the contract date analysis and on this parcel there is a 1943 contract, but the evidence indicates that the portion of the existing place of use in the SE¼ NE¼ SW¼ is an applied for water right most likely under the 1943 contract; therefore, that portion of the existing place of use is subject to the forfeiture provision of NRS § 533.060. The portion of the existing place of use in the NE¼ NE¼ SW¼ was developed under a vested water right and is not subject to the forfeiture of NRS § 533.060. The Tribe claims forfeiture and abandonment as to Parcel 7. In State Engineer's Ruling No. 5005, it indicates that the Tribe's contention as to this parcel goes to the area it describes as a canal, and found that no water was placed to beneficial use on the area described as the canal from 1948 through 1987.

The Applicant did not provide any additional evidence in

support of its claim that the water right was not forfeited or abandoned. Not changing any of the State Engineer's findings from State Engineer's Ruling No. 5005, without the additional evidence as ordered by the Ninth Circuit Court of Appeals, the State Engineer recommends that the Federal District Court follow the directions of the Ninth Circuit Court of Appeals, which appear to require the court declare the water right appurtenant to the SE¼ NE¼ SW¼ forfeited and abandoned and the water right appurtenant to the NE¼ NE¼ SW¼ abandoned.

Parcel 8 - The State Engineer's Ruling No. 5005 covers the contract date analysis and as to this parcel the State Engineer found the contract date was October 1, 1943. Therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The Tribe claims partial forfeiture and partial abandonment as to Parcel 8, and provided evidence that 4.24 acres of the 5.61 acres in Parcel 8 was irrigated from 1948 through 1987.<sup>41</sup> In State Engineer's Ruling No. 5005, he indicated that the Tribe's contention as to this parcel goes to the area it describes as a canal, and found that no water was placed to beneficial use on the area described as the canal from 1948 through 1987.

The Applicant did not provide any additional evidence in support of its claim that the water right was not forfeited or abandoned. Not changing any of the State Engineer's findings from State Engineer's Ruling No. 5005, without the additional evidence as ordered by the Ninth Circuit Court of Appeals, the State Engineer recommends that the Federal District Court follow the directions of the Ninth Circuit Court of Appeals, which appear to require the court declare for that portion not irrigated, that the water right appurtenant to the northern and eastern portions of the existing place of use be declared forfeited and abandoned, but that it find the water right appurtenant to 4.24 acres at the southern

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<sup>41</sup> Exhibit No. 1097, public administrative hearing before the State Engineer, March 7, 2000.

end of the existing place of use to be in good standing and subject to transfer.

In summary, the State Engineer recommends that the Federal District Court declare the water rights appurtenant to Parcel 1 partially forfeited and partially abandoned, Parcel 2 partially forfeited and fully abandoned, Parcels 3 and 4 available for transfer, Parcel 5 abandoned, Parcel 6 forfeited and abandoned, Parcel 7 partially forfeited and fully abandoned, Parcel 8 partially forfeited and abandoned.

APPLICATION 51045

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51048

The Court is hereby informed that the protest to Application 51048 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51050

The State Engineer has been informed that the permittee's successors-in-interest have chosen to participate in the AB 380 program by selling the water from the proposed place of use into the AB 380 program and the CWSD has irrevocably committed to retire the water rights. In light of that fact, there is no water right to support the proposed place of use under Permit 51050, the State Engineer hereby voids Permit 51050.

APPLICATION 51051

The court is informed that the ruling on remand as to Application 51051 is addressed in a separate sub-ruling to this ruling.

APPLICATION 51052

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching

water. Therefore, no recommendation is made at this time.

APPLICATION 51054

The court is hereby informed that as to Permit 51054 the permittee specifically appealed the portion of State Engineer's Ruling No. 5005 that found portions of each of Parcels 1 and 2 forfeited and abandoned. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue of an on-farm, dirt-lined ditch. The State Engineer did not allow the matter to be reopened and affirms State Engineer's Ruling No. 5005. Therefore, as far as this litigation is concerned the matter is before the court on the Applicant's appeal.

APPLICATION 51055

The court is hereby informed that Permit 51055 was cancelled by the State Engineer on December 6, 1991. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51056

The court is hereby informed that Permit 51056 was withdrawn by the permittee on or about January 13, 1998. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51057

The State Engineer has been informed that the permittee's successors-in-interest have chosen to participate in the AB 380 program by selling the water from the proposed place of use into the AB 380 program and the CWSD has irrevocably committed to retire the water rights. In light of that fact, there is no water right to support the proposed place of use under Permit 51057, the State Engineer hereby voids Permit 51057.

APPLICATION 51058

The court is hereby informed that the protest to Application 51058 was withdrawn by the Pyramid Lake Paiute Tribe on or about

May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51059

The court is hereby informed that the protest to Application 51059 was withdrawn by the Pyramid Lake Paiute Tribe on or about September 3, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51060

The court is informed that the ruling on remand as to Application 51060 is addressed in a separate sub-ruling to this ruling.

APPLICATION 51061

The court is hereby informed that the protest to Application 51061 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 21, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51082

The court is hereby informed that Permit 51082 was withdrawn by the permittee on or about February 19, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51136

The court is hereby informed that the protest to Application 51136 was withdrawn by the Pyramid Lake Paiute Tribe on or about April 6, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51137

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching

Ruling  
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water. Therefore, no recommendation is made at this time.

APPLICATION 51138

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51139

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program and has obtained matching water. Therefore, as far as the State Engineer is concerned the matter should be fully resolved and recommends the Federal District Court dismiss the protest and affirm the transfer.

APPLICATION 51217

The court is hereby informed that the protest to Application 51217 was withdrawn by the Pyramid Lake Paiute Tribe on or about June 28, 1995. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51225

The court is hereby informed that Permit 51225 was withdrawn by the permittee on or about February 23, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51226

The court is hereby informed that the protest to Application 51226 was withdrawn by the Pyramid Lake Paiute Tribe on or about June 16, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51227

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51228

The court is hereby informed that Permit 51228 was withdrawn by the permittee on or about December 1, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51229

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by selling 1.0 acre and obtaining matching water for 2.45 acres. Therefore, no recommendation is made at this time.

APPLICATION 51230

The court is hereby informed that the protest to Application 51230 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 13, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51231

The court is informed that the ruling on remand as to Application 51231 is addressed in a separate sub-ruling to this ruling.

APPLICATION 51232

The court is hereby informed that the protest to Application 51232 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 21, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51233

The court is hereby informed that Permit 51233 was withdrawn by the permittee on or about June 8, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51234

The court is hereby informed that Permit 51234 was withdrawn by the permittee on or about March 29, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51235

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51236

The court is hereby informed that the protest to Application 51236 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 8, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51237

The court is informed that the ruling on remand as to Application 51237 is addressed is a separate sub-ruling to this ruling.

APPLICATION 51238

The court is hereby informed that the protest to Application 51238 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 13, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51368

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51369

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program. Therefore, no recommendation is made at this time.

APPLICATION 51370

The court is hereby informed that Permit 51370 was withdrawn by the permittee on or about November 7, 1996; therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51371

The court is hereby informed that Permit 51371 was withdrawn by the permittee on or about April 12, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51372

The court is hereby informed that the protest to Application 51372 was withdrawn by the Pyramid Lake Paiute Tribe on or about June 25, 1995. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51373

The court is hereby informed that the protest to Application 51373 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 12, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51374

In State Engineer's Ruling No. 5005, the State Engineer had one parcel under consideration as to the Tribe's protest issues of partial lack of perfection, partial forfeiture and partial abandonment. The Tribe conceded that 6.89 acres out of the 8.14 acres in Parcel 1 had been irrigated from 1948 through 1987. In Ruling No. 5005, the State Engineer found that he did not have the correct contract before him; therefore, he could not review the protest issues as to the 1.25 acres that remained under contention

and denied the transfer as to the 1.25 acres and approving it as to the 6.89 acres.

The Applicants appealed the State Engineer's ruling and in a Motion for Modification of State Engineer's Ruling #5005 Based Upon Judicial Notice of the Record in Transfer Application No. 51374; Or, in the Alternative Remand to the State Engineer for Further Review filed September 6, 2001, the Applicants argued that TCID confirmed they were owners of the water right sought to be changed and that a Rebuttal Brief Submitted for Application 51374 dated December 22, 1996, had a copy of the relevant contract.

By Order dated August 7, 2002, the Federal District Court remanded Application 51374 to the State Engineer to reconsider State Engineer's Ruling No. 5005 on the basis of the TCID certification and the Application for Permanent Water Rights appended to the rebuttal brief.

The State Engineer finds the TCID certification provides no information as to the contract date and is irrelevant as to making the determination of the contract date in order to consider the protest issue as to whether the forfeiture statute is applicable. The State Engineer finds the contract date is February 16, 1945, and the water right is subject to the forfeiture provision of NRS § 533.060.

The Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) Of Use"<sup>42</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and portion irrigated. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985 and 1987 the land use was described as a farm structure, natural vegetation and a portion irrigated. The portion containing the farm structure is that portion as shown as not irrigated in Exhibit No. 1246 in the center of the existing place of use, and the portion identified as natural

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<sup>42</sup> Exhibit No. 1244, public administrative hearing before the State Engineer, April 12, 2000.

vegetation is a wooded area on the eastern portion of the existing place of use.<sup>43</sup> At the 1988 administrative hearing, the Applicants described the land use in 1948 as cultivated land and in 1988 as cultivated land. Noting that the Ninth Circuit Court of Appeals in *Alpine VI* held that the State Engineer has correctly applied the clear and convincing evidentiary standard and that as a general rule could accept the applicants' description of the land use as worthy of greater evidentiary weight, in this instance the State Engineer has to balance the evidence and finds the additional detail provided by the Tribe's evidence to be more accurate.

A witness for the Applicants testified that the portion the Tribe showed as not irrigated in the central portion of the existing place of use<sup>44</sup> was occupied by a house and garage and that the permanent structures occupied approximately 307 acres, and that there was a lawn around the house that appeared to have been irrigated.<sup>45</sup> As to the portion of the existing place of use shown as not irrigated by the Tribe on the eastern portion of parcel, the Applicants' witness indicated that the area is covered by large trees and topographically it lays in such a manner as it could have been irrigated as pasture.<sup>46</sup>

The State Engineer finds the Applicants' witnesses testimony that the house and garage occupied 307 acres must have been either stated in error or was a typographical error on the part of the court reporter, but it is the record before the State Engineer. The State Engineer finds there is no evidence that the lawn was

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<sup>43</sup> Exhibit Nos. 1245, 1246, Transcript, pp. 5860-5862, public administrative hearing before the State Engineer, April 12, 2000.

<sup>44</sup> Exhibit No. 1246, public administrative hearing before the State Engineer, April 12, 2000.

<sup>45</sup> Transcript, pp. 5889, 5892, public administrative hearing before the State Engineer, April 12, 2000.

<sup>46</sup> Transcript, p. 5891, public administrative hearing before the State Engineer, April 12, 2000.

irrigated with the surface water and commonly lawns are irrigated from the same well that provides domestic water to the residence. The State Engineer finds there is no evidence that the area occupied by the large trees was irrigated as pasture. The State Engineer finds the Tribe has proven non-use of the water appurtenant to the 1.25 acres for the 25-year period from 1962 through 1987. The State Engineer finds the Tribe proved the statutory period of non-use to subject the water right to a declaration of forfeiture. The State Engineer finds the Tribe proved a substantial period of non-use combined with improvements on the land inconsistent with irrigation as to the portion of the 1.25 acres where the house and garage are located, but did not prove a use necessarily inconsistent with irrigation as to the area occupied by the large trees. Therefore, the State Engineer finds, as to the eastern portion of the 1.25 acres, the Tribe's only evidence is non-use; therefore, the Tribe has failed to provide clear and convincing evidence of abandonment.

The State Engineer recommends pursuant to the law of the case that the Federal District Court declare the 1.25 acres in the center of the existing place of use as forfeited and abandoned.

APPLICATION 51375

The court is hereby informed that Permit 51375 was withdrawn by the permittee on or about January 15, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51376

The court is hereby informed that the protest to Application 51376 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51377

The court is hereby informed that the appeal to Application 51377 was dismissed from the court on December 17, 2001, and the protest to Application 51377 was withdrawn by the Pyramid Lake Paiute Tribe on or about September 3, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51378

The court is hereby informed that the protest to Application 51378 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 7, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATIONS 51379

The court is hereby informed that Application 51379 was considered and ruled upon when the these transfer applications were first considered, and was counted as part of the number of applications under consideration; however, it was not protested and is not part of these appeals. It was included here in order for completeness of review for the court, that is, so it can see the resolution as to all of the "subsequent 190 applications" (Groups 4-7) filed post "the original 25" (Group 3).

APPLICATION 51380

The court is hereby informed that the protest to Application 51380 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 1, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51381

The court is hereby informed that Application 51381 was considered and ruled upon when the these transfer applications were first considered, and was counted as part of the number of applications under consideration; however, it was not protested and

is not part of these appeals. It was included here in order for completeness of review for the court, that is, so it can see the resolution as to all of the "subsequent 190 applications" (Groups 4-7) filed post "the original 25" (Group 3).

APPLICATION 51382

The court is hereby informed that the protest to Application 51382 was withdrawn by the Pyramid Lake Paiute Tribe on or about September 16, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51384

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51599

The State Engineer finds that he would affirm his decision in State Engineer's Ruling No. 5005 whereby he declared 0.50 of an acre forfeited and abandoned and recommends the Federal District Court affirm the State Engineer's decision. The ruling contained no findings as to the transfer being an intrafarm transfer and there is no issue as to an on-farm, dirt-lined ditch.

APPLICATION 51600

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51601

The court is hereby informed that the Ninth Circuit Court of Appeals in *Alpine VI* affirmed the State Engineer's decision in State Engineer's Ruling No. 4825 as to Parcels 1, 2, 3 & 4 that the protestant had not provided clear and convincing evidence of non-use or an intent to abandon the water right. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

However, the State Engineer has also been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, as far as the State Engineer is concerned the matter should be fully resolved and the State Engineer recommends the Federal District Court dismiss the protest and affirm the transfer.

APPLICATION 51602

The court is hereby informed that Permit 51602 was withdrawn by the permittee on or about March 2, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51604

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program and has obtained matching water. Therefore, as far as the State Engineer is concerned the matter should be fully resolved and the State Engineer recommends the Federal District Court dismiss the protest and affirm the transfer.

APPLICATION 51605

The court is hereby informed that the protest to Application 51605 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 6, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51606

The court is hereby informed that the protest to Application 51606 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51607

The court is hereby informed that Permit 51607 was withdrawn by the permittee on or about August 31, 1999. Therefore, as far as

this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51645

The court is hereby informed that the protest to Application 51606 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51732

The court is hereby informed that the Ninth Circuit Court of Appeals in *Alpine VI* affirmed the State Engineer's finding in State Engineer's Ruling No. 4825 as to Parcels 1 & 2 that the protestant had not provided clear and convincing evidence of non-use or an intent to abandon the water right; therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer. Furthermore, the permittees have informed the State Engineer that they are participating in the AB 380 program and have obtained matching water. Therefore, as far as the State Engineer is concerned the matter should be fully resolved and the State Engineer recommends the Federal District Court dismiss the protest and affirm the transfer.

APPLICATION 51734

The court is informed that the ruling on remand as to Application 51734 is addressed in a separate sub-ruling to this ruling.

**GROUP 7**

APPLICATION 51383

The court is hereby informed that the protest to Application 51383 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 27, 2001. Therefore, as far as this litigation is concerned

the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51603

The court is hereby informed that Permit 51603 was withdrawn by the permittee on or about June 22, 1999. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51608

The court is informed that the ruling on remand as to Application 51608 is addressed in a separate sub-ruling to this ruling.

APPLICATION 51733

The State Engineer has been informed that the permittee's successors in interest have chosen to participate in the AB 380 program. Therefore, no recommendation is made at this time.

APPLICATION 51735

In State Engineer's Ruling No. 5005, the State Engineer had six parcels under consideration. The protest issues that remain as to those parcels are:

- Parcel 1 - forfeiture, abandonment
- Parcel 2 - partial forfeiture, partial abandonment
- Parcel 3 - forfeiture, abandonment
- Parcel 4 - forfeiture, abandonment
- Parcel 5 - forfeiture, abandonment
- Parcel 6 - forfeiture, abandonment

The decision under this application was not an intrafarm decision, but did have issues as to on-farm ditches. After repeated offers to reopen the hearing and having no response, the State Engineer did not reopen the hearing on this application.

As to Parcel 1, under Ruling No. 5005, the State Engineer found the contract date was April 19, 1950; therefore, the water right is subject to the forfeiture provision of NRS § 533.060. In Ruling No. 5005, the State Engineer found this parcel was covered

by an on-farm ditch. Having no additional evidence to support beneficial use of water on this ditch, the State Engineer finds no water was placed to beneficial use on Parcel 1 for the 39-year period from 1948 through 1987 and is subject to forfeiture and abandonment.

As to Parcel 2, the State Engineer found since the water right moved on to this parcel was part of those known as Group 1 and which the Ninth Circuit Court of Appeals precluded the Tribe from protesting on the grounds not raised in its original protest, the State Engineer found that he was not revisiting the transfer of water rights to this parcel and since they were not moved onto the parcel until 1985, the Tribe's historical evidence made no sense and the water right is not subject to the claims of forfeiture and abandonment.

As to Parcel 3 - under Ruling No. 5005, the State Engineer found the contract date was August 14, 1915; therefore, the water right is subject to the forfeiture provision of NRS § 533.060. Under Ruling No. 5005, the State Engineer found non-use on most this parcel from 1962 through 1987 and declared most of the water right forfeited and abandoned. Having no additional evidence to support beneficial use of water on this ditch, the State Engineer also finds no water was placed to beneficial use on the remainder of Parcel 3 for the 25-year period from 1962 through 1987 and the water right is subject to forfeiture and abandonment.

As to Parcel 4 - under Ruling No. 5005, the State Engineer declared the water rights appurtenant to this parcel forfeited and abandoned.

As to Parcel 5 - under Ruling No. 5005, the State Engineer found the contract date was June 24, 1920; therefore, the water right is subject to the forfeiture provision of NRS § 533.060. Under Ruling No. 5005, the State Engineer found non-use on most this parcel from 1962 through 1987 and declared most of the water right forfeited and abandoned. Having no additional evidence to support beneficial use of water on the ditch, the State Engineer

also finds no water was placed to beneficial use on the remainder of Parcel 5 for the 25-year period from 1962 through 1987 and the water right is subject to forfeiture and abandonment.

As to Parcel 6 - under Ruling No. 5005, the State Engineer declared the water rights appurtenant to this parcel forfeited and abandoned.

The State Engineer finds that all water rights except for those appurtenant to Parcel 2 are subject to forfeiture and abandonment and recommends to the Federal District Court that it follow the law of the case and declare all but Parcel 2 forfeited and abandoned.

APPLICATION 51736

The court is hereby informed that Permit 51736 was withdrawn by the permittee on or about August 17, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51737

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 51738

*See also 47809.* The court is hereby informed that Permit 51738 was withdrawn by the permittee on or about April 28, 2003. When the Applicants decided to participate in the AB 380 program, they withdrew permit 51738 and the water did not revert back to Permit 47809, but rather was sold into the AB 380 program. To the State Engineer's knowledge on February 29, 2003, all parties stipulated that settlement had been consummated and the permits were withdrawn. Therefore, as far as this litigation is concerned as to Application 51738 the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51953

The court is hereby informed that the protest to Application 51953 was withdrawn by the Pyramid Lake Paiute Tribe on or about April 27, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51954

The court is hereby informed that the protest to Application 51954 was withdrawn by the Pyramid Lake Paiute Tribe on or about March 29, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51955

The court is hereby informed that the protest to Application 51955 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51956

The court is hereby informed that the protest to Application 51956 was withdrawn by the Pyramid Lake Paiute Tribe on or about August 13, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51957

The court is hereby informed that Permit 51957 was withdrawn by the permittee on or about December 1, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51958

The court is hereby informed that the protest to Application 51958 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 27, 2002. Therefore, as far as this litigation is

concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51959

The court is hereby informed that the protest to Application 51959 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51960

The court is hereby informed that Permit 51960 was withdrawn by the permittee on or about December 20, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51961

The court is hereby informed that Permit 51961 was withdrawn by the permittee on or about March 13, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 51997

The court is hereby informed that Permit 51997 was withdrawn by the permittee on or about April 22, 1994. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52021

The court is hereby informed that Permit 52021 was withdrawn by the permittee on or about February 23, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52252

The court is hereby informed that the protest to Application 52252 was withdrawn by the Pyramid Lake Paiute Tribe on or about February 14, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52335

The State Engineer finds his ruling as to this application was not based on the intrafarm exception and finds he affirms his decision in State Engineer's Ruling No. 5005 and recommends the Federal District Court also affirm said decision.

APPLICATION 52361

The court is hereby informed that Permit 52361 was withdrawn by the permittee on or about July 8, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52542

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program. Therefore, no recommendation is made at this time.

APPLICATION 52543

The court is hereby informed that the protest to Application 52543 was withdrawn by the Pyramid Lake Paiute Tribe on or about September 27, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52544

The court is hereby informed that the protest to Application 52544 was withdrawn by the Pyramid Lake Paiute Tribe on or about April 16, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52545

The court is hereby informed that the protest to Application 52545 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52546

The court is hereby informed that the protest to Application 52546 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 27, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52547

The court is hereby informed that the protest to Application 52547 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 10, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52548

The court is hereby informed that the protest to Application 52548 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 12, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52549

The State Engineer finds he affirms his decision in State Engineer's Ruling No. 5005 that declared the water rights on the two parcels at issue as forfeited or abandoned. The State Engineer finds this was not an intrafarm decision and there was no issue as to an on-farm, dirt-line ditch. The State Engineer recommends the Federal District Court affirm his decision.

APPLICATION 52550

In State Engineer's Ruling No. 5005, the State Engineer only had issues remaining as to Parcels 4, 6 and 7. In that ruling he

found that no water right had been perfected on Parcels 4, 6 and a portion of 7 and that decision was affirmed by the Federal District Court on March 12, 2004. As to the remainder of Parcel 7, a portion was shown as irrigated and the rest was covered by an on-farm supply ditch. The State Engineer has been informed that the Applicant is participating in the AB 380 program and is obtaining matching water for the 0.28 of an acre covered by the on-farm supply ditch, and by letter dated October 7, 2004, the Tribe agreed the Applicant could obtain matching water for that 0.28 of an acre. The State Engineer recommends because of the agreement for matching that the Federal District Court affirm the transfer of water from the 0.17 of an acre the Tribe conceded was irrigated and from the 0.28 of an acre.

APPLICATION 52551

The court is hereby informed that the protest to Application 52551 was withdrawn by the Pyramid Lake Paiute Tribe on or about January 12, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52552

The court is informed that the ruling on remand as to Application 52552 is addressed in a separate sub-ruling to this ruling.

APPLICATION 52553

The court is hereby informed that Permit 52553 was withdrawn by the permittee on or about September 13, 2002. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52554

The State Engineer has been informed that the permittee has chosen to participate in the AB 380 program by obtaining matching water. Therefore, no recommendation is made at this time.

APPLICATION 52555

The court is hereby informed that the protest to Application 52555 was withdrawn by the Pyramid Lake Paiute Tribe on or about June 28, 1995. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52570

The court is hereby informed that Permit 52570 was withdrawn by the permittee on or about December 10, 1999. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52668

The court is hereby informed that Permit 52668 was cancelled by the State Engineer on December 13, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52669

The court is hereby informed that the protest to Application 52669 was withdrawn by the Pyramid Lake Paiute Tribe on or about October 13, 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52670

The court is hereby informed that Permit 52670 was withdrawn by the permittee on or about November 7, 1996. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 52843

The court is informed that the ruling on remand as to Application 52843 is addressed in a separate sub-ruling to this ruling.

APPLICATION 53659

The court is hereby informed that the State Engineer's decision in State Engineer's Ruling No. 4800 as to Application 53659, which denied the application on title issues, was not appealed. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 53661

The court is hereby informed that the protest to Application 53661 was withdrawn by the Pyramid Lake Paiute Tribe on or about July 26 2004. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 53662

The court is informed that the ruling on remand as to Application 53662 is addressed in a separate sub-ruling to this ruling.

APPLICATION 53910

The State Engineer finds he affirms his decision in State Engineer's Ruling No. 5005 and recommends the Federal District Court affirm the State Engineer's decision.

APPLICATION 54152

The court is hereby informed that Permit 54152 was withdrawn by the permittee on or about March 31, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 54594

The court is hereby informed that Permit 54594 was cancelled by the State Engineer on May 31, 1996, and subsequently the permittee requested withdrawal of the permit on January 15, 1997. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 54595

The court is hereby informed that the protest to Application 54595 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 8, 2000. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 54596

The court is hereby informed that the protest to Application 54596 was withdrawn by the Pyramid Lake Paiute Tribe on or about November 6, 2003. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 54714

The court is hereby informed that the protest to Application 54714 was withdrawn by the Pyramid Lake Paiute Tribe on or about May 14, 2001. Therefore, as far as this litigation is concerned the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

APPLICATION 54715

The State Engineer has been informed that the permittee is participating in the AB 380 program. Therefore, no recommendation is made at this time.

APPLICATION 54882

The court is hereby informed that the protest to Application 54882 was withdrawn by the Pyramid Lake Paiute Tribe on or about March 26, 2001. Therefore, as far as this litigation is concerned

the matter is concluded and nothing remains pending before the court with respect to matters before the State Engineer.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of

December, 2004.

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

IN THE MATTER OF APPLICATIONS 49880)  
AND 52843 )

RULING ON REMAND

GENERAL

**#5464 - A**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>47</sup> and *Alpine VI*<sup>48</sup> and the Federal District Court's Order of February 25, 2004,<sup>49</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that an applicant

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<sup>47</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>48</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>49</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

- of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.
9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
  10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

The following argument was presented in reference to several applicants and it was indicated it is applicable to this applicant. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that is he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium," is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and

its agent TCID were in the business of selling water, not transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tracts Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures, which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold, in part, because of pressure to reduce or limit the total irrigable acreage within the Project.

The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement.

The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including,

but not necessarily limited to, what has been referred to in these proceedings as the "A List." Once the BOR discontinued these "sale" programs, there was no means to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. The Applicant argues that State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>50</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not assert any jurisdiction over the water rights within the Newlands Project prior to the *Alpine* decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that a true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate

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<sup>50</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

20-day time period in April and May 1973.<sup>51</sup>

The State Engineer finds that the rule of the case dictates his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

### III.

The court is hereby informed that as to Permits 49880 and 52843 the Applicant specifically appealed State Engineer's Ruling No. 5005 that found the water rights forfeited and abandoned. The Applicant argues that the Federal District Court never addressed his appeal on its own merits, but rather it got lost in the shuffle of the issues litigated as to intrafarm transfers and on-farm, dirt-lined ditches. The Applicant argues since his case was never heard by the Federal District Court, and even though the State Engineer's ruling contained no findings as to the transfer being an intrafarm transfer he should be allowed to reopen his case in its entirety because of the "general remand" to the State Engineer. The Applicant requested the opportunity to reopen his hearing in its entirety based on the argument that the Applicants circumstances had to do with obtaining lottery water or small tract sales water and should be treated differently.

The State Engineer denied that request to completely reopen the Applicant's case because the State Engineer's decision was not been based on the intrafarm exemption. The request was denied on the grounds that the Ninth Circuit Court of Appeals in *Alpine VI* remanded only those transfer applications that had been granted by the State Engineer and has already affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. The State Engineer takes the position that only those applications that had either been approved on the

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<sup>51</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman, Transcript, August 10-11, 2004 and Exhibit Nos. 1555 and 1635.

grounds of an intrafarm exemption or had issues as to on-farm, dirt-lined ditches were remanded for additional consideration and only as to the specific issues remanded by the Federal District Court. The remand was not to consider completely new issues not previously addressed or that were previously addressed and were not remanded for further consideration.

Since the transfer requested under Application 49880 had no issue as to an intrafarm transfer or as to an on-farm supply ditch, the State Engineer did not reopen the hearing, and recommends the Federal District Court affirm Ruling No. 5005 as to Application 49880, which held that the water right requested for transfer was forfeited and abandoned. However, the court needs to take note that this applicant appealed that decision and never had his appeal considered by the court, and the State Engineer recommends the Federal District Court consider the Applicant's original appeal as filed to the State Engineer's decision.

#### IV.

As to Application 52843, the State Engineer had seven parcels of land under consideration. There was no protest claim as to Parcel 2, claims of forfeiture as to Parcels 1, 5 and 6, and claims of abandonment as to Parcels 1, 3, 4, 5, 6 and a portion of 7. In State Engineer's Ruling No. 5005, the State Engineer concluded that the water rights appurtenant to Parcels 1, 5 and 6 were forfeited and the water rights appurtenant to Parcels 1, 6 and 0.09 of an acre in Parcel 7 were abandoned. Further, that the Tribe had not proved its claims of abandonment as to Parcels 3, 4 and 5. There were no issues as to these transfers being an intrafarm transfer and the only remaining issue is to an on-farm supply ditch is that covers 0.06 of an acre in Parcel 7. There was an on-farm, supply ditch in Parcel 3, but the State Engineer found the Tribe had not proved its case by clear and convincing evidence and does not believe the Tribe or the United States appealed that finding.

Testimony was presented that the Applicant always used the on-farm, dirt-lined ditches for pasturing cows after the end of the

irrigation season to the beginning of the next.<sup>52</sup> While they did not plant crops in the ditches, the cows pasture on volunteer plants, such as alfalfa and clover.<sup>53</sup>

The State Engineer finds the on-farm supply ditch is not a use inconsistent with irrigation. The State Engineer finds no specific evidence was presented as to the payment of taxes and assessments as to this particular transfer. The State Engineer finds that since the land use was described as an on-farm ditch from 1962 through the filing of the application, the evidence demonstrates continuous use of the water. The State Engineer finds that in Nevada native diversified grasses are irrigated all over the state as pasture; therefore, the use of the ditch in Parcel 3 as native pasture demonstrates beneficial use of water.

The State Engineer recommends the Federal District Court affirm State Engineer's Ruling No. 5005 as to Application 52843.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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<sup>52</sup> Transcript, p. 6926, public administrative hearing before the State Engineer, September 21, 2004.

<sup>53</sup> Transcript, pp. 6927-6936, public administrative hearing before the State Engineer, September 21, 2004.

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

IN THE MATTER OF APPLICATION 50008)

RULING ON REMAND

GENERAL

**#5464 - B**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>54</sup> and *Alpine VI*<sup>55</sup> and the Federal District Court's Order of February 25, 2004,<sup>56</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that an applicant

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<sup>54</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>55</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>56</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

**FINDINGS OF FACT**

**I.**

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

- of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.
9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
  10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

In State Engineer's Ruling No. 4798, the State Engineer was addressing 13 parcels of land identified as the existing places of use. The Tribe alleged forfeiture and abandonment as to all 13 parcels. The State Engineer found that as to Parcels 1, 3, 5, 6, 7, a portion of 8, a portion of 9 and 13 that the water right contracts were dated pre-1913; therefore, the claims of forfeiture were without merit. The State Engineer found that since the water rights as to 1.50 acres of the 1.80 acres under consideration in Parcel 1, Parcel 4, Parcel 10 and as to 1.00 acre of the 1.30 acres in Parcel 12 were moved on to these existing places of use under previous change applications that have been affirmed by the courts, he would not revisit the them under this protest.

The issues remaining for consideration are the Tribe's forfeiture claims as to Parcel 2, a portion of 8, a portion of 9, 11 and a portion of 12 and its abandonment claims as to 0.30 of an acre in Parcel 1, Parcels 2, 3, 5, 6, 7, 8, 9, 11, 0.30 of an acre in Parcel 12 and Parcel 13.

III.

Based on testimony and evidence presented, the Applicant provided the following in its closing argument and proposed order. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed the evidence and testimony to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that if he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's factual summary and argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the evidence and argument before them.

Said factual summary and argument indicates:

Pursuant to the Reclamation Act of June 17, 1902, the United States Department of Interior withdrew lands in Churchill and Lyon Counties in the State of Nevada, for what is now the Newlands Project.<sup>57</sup> The project purpose was to conserve and divert water from the Truckee and Carson Rivers for flood control and irrigation purposes. In order to initially determine the acreage eligible to receive water delivery from the Project, the Bureau of Reclamation classified acreage within the Project boundaries within six classes.<sup>58</sup> Class 1-4 lands were considered irrigable and Classes 5 and 6 were considered non-irrigable. However, Class 5 lands were considered to be reclaimable and could be reclassified. The first irrigable classification determinations were documented in a drawing referred to as the 1913 Irrigable Area Map (aka funny

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<sup>57</sup> Exhibit No. 1521, public administrative hearing before the State Engineer, August 9, 2004.

<sup>58</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

papers).<sup>59</sup>

With regard to conserving and efficiency, Reclamation exchanged vested (pre-Project) water rights within the Project boundaries for Project water storage delivery contracts to landowners in the form of "Permanent Water Right Contracts" (hereinafter "vested contracts").<sup>60</sup> Those holding vested contracts were not required to pay construction charges, only the annual operation and maintenance costs for Project deliveries. The first vested contract issued by Reclamation to a Newlands Project landowner was on January 8, 1907, to G.E. Burton and W.F. Kaiser. The last vested contract was signed on July 21, 1919, by J.W. Freeman. In total, the United States exchanged 22,148 acres of vested (pre-Project) water rights for storage delivery contracts from the Project. Most vested contracts had an attached drawing showing generally where the water was used by the landowner at the time of the exchange.<sup>61</sup>

In addition to these first contracts, Reclamation issued 45,207 acres of Permanent Water Right Contracts referred to as "Application Lands" (hereinafter "application contracts") for those willing to pay for the construction, operation and maintenance of the Project in return for receiving water delivery from the Project onto homestead lands not previously irrigated. These application contracts were issued between 1903 and 1926.<sup>62</sup>

In 1926, Reclamation entered into a repayment contract with the Truckee-Carson Irrigation District (TCID) to take over ownership and management of the Newlands Project pursuant to the

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

contract terms.<sup>63</sup> Once the contract was signed, TCID (instead of Reclamation) began accepting applications for "Non-Application Lands" (hereinafter "non-application contracts").<sup>64</sup> These lands were withdrawn and classified as irrigable by Reclamation but were not homesteaded before 1926.<sup>65</sup> These non-application contracts were first approved by TCID and then forwarded to Reclamation for final approval.<sup>66</sup> The process for issuing water right delivery contracts involved the following steps: (1) Landowner made application to TCID; (2) Application was required to include all lands classified as irrigable by Reclamation in the Lot; (3) TCID referred application to Reclamation; (4) Reclamation confirmed that all lands applied for were classified irrigable. Lands in the application not irrigable would not receive Reclamation approval. Class 5 lands not approved would be instructed by Reclamation and/or TCID to lease or buy water from TCID so that the Landowner might use the water on the "non-irrigable" classed land to establish actual irrigability. These "reclaimed Class 5 lands" could then be reclassified (Class 1-4) and become eligible to receive a non-application contract; (5) Once approved, TCID recorded the non-application contract at the County Recorders Office. TCID actually issued 9,261 acres of non-application contracts during this period. The last non-application contract was issued on December 8, 1964.

In 1953, Reclamation agreed to sell small land parcels "Small Tract Sales" containing irrigable land within the Project owned by

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<sup>63</sup> Exhibit No. 1518, public administrative hearing before the State Engineer, August 9, 2004.

<sup>64</sup> Exhibit No. 1512, public administrative hearing before the State Engineer, August 9, 2004.

<sup>65</sup> Exhibit No. 1514, public administrative hearing before the State Engineer, August 9, 2004.

<sup>66</sup> Exhibit Nos. 1516, 1517, 1521, 1528, public administrative hearing before the State Engineer, August 9, 2004.

the United States.<sup>67</sup> These were withdrawn lands not yet patented. Contracts for Small Tract Sales provided that the irrigable portions of land sold would be granted a water storage delivery contract upon application to TCID. Even though Reclamation inquired occasionally to TCID regarding the status of various small tract owners, 530 acres of the 1,233 irrigable acres within these small tracts were never granted water storage delivery contracts. Beginning in 1984, the owners of those lands that never received water storage delivery contracts, but for which the landowner (1) had purchased both the land and right to water delivery from the Project and (2) had perfected storage water for irrigation, were informed of a change in procedure. TCID instructed them to obtain recognition of their right to use project storage waters on their purchased lands within the Project by means of a transfer before the Nevada State Engineer instead of through an application to Reclamation or TCID for a contract.

This change in procedure for obtaining storage water delivery from the Project likely occurred for financial reasons. As a result of an amendment dated June 14, 1944, to the 1926 contract between the U.S. and TCID, provision for repayment of the then \$500,000 deficit portion on the construction obligation was computed on the basis of \$54 an acre. By 1964, Reclamation and TCID had issued approximately 54,471 acres of application and non-application contracts which produced sufficient revenue to repay the construction charges against the Project. The last \$3,291.64 was satisfied by issuing only 61 acres of the 86 acres on the application of Charles F. McCuskey.<sup>68</sup>

Because sufficient water storage delivery contracts had been sold to repay the construction obligation to the United States,

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<sup>67</sup> Exhibit Nos. 1512, 1513, 1514, 1525, 1539, public administrative hearing before the State Engineer, August 9, 2004.

<sup>68</sup> Exhibit No. 1519, public administrative hearing before the State Engineer, August 9, 2004.

Reclamation took the position that no new water delivery contracts could be issued. However, this position failed to take into account the following facts: (1) TCID had available for reissuance about 1,500 acres of storage water delivery contracts returned to it by reason of foreclosures on unpaid assessments; (2) many acres previously receiving water storage delivery were now replaced by roads, corrals, and buildings; (3) the United States Navy was enlarging its base and purchasing large tracts of land within the Project some holding water delivery contracts; and (4) some storage water delivery contracts were placed in a suspended or non-pay class because the landowners were not able to increase crop production on these lands to make them profitable. Reclamation suggested that these storage water right contracts could be transferred to other irrigable lands within the Project.<sup>69</sup>

At that time, Reclamation and TCID began negotiating on various items including the problem of "irrigated, non-water righted lands" within the Project. "Irrigated, non-water righted lands" were lands receiving storage water delivery from TCID for which a storage water contract had not been issued. The negotiated agreement later became known as the "9 Point Agreement." This was a global settlement, but as it pertained to "transfer" of water (amending storage water delivery contracts to describe different lands) it was negotiated (1) to allow TCID to sell 1,000 acres of new water storage delivery contracts; and (2) to allow TCID to "transfer" (more appropriately to amend existing water storage delivery contracts) from those 1,500 acres of described storage water delivery contracts to other irrigable and productive lands. Issuance of the new contracts and amending ("transferring") other contracts for storage water delivery to 2,500 acres would have covered the lands of farmers who had requested new storage water right contracts since the United States moratorium on the issuance

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<sup>69</sup> Exhibit Nos. 1519, 1522-24, 1526-28, 1531-32, 1543, 1545, 1547-48, 1550-52, 1572-82, public administrative hearing before the State Engineer, August 9, 2004.

of new water right contracts on December 11, 1964. This list of landowners was attached to the "9 Point Agreement" as Appendix A. It later became known as the "A List."<sup>70</sup>

Because the federal district court has assumed jurisdiction of the Carson River for purposes of adjudicating the rights therein under the Alpine Decree, the State continued to abstain from exercising jurisdiction within the Newlands Project to issue or transfer water rights.<sup>71</sup>

In 1972, after 8 years of negotiations on the "9 Point Agreement," rules were finally approved by TCID and Reclamation to process the issuance of new storage water delivery contracts and the storage water delivery contract amendments (aka "transfers"). Before any storage water delivery could occur under these new and amended contracts, the landowner was required to use water delivery from any described lands under his existing storage water delivery contracts that he was either not irrigating on his farm unit (intrafarm), that was associated with less productive lands, or that was associated with lands left idle or lands under improvements such as corrals, homes, and stack yards.<sup>72</sup> If the Landowner still did not have sufficient storage water delivery contracts to cover his irrigated acreage after amending his existing storage water delivery contracts intrafarm, he was eligible to buy additional storage water delivery contracts through TCID (authorized new or reissued). These "transfer" applications required Reclamations approval. The "A List" provided the priority in making the few "transfers" that occurred.

In 1972, Operating Criteria and Procedures ("OCAP") for Federal Facilities in the Truckee-Carson River Basins was modified

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<sup>70</sup> *Id.*

<sup>71</sup> Testimony of Peter Morros, public administrative hearing before the State Engineer, August 9, 2004.

<sup>72</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

by the District of Columbia and forwarded to the Department of Interior to establish the operating criteria and procedures for TCID.<sup>73</sup>

Pursuant to the "9 Point Agreement," TCID processed and sent to Reclamation "transfer" applications for many Landowners. Between April 27, 1973, and May 15, 1973, a twenty-day period, Reclamation approved 29 individual "transfer" applications for approximately 850 acres of land.<sup>74</sup> On May 22, 1973, Reclamation suspended approval of any "transfer" applications.<sup>75</sup> TCID continued to accept "transfer" applications for the purpose of amending storage water delivery contracts and forwarded them to Reclamation for a period of time. However, Reclamation refused approval.<sup>76</sup>

In September 1973, Reclamation sent TCID notice that it was terminating the 1926 contract. The Secretary of Interior's letter canceling the 1926 contract and taking over supervisory management of the Project was published in the local paper. Therefore, the information that no "transfers" (amendments to storage water delivery contracts) would be allowed in the Project was disseminated to the public at large.<sup>77</sup> In 1975, TCID received a letter from Reclamation notifying it that "Interior was no longer

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<sup>73</sup> Exhibit Nos. 1553-54, public administrative hearing before the State Engineer, August 10, 2004.

<sup>74</sup> Testimony of Ernest Shank and Exhibit Nos. 1529-30, 1555-56, public administrative hearing before the State Engineer, August 9 and 10, 2004.

<sup>75</sup> Exhibit Nos. 1534, 1557-58, public administrative hearing before the State Engineer, August 10, 2004.

<sup>76</sup> Exhibit Nos. 1534-45, 1541, 1558, 1561, public administrative hearing before the State Engineer, August 10, 2004.

<sup>77</sup> Exhibit Nos. 1537-38, public administrative hearing before the State Engineer, August 10, 2004.

considering the "9 Point Agreement."<sup>78</sup>

In 1980, Reclamation hired an engineering firm to study and determine which lands within the Project were receiving storage water delivery. Available irrigability classification maps, original applications for storage water delivery, and ledger cards noting water delivery as they existed in TCID's files were used in this process. Clyde-Criddle-Woodland, Inc. verified water delivery and use within each quarter/quarter section of the Project ("Criddle Report") using this method.<sup>79</sup> Chilton Engineering issued a report verifying that 73,672 acres were deemed to be the total water right contracts issued within the Newlands Project.

Through the decades between 1970 and 1980 and into the 1980's after the *Alpine*<sup>80</sup> decision and *Nevada v. U.S.*,<sup>81</sup> the "A List" grew to about 4,000 acres requiring changes in the described areas requiring storage water delivery. The final Decree issued in *Alpine* finally secured the Nevada State Engineer's jurisdiction to process transfers for changes in place of use within the Project.

On March 13, 1984, TCID held a lottery to prioritize 135 individuals on the "A List" who were seeking storage water delivery contracts. TCID sold storage water delivery contracts that had been authorized or returned to approximately the first 60 individuals on the list. Many individuals purchased storage water delivery contracts from neighbors.<sup>82</sup>

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<sup>78</sup> Exhibit Nos. 1539, 1540, 1561-62, 1564-65, public administrative hearing before the State Engineer, August 10, 2004.

<sup>79</sup> Exhibit Nos. 1567, 1570, public administrative hearing before the State Engineer, August 10, 2004.

<sup>80</sup> *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (1983), cert. denied, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

<sup>81</sup> *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983).

<sup>82</sup> Exhibit Nos. 1542, 1549, public administrative hearing before the State Engineer, August 10, 2004.

Between 1980-84, due to the existing subdivisions of the farms, it became increasingly difficult for engineering staff at TCID to divide storage water delivery contracts among parceled lands. Thus, TCID commenced to make storage water delivery drawings match the 1:400 scale of Reclamation's Property and Structures maps. Revisions were done using the 1913 Irrigable Area maps, 1972 revisions of water right drawings, 1948 and 1974 photographs, and 1903-64 water right applications.<sup>83</sup> There were no field investigations or physical surveys used as a basis for these maps. They were drawn only for purposes of allocating storage water delivery contracts between properties that were divided. These drawings were later taken and copied by Reclamation. Never intended to become such, they are now referred to as "water rights maps."

In order to decide who ought to file transfers with the Nevada State Engineer, TCID took these "water right maps" and overlaid them with the Bureau of Reclamation's annual aerial photographs. When these two did not match, it was assumed that a transfer needed to be filed. From these drawings, TCID and private engineering firms prepared transfer maps for the landowners to accompany transfer applications filed with the Nevada State Engineer.

The applicants argue that because jurisdiction did not lie with the Nevada State Engineer to make transfers within the Newlands Project until the final decree in *Alpine*, relevant attempts to transfer as required by the 9th Circuit are those that were attempted after the date of *Alpine*, in 1983. The applicants argue that "water rights maps" in this proceeding shall be considered drawings and not the best evidence of the existing and proposed places of use, rather the applicant's testimony shall be the best evidence.

The State Engineer finds that the rule of the case dictates

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<sup>83</sup> Exhibit Nos. 1501, 156768, 15709, public administrative hearing before the State Engineer, August 10, 2004.

his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world. The State Engineer finds the "water rights maps" were not used to indicate the proposed places of use and are the best evidence of the authorized or recognized existing places of use.

#### IV.

The State Engineer has previously considered a transfer application for this applicant in the group of 215 applications known commonly as the TCID transfer cases. In State Engineer's Ruling No. 4591,<sup>84</sup> the State Engineer had under consideration other changes within the Rambling River Ranches, Inc. property. In that ruling, the State Engineer found that the Applicants testified that they never intended to abandon any water rights, particularly since the water was being used on other portions of the ranch, that they had continually paid the assessment charges for their water, and as such, had demonstrated no intent to abandon their water rights and there was no union of acts of abandonment with intent to abandon.

As to Parcel 1, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>85</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 the land use on this parcel was described as bare land. At the 1988 administrative hearing, the Applicant described the land use in 1948 and 1988 as barren land.<sup>86</sup> The State Engineer finds the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, but the use is not inconsistent with irrigation.

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<sup>84</sup> State Engineer's Ruling No. 4591, dated December 22, 1997, official records in the Office of the State Engineer.

<sup>85</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>86</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

As to Parcel 2, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>87</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984 the land use on this parcel was described as bare land and irrigated and in 1985, 1986 as bare land, and a portion irrigated. At the 1988 administrative hearing, the Applicant described the land use in 1948 and 1988 as barren land.<sup>88</sup> The State Engineer finds the evidence demonstrates non-use of the water on a portion of this parcel for a 38-year period of time, but the use is not inconsistent with irrigation.

As to Parcel 3, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>89</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 the land use on this parcel was described as bare land. At the 1988 administrative hearing, the Applicant described the land use in 1948 and 1988 as barren land.<sup>90</sup> The State Engineer finds the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, but the use is not inconsistent with irrigation.

As to Parcel 5, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>91</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 the land use on this parcel was described as

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<sup>87</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>88</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>89</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>90</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>91</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

bare land. At the 1988 administrative hearing, the Applicant described the land use in 1948 and 1988 as barren land.<sup>92</sup> The State Engineer finds the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, but the use is not inconsistent with irrigation.

As to Parcel 6, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>93</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 the land use on this parcel was described as bare land. At the 1988 administrative hearing, the Applicant described the land use in 1948 and 1988 as barren land.<sup>94</sup> The State Engineer finds the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, but the use is not inconsistent with irrigation.

As to Parcel 7, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>95</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 the land use on this parcel was described as bare land and road. At the 1988 administrative hearing, the Applicant described the land use in 1948 as barren land and in 1988 as barren land near road.<sup>96</sup> The State Engineer finds the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, but the use is not inconsistent with

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<sup>92</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>93</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>94</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>95</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>96</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

irrigation as to a portion of this parcel.

As to Parcel 8, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>97</sup> which indicates from aerial photographs that in 1948 the land use was described as bare land, natural vegetation and irrigated, and in 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 the land use on this parcel was described as bare land, road and canal. At the 1988 administrative hearing, the Applicant described the land use in 1948 as barren land and in 1988 as barren land, road and ditch.<sup>98</sup> The State Engineer finds the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, and for some of the area the use is not inconsistent with irrigation.

As to Parcel 9, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>99</sup> which indicates from aerial photographs that in 1948 and 1962 the land use was described as a ditch, in 1972 as a road and canal, in 1973 as a ditch, in 1974 and 1975 as a road and canal, in 1977 as a road and a ditch, in 1980 and 1984 as a road and canal, and in 1985 and 1986 as a road and ditch. At the 1988 administrative hearing, the Applicant described the land use in 1948 as barren land and in 1988 as barren land and a stack yard.<sup>100</sup> The State Engineer finds taking the Applicant's land use description the evidence demonstrates non-use of the water on this parcel for a 38-year period of time, and for some of the area the use is not inconsistent with irrigation.

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<sup>97</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>98</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>99</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>100</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

As to Parcel 11, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>101</sup> which indicates from aerial photographs that in 1948 the land use was described as bare land and vegetation, in 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 as bare land and a road area. At the 1988 administrative hearing, the Applicant described the land use in 1948 as a slough and in 1988 as a slough and a drain.<sup>102</sup> The State Engineer finds taking the Applicant's land use description the evidence demonstrates non-use of the water on this parcel for a 24-year period of time, and the use is inconsistent with irrigation.

As to Parcel 12, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>103</sup> which indicates from aerial photographs that in 1948 the land use was described as bare land and vegetation, in 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 as bare land, road, canal and riparian vegetation. At the 1988 administrative hearing, the Applicant described the land use in 1948 and 1988 as a slough.<sup>104</sup> The State Engineer finds taking the Applicant's land use description the evidence demonstrates non-use of the water on this parcel for a 24-year period of time, and the use is inconsistent with irrigation.

As to Parcel 13, the Tribe provided evidence in Table 2 -

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<sup>101</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>102</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>103</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>104</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

"Land Use Descriptions for Existing Place(s) of Use"<sup>105</sup> which indicates from aerial photographs that in 1948 the land use was described as bare land, natural vegetation and a portion irrigated, in 1962 as a canal and adjacent land and a portion irrigated, in 1972, 1973, 1974, 1975 as a road, canal, riparian vegetation and a portion irrigated, in 1977, 1980, 1984, 1985, 1986 as a road, canal, riparian vegetation and a portion irrigated. At the 1988 administrative hearing, the Applicant described the land use in 1948 as barren land and a road and in 1988 as roads and drain.<sup>106</sup> The State Engineer finds taking the Applicant's land use description the evidence demonstrates non-use of the water on this parcel for a 40-year period of time, and the use is inconsistent with irrigation.

The Applicant alleges that the water was used at the original place of use for all thirteen parcels until the early 1970's,<sup>107</sup> and after the 1970's the water described in the transfer was used on the proposed place of use.

The State Engineer finds that while the water may have been used, as shown by the Tribe's and the Applicant's original evidence, it was not always on the existing place of use identified in the application.

V.

The State Engineer finds the evidence demonstrates that the taxes and assessments have always been paid on this property since the Applicant's family has owned it from the mid-1930's.<sup>108</sup> The

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<sup>105</sup> Exhibit No. 395, public administrative hearing before the State Engineer, September 22-23, 1997.

<sup>106</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 27, 1997.

<sup>107</sup> Exhibit No. 1503, p. 2 ln 24-25, public administrative hearing before the State Engineer, August 12, 2004.

<sup>108</sup> Transcript, p. 1859, public administrative hearing before the State Engineer, March 4, 1997; Transcript, p. 2704 and Exhibit Nos. 1634, 1636, public administrative hearing before the State

State Engineer finds the evidence demonstrates continual use of the water.<sup>109</sup>

VI.

Applicant George Frey began leveling the fields on the west side of the property in 1965 and gradually worked toward the east side of the land.<sup>110</sup> According to Applicant George Frey's daily activity books, the major land leveling projects were not completed until December 20, 1983.<sup>111</sup> During the leveling process, Applicant George Frey was in contact with TCID to purchase sufficient water rights if needed, confirm that water rights would be available for the newly leveled fields, or just to inform TCID of improvements.<sup>112</sup>

In 1982, Applicant George Frey received a letter from TCID requesting that landowners involved in the Newlands Project come into the office to fix any water right issues.<sup>113</sup> Applicant George Frey went to TCID to verify changes and TCID told him to return when all improvements were finished and to keep TCID

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Engineer, August 12, 2004; Exhibit Nos. 1499, 1503, public administrative hearing before the State Engineer, August 9, 2004.

<sup>109</sup> See, testimony of George Frey and Norman Frey, public administrative hearing before the State Engineer, March 4, 1997, September 27, 1997, August 12, 2004.

<sup>110</sup> Exhibit No. 1636, p. 3, ln 23-24, public administrative hearing before the State Engineer, August 12, 2004.

<sup>111</sup> Exhibit No. 1636, p. 3, ln 25-26, public administrative hearing before the State Engineer, August 12, 2004.

<sup>112</sup> Exhibit No. 1636, p. 4 ln 3-6, public administrative hearing before the State Engineer, August 12, 2004.

<sup>113</sup> Exhibit No. 1636, p. 4 ln 14-16, public administrative hearing before the State Engineer, August 12, 2004; Exhibit No. 1505, p. 4 ln 4-9, public administrative hearing before the State Engineer, August 10-11, 2004.

apprised of the situation.<sup>114</sup>

Since 1936, Applicant George Frey attempted many times to relate his water rights as they appeared on the TCID drawings with his actual use of water rights.<sup>115</sup> He worked consistently with TCID to try to establish the number of water righted acres required, but the entire process was complicated by TCID, which had no actual surveys of the area's water rights.<sup>116</sup> As he indicated in his testimony, from the time he was thirteen until the 1980's, there was no way for him to transfer his rights, despite numerous efforts.<sup>117</sup> However, throughout the entire water transfer process TCID never requested that he fill out any paperwork on his own or suggested that he should go to the State Engineer's office or to the Bureau of Reclamation (BOR).<sup>118</sup> George Frey was never directed past the TCID offices and was led to believe that TCID was taking care of his water transfer applications.<sup>119</sup>

In 1983, Applicant Norman Frey became involved in the transfer process when it came to his attention that TCID had noticed a

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<sup>114</sup> Exhibit No. 1636, p. 4 ln 20-21, public administrative hearing before the State Engineer, August 12, 2004.

<sup>115</sup> Exhibit No. 1636, p. 4 ln 25-26, public administrative hearing before the State Engineer, August 12, 2004

<sup>116</sup> Exhibit No. 1636, p. 5 ln 8-10, public administrative hearing before the State Engineer, August 12, 2004

<sup>117</sup> Testimony of George and Norman Frey, public administrative hearing before the State Engineer, August 12, 2004.

<sup>118</sup> Exhibit No. 1636, p. 5 ln 20-23, public administrative hearing before the State Engineer, August 12, 2004; Exhibit No. 1502, p. 3 ln 1-3, public administrative hearing before the State Engineer, August 9, 2004.

<sup>119</sup> Exhibit No. 1636, p. 5 ln 18-23, public administrative hearing before the State Engineer, August 12, 2004; Exhibit No. 1502, p. 3 ln 1-3, public administrative hearing before the State Engineer, August 9, 2004.

different transfer application, transfer number 47892, incorrectly.<sup>120</sup> There was a constant flow of misinformation between BOR, TCID and the community regarding the transfer process.<sup>121</sup>

The parcels of land involved in this transfer are small in total acreage and their impact to the elevation of Pyramid Lake. Pyramid Lake loses an average of 450,400 acre-feet of water per year due to evaporation.<sup>122</sup> There are 525,600 minutes a year; that means that Pyramid Lake loses roughly .856 acre-feet of water per minute through evaporation.<sup>123</sup> The 74.5 acre-feet of water involved in this transfer, if allowed to go to Pyramid Lake, would be lost in 63.02 minutes due to evaporation.<sup>124</sup>

However, if the water rights are lost, the Applicant loses the ability to irrigate 18.2 acres of land.<sup>125</sup> That land would yield an average of 6 tons of alfalfa a year, about 4% of the Applicant's yearly income, which would equal about \$11,000 dollars a year in income, and that income can make the difference between a year of

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<sup>120</sup> Exhibit No. 1503, p. 3 ln 18-24, public administrative hearing before the State Engineer, August 9, 2004.

<sup>121</sup> Exhibit No. 1503, p. 4 ln 12-19; Exhibit No. 1053, Attachment G and H, public administrative hearing before the State Engineer, August 9, 2004; Testimony of George and Norman Frey, public administrative hearing before the State Engineer, August 12, 2004.

<sup>122</sup> Exhibit No. 1503, p. 5 ln 21-22, public administrative hearing before the State Engineer, August 9, 2004.

<sup>123</sup> Exhibit No. 1503, p. 5 ln 22-24, public administrative hearing before the State Engineer, August 9, 2004.

<sup>124</sup> Exhibit No. 1503, p. 5 ln 24-25, public administrative hearing before the State Engineer, August 9, 2004.

<sup>125</sup> Exhibit No. 1503, p. 6 ln 2, public administrative hearing before the State Engineer, August 9, 2004.

profit or a year of loss.<sup>126</sup>

The State Engineer finds that multiple times (1930s, 1940s, 1960s and 1970s) the Applicant or others in his family have attempted to get water rights on the lands being irrigated either by purchase or transfer in order to get the records into compliance as to lands being irrigated, but was thwarted in those attempts by either the TCID or the Bureau of Reclamation.<sup>127</sup> The State Engineer finds that when the Applicant made inquiries as to getting the water rights properly mapped on his property he was told by TCID to get all his fields laid out and then they would cover the places irrigated by shuffling water rights around.<sup>128</sup> The State Engineer finds the Applicant has always had sufficient water rights in its ownership to cover the amount of land that was being irrigated. The State Engineer finds the Applicant has continually used its water rights.<sup>129</sup> The State Engineer finds the only parcels that have issues remaining for consideration as to the Tribe's forfeiture claims are Parcel 2 (2.0 acres), a portion of Parcel 8 (the State Engineer is unable to exactly quantify which portion is covered by the 1947 contract, but it is less than 1.00 acre), a portion of Parcel 9 (the State Engineer is unable to exactly quantify which portion is covered by the 1947 contract but it is less than the 1.35 acres requested for transfer), Parcel 11 (0.50 of an acre) and a portion of Parcel 12 (1.30 acres) for a total of less than 6.15 acres of land and somewhere around 25 acre-

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<sup>126</sup> Exhibit No. 1503, p. 6 ln 2-5, public administrative hearing before the State Engineer, August 9, 2004.

<sup>127</sup> Transcript, pp. 1836-1835, 1859, public administrative hearing before the State Engineer, March 4, 1997; Transcript, p. 2704 and Exhibit No. 1634, public administrative hearing before the State Engineer, August 12, 2004.

<sup>128</sup> Transcript, pp. 2702-2704, public administrative hearing before the State Engineer, August 12, 2004.

<sup>129</sup> Transcript, p. 6870, public administrative hearing before the State Engineer, August 12, 2004.

feet of water annually. The State Engineer finds to lose the water from this land would mean a loss of approximately \$5,000 per year in income for the Applicant.<sup>130</sup> As to forfeiture, the State Engineer finds the Applicants attempted multiple times to get their water rights in line with their use of the water and were thwarted in that attempt. The State Engineer finds the hardship to the Applicant is far outweighed by the infinitesimal benefit to Pyramid Lake, and in fact allowing the transfer is not increasing diversions from Pyramid Lake, but rather, the water right already has been decreed for use in the Project. To say it is increasing diversions from Pyramid Lake is in effect readjudicating the water right from the Project to Pyramid Lake. The State Engineer finds there is absolutely no evidence of the Applicant intending to abandon this water right. Some of the land is not covered by a use inconsistent with irrigation, the Applicant has continually paid its taxes and assessments, the Applicant has continually used the water and has inquired repeatedly about either moving or obtaining water in order to have the lands being irrigated covered by water rights, and many areas were described as bare land, which the Federal District Court has found does not constitute abandonment. The State Engineer finds if this applicant does not meet the standards to avoid forfeiture or abandonment, then no other applicant ever will.

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<sup>130</sup> Transcript, pp. 6873-6874, public administrative hearing before the State Engineer, August 12, 2004.

Ruling  
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The State Engineer recommends the Federal District Court affirm the State Engineer findings, overruling the protest and granting the application in its entirety.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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

IN THE MATTER OF APPLICATION 51043)

RULING ON REMAND

GENERAL

**# 5464 - C**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>131</sup> and *Alpine VI*<sup>132</sup> and the Federal District Court's Order of February 25, 2004,<sup>133</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>131</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>132</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>133</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

- of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.
9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
  10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

Based on testimony and evidence presented, the Applicant provided the following in its closing argument and proposed order. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed the evidence and testimony to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that if he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's factual summary and argument to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the evidence and argument before them.

Said factual summary and argument indicates:

Pursuant to the Reclamation Act of June 17, 1902, the United States Department of Interior withdrew lands in Churchill and Lyon Counties in the State of Nevada, for what is now the Newlands

Project.<sup>134</sup> The project purpose was to conserve and divert water from the Truckee and Carson Rivers for flood control and irrigation purposes. In order to initially determine the acreage eligible to receive water delivery from the Project, the Bureau of Reclamation classified acreage within the Project boundaries within six classes.<sup>135</sup> Class 1-4 lands were considered irrigable and Classes 5 and 6 were considered non-irrigable. However, Class 5 lands were considered to be reclaimable and could be reclassified. The first irrigable classification determinations were documented in a drawing referred to as the 1913 Irrigable Area Map (aka funny papers).<sup>136</sup>

With regard to conserving and efficiency, Reclamation exchanged vested (pre-Project) water rights within the Project boundaries for Project water storage delivery contracts to landowners in the form of "Permanent Water Right Contracts" (hereinafter "vested contracts").<sup>137</sup> Those holding vested contracts were not required to pay construction charges, only the annual operation and maintenance costs for Project deliveries. The first vested contract issued by Reclamation to a Newlands Project landowner was on January 8, 1907, to G.E. Burton and W.F. Kaiser. The last vested contract was signed on July 21, 1919, by J.W. Freeman. In total, the United States exchanged 22,148 acres of vested (pre-Project) water rights for storage delivery contracts from the Project. Most vested contracts had an attached drawing showing generally where the water was used by the landowner at the

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<sup>134</sup> Exhibit No. 1521, public administrative hearing before the State Engineer, August 9, 2004.

<sup>135</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

time of the exchange.<sup>138</sup>

In addition to these first contracts, Reclamation issued 45,207 acres of Permanent Water Right Contracts referred to as "Application Lands" (hereinafter "application contracts") for those willing to pay for the construction, operation and maintenance of the Project in return for receiving water delivery from the Project onto homestead lands not previously irrigated. These application contracts were issued between 1903 and 1926.<sup>139</sup>

In 1926, Reclamation entered into a repayment contract with the Truckee-Carson Irrigation District (TCID) to take over ownership and management of the Newlands Project pursuant to the contract terms.<sup>140</sup> Once the contract was signed, TCID (instead of Reclamation) began accepting applications for "Non-Application Lands" (hereinafter "non-application contracts").<sup>141</sup> These lands were withdrawn and classified as irrigable by Reclamation but were not homesteaded before 1926.<sup>142</sup> These non-application contracts were first approved by TCID and then forwarded to Reclamation for final approval.<sup>143</sup> The process for issuing water right delivery contracts involved the following steps: (1) Landowner made application to TCID; (2) Application was required to include all lands classified as irrigable by Reclamation in the Lot; (3) TCID referred application to Reclamation; (4) Reclamation confirmed that all lands applied for were classified irrigable. Lands in the

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Exhibit No. 1518, public administrative hearing before the State Engineer, August 9, 2004.

<sup>141</sup> Exhibit No. 1512, public administrative hearing before the State Engineer, August 9, 2004.

<sup>142</sup> Exhibit No. 1514, public administrative hearing before the State Engineer, August 9, 2004.

<sup>143</sup> Exhibit Nos. 1516, 1517, 1521, 1528, public administrative hearing before the State Engineer, August 9, 2004.

application not irrigable would not receive Reclamation approval. Class 5 lands not approved would be instructed by Reclamation and/or TCID to lease or buy water from TCID so that the Landowner might use the water on the "non-irrigable" classed land to establish actual irrigability. These "reclaimed Class 5 lands" could then be reclassified (Class 1-4) and become eligible to receive a non-application contract; (5) Once approved, TCID recorded the non-application contract at the County Recorders Office. TCID actually issued 9,261 acres of non-application contracts during this period. The last non-application contract was issued on December 8, 1964.

In 1953, Reclamation agreed to sell small land parcels "Small Tract Sales" containing irrigable land within the Project owned by the United States.<sup>144</sup> These were withdrawn lands not yet patented. Contracts for Small Tract Sales provided that the irrigable portions of land sold would be granted a water storage delivery contract upon application to TCID. Even though Reclamation inquired occasionally to TCID regarding the status of various small tract owners, 530 acres of the 1,233 irrigable acres within these small tracts were never granted water storage delivery contracts. Beginning in 1984, the owners of those lands that never received water storage delivery contracts, but for which the landowner (1) had purchased both the land and right to water delivery from the Project and (2) had perfected storage water for irrigation, were informed of a change in procedure. TCID instructed them to obtain recognition of their right to use project storage waters on their purchased lands within the Project by means of a transfer before the Nevada State Engineer instead of through an application to Reclamation or TCID for a contract.

This change in procedure for obtaining storage water delivery from the Project likely occurred for financial reasons. As a

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<sup>144</sup> Exhibit Nos. 1512, 1513, 1514, 1525, 1539, public administrative hearing before the State Engineer, August 9, 2004.

result of an amendment dated June 14, 1944, to the 1926 contract between the U.S. and TCID, provision for repayment of the then \$500,000 deficit portion on the construction obligation was computed on the basis of \$54 an acre. By 1964, Reclamation and TCID had issued approximately 54,471 acres of application and non-application contracts which produced sufficient revenue to repay the construction charges against the Project. The last \$3,291.64 was satisfied by issuing only 61 acres of the 86 acres on the application of Charles F. McCuskey.<sup>145</sup>

Because sufficient water storage delivery contracts had been sold to repay the construction obligation to the United States, Reclamation took the position that no new water delivery contracts could be issued. However, this position failed to take into account the following facts: (1) TCID had available for reissuance about 1,500 acres of storage water delivery contracts returned to it by reason of foreclosures on unpaid assessments; (2) many acres previously receiving water storage delivery were now replaced by roads, corrals, and buildings; (3) the United States Navy was enlarging its base and purchasing large tracts of land within the Project some holding water delivery contracts; and (4) some storage water delivery contracts were placed in a suspended or non-pay class because the landowners were not able to increase crop production on these lands to make them profitable. Reclamation suggested that these storage water right contracts could be transferred to other irrigable lands within the Project.<sup>146</sup>

At that time, Reclamation and TCID began negotiating on various items including the problem of "irrigated, non-water righted lands" within the Project. "Irrigated, non-water righted lands" were lands receiving storage water delivery from TCID for

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<sup>145</sup> Exhibit No. 1519, public administrative hearing before the State Engineer, August 9, 2004.

<sup>146</sup> Exhibit Nos. 1519, 1522-24, 1526-28, 1531-32, 1543, 1545, 1547-48, 1550-52, 1572-82, public administrative hearing before the State Engineer, August 9, 2004.

which a storage water contract had not been issued. The negotiated agreement later became known as the "9 Point Agreement." This was a global settlement, but as it pertained to "transfer" of water (amending storage water delivery contracts to describe different lands) it was negotiated (1) to allow TCID to sell 1,000 acres of new water storage delivery contracts; and (2) to allow TCID to "transfer" (more appropriately to amend existing water storage delivery contracts) from those 1,500 acres of described storage water delivery contracts to other irrigable and productive lands. Issuance of the new contracts and amending ("transferring") other contracts for storage water delivery to 2,500 acres would have covered the lands of farmers who had requested new storage water right contracts since the United States moratorium on the issuance of new water right contracts on December 11, 1964. This list of landowners was attached to the "9 Point Agreement" as Appendix A. It later became known as the "A List."<sup>147</sup>

Because the federal district court has assumed jurisdiction of the Carson River for purposes of adjudicating the rights therein under the Alpine Decree, the State continued to abstain from exercising jurisdiction within the Newlands Project to issue or transfer water rights.<sup>148</sup>

In 1972, after 8 years of negotiations on the "9 Point Agreement," rules were finally approved by TCID and Reclamation to process the issuance of new storage water delivery contracts and the storage water delivery contract amendments (aka "transfers"). Before any storage water delivery could occur under these new and amended contracts, the landowner was required to use water delivery from any described lands under his existing storage water delivery contracts that he was either not irrigating on his farm unit (intrafarm), that was associated with less productive lands, or

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<sup>147</sup> *Id.*

<sup>148</sup> Testimony of Peter Morros, public administrative hearing before the State Engineer, August 9, 2004.

that was associated with lands left idle or lands under improvement such as corrals, homes, and stack yards.<sup>149</sup> If the Landowner still did not have sufficient storage water delivery contracts to cover his irrigated acreage after amending his existing storage water delivery contracts intrafarm, he was eligible to buy additional storage water delivery contracts through TCID (authorized new or reissued). These "transfer" applications required Reclamations approval. The "A List" provided the priority in making the few "transfers" that occurred.

In 1972, Operating Criteria and Procedures ("OCAP") for Federal Facilities in the Truckee-Carson River Basins was modified by the District of Columbia and forwarded to the Department of Interior to establish the operating criteria and procedures for TCID.<sup>150</sup>

Pursuant to the "9 Point Agreement," TCID processed and sent to Reclamation "transfer" applications for many Landowners. Between April 27, 1973, and May 15, 1973, a twenty-day period, Reclamation approved 29 individual "transfer" applications for approximately 850 acres of land.<sup>151</sup> On May 22, 1973, Reclamation suspended approval of any "transfer" applications.<sup>152</sup> TCID continued to accept "transfer" applications for the purpose of amending storage water delivery contracts and forwarded them to Reclamation for a period of time. However, Reclamation refused

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<sup>149</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

<sup>150</sup> Exhibit Nos. 1553-54, public administrative hearing before the State Engineer, August 10, 2004.

<sup>151</sup> Testimony of Ernest Shank and Exhibit Nos. 1529-30, 1555-56, public administrative hearing before the State Engineer, August 9 and 10, 2004.

<sup>152</sup> Exhibit Nos. 1534, 1557-58, public administrative hearing before the State Engineer, August 10, 2004.

approval.<sup>153</sup>

In September 1973, Reclamation sent TCID notice that it was terminating the 1926 contract. The Secretary of Interior's letter canceling the 1926 contract and taking over supervisory management of the Project was published in the local paper. Therefore, the information that no "transfers" (amendments to storage water delivery contracts) would be allowed in the Project was disseminated to the public at large.<sup>154</sup> In 1975, TCID received a letter from Reclamation notifying it that "Interior was no longer considering the "9 Point Agreement."<sup>155</sup>

In 1980, Reclamation hired an engineering firm to study and determine which lands within the Project were receiving storage water delivery. Available irrigability classification maps, original applications for storage water delivery, and ledger cards noting water delivery as they existed in TCID's files were used in this process. Clyde-Criddle-Woodland, Inc. verified water delivery and use within each quarter/quarter section of the Project ("Criddle Report") using this method.<sup>156</sup> Chilton Engineering issued a report verifying that 73,672 acres were deemed to be the total water right contracts issued within the Newlands Project.

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<sup>153</sup> Exhibit Nos. 1534-45, 1541, 1558, 1561, public administrative hearing before the State Engineer, August 10, 2004.

<sup>154</sup> Exhibit Nos. 1537-38, public administrative hearing before the State Engineer, August 10, 2004.

<sup>155</sup> Exhibit Nos. 1539, 1540, 1561-62, 1564-65, public administrative hearing before the State Engineer, August 10, 2004.

<sup>156</sup> Exhibit Nos. 1567, 1570, public administrative hearing before the State Engineer, August 10, 2004.

Through the decades between 1970 and 1980 and into the 1980's after the *Alpine*<sup>157</sup> decision and *Nevada v. U.S.*,<sup>158</sup> the "A List" grew to about 4,000 acres requiring changes in the described areas requiring storage water delivery. The final Decree issued in *Alpine* finally secured the Nevada State Engineer's jurisdiction to process transfers for changes in place of use within the Project.

On March 13, 1984, TCID held a lottery to prioritize 135 individuals on the "A List" who were seeking storage water delivery contracts. TCID sold storage water delivery contracts that had been authorized or returned to approximately the first 60 individuals on the list. Many individuals purchased storage water delivery contracts from neighbors.<sup>159</sup>

Between 1980-84, due to the existing subdivisions of the farms, it became increasingly difficult for engineering staff at TCID to divide storage water delivery contracts among parceled lands. Thus, TCID commenced to make storage water delivery drawings match the 1:400 scale of Reclamation's Property and Structures maps. Revisions were done using the 1913 Irrigable Area maps, 1972 revisions of water right drawings, 1948 and 1974 photographs, and 1903-64 water right applications.<sup>160</sup> There were no field investigations or physical surveys used as a basis for these maps. They were drawn only for purposes of allocating storage water delivery contracts between properties that were divided. These drawings were later taken and copied by Reclamation. Never intended to become such, they are now referred

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<sup>157</sup> *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (1983), cert. denied, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

<sup>158</sup> *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983).

<sup>159</sup> Exhibit Nos. 1542, 1549, public administrative hearing before the State Engineer, August 10, 2004.

<sup>160</sup> Exhibit Nos. 1501, 156768, 15709, public administrative hearing before the State Engineer, August 10, 2004.

to as "water rights maps."

In order to decide who ought to file transfers with the Nevada State Engineer, TCID took these "water right maps" and overlaid them with the Bureau of Reclamation's annual aerial photographs. When these two did not match, it was assumed that a transfer needed to be filed. From these drawings, TCID and private engineering firms prepared transfer maps for the landowners to accompany transfer applications filed with the Nevada State Engineer.

The Applicant argues that because jurisdiction did not lie with the Nevada State Engineer to make transfers within the Newlands Project until the final decree in *Alpine*, relevant attempts to transfer as required by the 9th Circuit are those that were attempted after the date of *Alpine*, in 1983. The Applicant argues that "water rights maps" in this proceeding shall be considered drawings and not the best evidence of the existing and proposed places of use, rather the applicant's testimony shall be the best evidence.

The State Engineer finds that the rule of the case dictates his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world. The State Engineer finds the "water rights maps" were not used to indicate the proposed places of use and are the best evidence of the authorized or recognized existing places of use.

### III.

In State Engineer's Ruling No. 5047, the State Engineer had three parcels of land from which water was being transferred under consideration. The State Engineer reopened the administrative hearing as to Application 51043 on August 10 and 11, 2004. As to the three parcels, the Tribe's remaining allegation is abandonment, since the State Engineer has already found the contracts pre-date 1913; therefore, the water rights are not subject to the forfeiture provision of NRS § 533.060.

As to Parcel 1 - The Tribe's evidence presented at the 1997

administrative hearing indicated that from 1948 through 1985 the land use was described as bare land and natural vegetation.<sup>161</sup> At the 1988 administrative hearing, the Applicant described the land use in 1948 as cultivated land and in 1948 as marginal ground.<sup>162</sup> At the reopened hearing in August 2004, the Tribe changed its land use descriptions and indicated that the land use was bare land and natural vegetation in 1948 and 1962, but for 1973, 1974, 1975, 1977, 1980, 1984 and 1985 the land use is now described as bare land, natural vegetation and farm yard.<sup>163</sup> The Applicant testified that when he bought this parcel in 1968 it was being irrigated and was in alfalfa, that he tried to irrigate it the first year he was there, but that when he leveled another piece of ground in 1972 he quit irrigating the parcel, fenced it off and left it as pasture.<sup>164</sup>

As to Parcel 2 - The Tribe's evidence presented at the 1997 administrative hearing indicated that from 1948 through 1985 the land use was described as bare land and natural vegetation.<sup>165</sup> At the 1988 administrative hearing, the Applicant described the land use in 1948 as cultivated land and in 1988 as marginal ground.<sup>166</sup> At the reopened hearing in August 2004, the Tribe changed its land use description and indicated that the land use was bare land and

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<sup>161</sup> Exhibit Nos. 409 and 410, public administrative hearing before the State Engineer, September 23, 1997.

<sup>162</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

<sup>163</sup> Exhibit No. 1593, public administrative hearing before the State Engineer, August 11, 2004.

<sup>164</sup> Transcript, pp. 2811-2812, public administrative hearing before the State Engineer, September 23, 1997.

<sup>165</sup> Exhibit Nos. 409 and 410, public administrative hearing before the State Engineer, September 23, 1997.

<sup>166</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

natural vegetation in 1948 and 1962, but for 1973, 1974, 1975, 1977, 1980, 1984 and 1985 the land use is now described as bare land, natural vegetation and farm yard.<sup>167</sup> The Applicant testified that when he bought this parcel about 1/3rd of it was being irrigated, that he tried to irrigate it for two years and gave up around 1970.<sup>168</sup>

As to Parcel 3 - The Tribe's evidence presented at the 1997 administrative hearing indicated that from 1948 through 1985 the land use was described as bare land and natural vegetation.<sup>169</sup> At the 1988 administrative hearing, the Applicant described the land use in 1948 as cultivated land and in 1988 as isolated from field.<sup>170</sup> At the reopened hearing in August 2004, the Tribe indicated that the land use was bare land, natural vegetation and delivery ditch from 1948 to 1985.<sup>171</sup> The Applicant testified that when he bought this parcel it had been cut off from the rest of the area by the highway, that the old fence around it had fallen down, apparently the predecessors had put cattle in there to graze the ditch, but that he just cleaned up the fence and has not put livestock in there.<sup>172</sup>

Around 1972, the Applicant leveled the first field and physically changed the place he was using the water to the newly

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<sup>167</sup> Exhibit No. 1593, public administrative hearing before the State Engineer, August 11, 2004.

<sup>168</sup> Transcript, pp. 2812-2813, public administrative hearing before the State Engineer, September 23, 1997.

<sup>169</sup> Exhibit Nos. 409 and 410, public administrative hearing before the State Engineer, September 23, 1997.

<sup>170</sup> Exhibit No. 397, public administrative hearing before the State Engineer, September 22, 1997.

<sup>171</sup> Exhibit No. 1593, public administrative hearing before the State Engineer, August 11, 2004.

<sup>172</sup> Transcript, pp. 2814-2815, public administrative hearing before the State Engineer, September 23, 1997.

leveled field. He testified that he tried to check into transferring the water, but found out that it really could not be done. He went to TCID and tried to find out the proper way to transfer the water and did all the paperwork, but it was lost in the shuffle. When he inquired in 1977 he was told that a transfer would not go through.<sup>173</sup> The Applicant again applied to TCID in 1982, but that application also never went anywhere. All the taxes and assessments have been kept current on these parcels.<sup>174</sup>

The State Engineer in Ruling No. 4798 already made determinations as to the land uses on the various parcels, and due to various problems as seen in the discussion in the transcript,<sup>175</sup> the State Engineer found the Applicants' land use descriptions to be the most accurate. The State Engineer finds the permit was not remanded in order for the Tribe to have another opportunity to present its case in chief as to the land uses, and by the Tribe changing its land use descriptions it confirms the State Engineer's concern as to the quality of the evidence to support land use determinations on parcels as small as those found in these cases. The State Engineer in Ruling No. 4798 has already found the land uses on the existing places of use are not inconsistent with irrigation. The State Engineer finds there is evidence of the payment of taxes and assessments. The State Engineer finds that the Tribe's only evidence was non-use and with evidence of the payments of taxes and assessments, the law of the case provides that the Tribe has failed to provide clear and convincing evidence of abandonment. The State Engineer finds there is also additional evidence to support a lack of intent to abandon

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<sup>173</sup> Transcript, pp. 2807-2810, public administrative hearing before the State Engineer, September 23, 1997.

<sup>174</sup> Transcript, pp. 6490-5601, public administrative hearing before the State Engineer, August 10, 2004.

<sup>175</sup> Transcript, pp. 6635-6653, public administrative hearing before the State Engineer, August 11, 2004.

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the water rights in that the Applicants have continued to use the water, attempted to file a transfer application and were unsuccessful in that attempt.

IV.

The State Engineer recommends the Federal District Court find there is no evidence of an intent to abandon the water rights requested for transfer under Application 51043 and affirm the State Engineer's decision overruling the protest and granting Application 51043.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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

IN THE MATTER OF APPLICATIONS 51051)  
AND 51052 )

RULING ON REMAND

**#5464 - D**

GENERAL

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>176</sup> and *Alpine VI*<sup>177</sup> and the Federal District Court's Order of February 25, 2004,<sup>178</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State

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<sup>176</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>177</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>178</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

Engineer was also provided the discretion to consider evidence that an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

**FINDINGS OF FACT**

**I.**

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.

5. Abandonment is a question of fact to be determined from all the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.
6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer

- applications. Only those applications approved on the grounds of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.
9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
  10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

In State Engineer's Ruling No. 5047, the State Engineer addressed 15 parcels of land identified as the existing places of use under Application 51051 (there was no protest claim as to Parcel 12) and 2 parcels of land identified as the existing places of use under Application 51052. The ruling on these applications all came under the exemption for an intrafarm transfer. The Applicant has now informed the State Engineer that he intends to participate in the AB 380 program by matching all the waters rights challenged under Application 51052 and has obtained matching water. As to Application 51051, the Applicant informed the State Engineer that he intends to participate in the AB 380 program by matching the water rights challenged under Parcel 15 and has obtained matching water. Therefore, as far as the State Engineer is concerned the matter as to Parcel 15 in Application 51051 and as to Application 51052 is fully resolved and the protest should be dismissed and the transfers granted.

## III.

The Applicant presented the following in its closing argument. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that if he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium" is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and its agent TCID were in the business of selling water, not transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tracts Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold in part because of pressure to reduce or limit the total irrigable acreage within the Project. The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the

Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement. The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including, but not necessarily limited to, what has been referred to in these proceedings as the "A List." Once the BOR discontinued these "sale" programs, there was no means to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>179</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not

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<sup>179</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

assert any jurisdiction over the water rights within the Newlands Project prior to the *Alpine* decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that a true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate 20-day time period in April and May 1973.<sup>180</sup>

The State Engineer finds that the rule of the case dictates his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

#### IV.

Referring to Application 51051, as to Parcels 1, 2, 4, 8 and 10, the State Engineer has already found that the Tribe did not provide clear and convincing evidence of non-use. These lands were all described by the Applicant as river edge and described by the Tribe as a creek or natural drainage, and since the United States exchanged Project water rights for vested waters from these lands it must have considered them irrigated for some land use such as pasture. The State Engineer will not revisit those land use findings from Ruling No. 5047.

As to Parcels 3, 5 and 11, the State Engineer found either that the Tribe had not proved non-use as to a portion of the

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<sup>180</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman and Exhibit Nos. 1555 and 1635.

existing place of use or that there was not clear and convincing evidence of non-use as to a portion of the parcel. As to Parcels 6 and 13, the State Engineer found there was not clear and convincing evidence of non-use because either a portion or all of the parcel was irrigated or covered by an on-farm supply ditch.

As to Parcels 7, 9 and 14, the State Engineer found evidence of non-use, but the transfers were permitted under the intrafarm exemption to abandonment.

As to Parcel 3, the evidence indicates that of the 6.18 acres in the parcel, 1.94 acres were irrigated from 1948 through 1987,<sup>181</sup> and 0.41 of an acre was covered by an on-farm supply ditch.<sup>182</sup> Testimony was provided by the Applicant that in the fall months he lets cattle graze on the field and ditch areas, but nothing is specifically planted in the ditch. Rather, wild asparagus, salt grass and other native vegetation grows in the ditch, but alfalfa is planted on the sides of the ditch. He noted that plants near the ditch grow back faster after cutting than those further away indicating to him that seepage from the ditch must assist the plants in the more rapid growth. The State Engineer finds that in Nevada native diversified grasses are irrigated all over the state as pasture; therefore, the State Engineer finds the ditch in Parcel 3 is used as pasture demonstrating beneficial use of water.

As noted in Ruling No. 5047, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>183</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on

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<sup>181</sup> Exhibit No. 1611, public administrative hearing before the State Engineer, August 11, 2004.

<sup>182</sup> Exhibit No. 1612, public administrative hearing before the State Engineer, August 11, 2004.

<sup>183</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

this parcel was described as a portion irrigated, creek or natural drainage, road, drainage ditch and on-farm supply ditch. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 3 as being roads, ditches and river edge.<sup>184</sup> Accepting, the Applicants' land use description, taken in conjunction with the Tribe's evidence, the State Engineer finds there is evidence of beneficial use on the 1.94 acres irrigated and the 0.41 of an acre taken up by the on-farm ditch, and on the river edge by the fact that the river edge was covered by a vested water right exchanged for a Project water right, the United States must have seen the area irrigated for such land use as pasture. Since there is no quantification of that portion of the existing place of use taken up by the road, the State Engineer finds the Tribe has not proved non-use on any specifically identifiable portion of the existing place of use; therefore, it has not proven non-use by clear and convincing evidence.

As to Parcel 5, the evidence indicates that of the 8.71 acres in the parcel, that 5.34 acres were irrigated from 1948 through 1987,<sup>185</sup> and 0.54 of an acre was covered by an on-farm supply ditch.<sup>186</sup> Testimony was provided by the Applicant that in the fall months he lets cattle graze on the field and ditch areas, but nothing is specifically planted in the ditch. Rather, wild asparagus, salt grass and other native vegetation grows in the ditch, but alfalfa is planted on the sides of the ditch. He noted that plants near the ditch grow back faster after cutting than those further away indicating to him that seepage from the ditch must assist the plants in the more rapid growth. The State

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<sup>184</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>185</sup> Exhibit No. 1610, public administrative hearing before the State Engineer, August 11, 2004.

<sup>186</sup> Exhibit No. 1609, public administrative hearing before the State Engineer, August 11, 2004.

Engineer finds that in Nevada native diversified grasses are irrigated all over the state as pasture; therefore, the State Engineer finds the ditch in Parcel 5 is used as pasture demonstrating beneficial use of water.

As noted in Ruling No. 5047, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>187</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as an on-farm supply ditch, portion irrigated, road, farm structure and farm yard. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 5 in 1948 and 1988 as being cultivated land, ditch and farmstead.<sup>188</sup> Accepting the Applicants' land use description, in conjunction with the Tribe's evidence, the State Engineer finds there is evidence of beneficial use on the 5.34 acres irrigated, and on the 0.54 of an acre taken up by the on-farm ditch. The remaining 2.83 acres of land must be that portion of land where the land use is the farmstead. The State Engineer finds the Tribe has proved non-use on 2.83 acres of land in Parcel 5 and the use is inconsistent with irrigation.

As to Parcel 6, the evidence indicates that all of the 0.07 of an acre in the parcel is covered by an on-farm supply ditch.<sup>189</sup> Testimony was provided by the Applicant that in the fall months he lets cattle graze on the field and ditch areas, but nothing is specifically planted in the ditch. Rather, wild asparagus, salt grass and other native vegetation grows in the ditch, but alfalfa is planted on the sides of the ditch. He noted that plants near

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<sup>187</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

<sup>188</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>189</sup> Exhibit No. 1609, public administrative hearing before the State Engineer, August 11, 2004.

the ditch grow back faster after cutting than those further away indicating to him that seepage from the ditch must assist the plants in the more rapid growth. The State Engineer finds that in Nevada native diversified grasses are irrigated all over the state as pasture; therefore, the State Engineer finds the ditch in Parcel 6 is used as pasture demonstrating beneficial use of water.

As noted in Ruling No. 5047, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>190</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as an on-farm supply ditch. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 6 as being a ditch.<sup>191</sup> Accepting the Applicants' land use description, in conjunction with the Tribe's evidence, the State Engineer finds there is evidence of beneficial use on Parcel 6 and the Tribe has not proved non-use.

As to Parcel 7, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>192</sup> which indicates from aerial photographs that in 1948 the land use was described as a road, portion irrigated and natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, farm yard and natural vegetation. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 7 as cultivated land in 1948 and a stackyard in 1988.<sup>193</sup> Accepting the

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<sup>190</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

<sup>191</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>192</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

<sup>193</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

Applicants' land use description, taken in conjunction with the Tribe's evidence, the State Engineer found non-use of the water on Parcel 7 for the 25-year period from 1962 through 1987, and finds, but for the unquantified portion where the land use is natural vegetation, is a use inconsistent with irrigation.

As to Parcel 9, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>194</sup> which indicates from aerial photographs that in 1948 the land use was described as natural vegetation. In 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as natural vegetation and portion irrigated. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 9 in 1948 and 1988 as barren land.<sup>195</sup> In Ruling No. 5047, the State Engineer found non-use as to this parcel; however, based on the Federal District Court's Order of April 16, 2001, that bare land by itself does not constitute abandonment, the State Engineer finds the use is not inconsistent with irrigation.

As to Parcel 11, the evidence indicates that of the 10.60 acres in the parcel, 1.41 acres were irrigated from 1948 through 1987,<sup>196</sup> and 0.63 of an acre was covered by an on-farm supply ditch,<sup>197</sup> but this particular ditch has now been lined with cement.<sup>198</sup> As noted in Ruling No. 5047, the Tribe provided

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<sup>194</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

<sup>195</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>196</sup> Exhibit No. 1606, public administrative hearing before the State Engineer, August 11, 2004.

<sup>197</sup> Exhibit No. 1607, public administrative hearing before the State Engineer, August 11, 2004.

<sup>198</sup> Transcript, pp. 6771-6772, public administrative hearing before the State Engineer, August 11, 2004.

evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>199</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a portion irrigated, road, on-farm supply ditch, creek or natural drainage. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 11 in 1948 and 1988 as a river edge, ditch and road.<sup>200</sup> Accepting the Applicants' land use description, taken in conjunctive with the Tribe's evidence, the State Engineer finds there is evidence of beneficial use on the 1.41 acres irrigated, and on the river edge by the fact that the river edge was covered by a vested water right exchanged for a project water right, the United States must have seen the area irrigated for such land use as pasture. Since there is no quantification of that portion of the existing place of use taken up by the road, the State Engineer finds the Tribe has not proved non-use on any specifically identifiable portion of the existing place of use by clear and convincing evidence.

As to Parcel 13, the evidence indicates that of the 0.66 of an acre in the parcel, 0.26 of an acre was irrigated from 1948 through 1987,<sup>201</sup> and 0.40 of an acre was covered by an on-farm supply ditch.<sup>202</sup> Testimony was provided by the Applicant that in the fall months he lets cattle graze on the field and ditch areas, but nothing is specifically planted in the ditch. Rather, wild asparagus, salt grass and other native vegetation grows in the

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<sup>199</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

<sup>200</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>201</sup> Exhibit No. 1610, public administrative hearing before the State Engineer, August 11, 2004.

<sup>202</sup> Exhibit No. 1609, public administrative hearing before the State Engineer, August 11, 2004.

ditch, but alfalfa is planted on the sides of the ditch. He noted that plants near the ditch grow back faster after cutting than those further away indicating to him that seepage from the ditch must assist the plants in the more rapid growth. The State Engineer finds that in Nevada native diversified grasses are irrigated all over the state as pasture; therefore, the State Engineer finds the ditch in Parcel 13 is used as pasture demonstrating beneficial use of water.

As noted in Ruling No. 5047, The Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>203</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as an on-farm supply ditch and portion irrigated. At the 1989 administrative hearing on this application, the Applicants described the land use on Parcel 13 in 1948 and 1988 as a road and river edge.<sup>204</sup> Accepting the Applicants' land use description, taken in conjunctive with the Tribe's evidence, the State Engineer finds there is evidence of beneficial use on Parcel 13 and the Tribe has not proved non-use.

As to Parcel 14, the Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>205</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as natural vegetation. At the 1989 administrative hearing on this application, the Applicants described the land use of Parcel 14 in 1948 and 1988 as barren

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<sup>203</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

<sup>204</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>205</sup> Exhibit No. 1604, public administrative hearing before the State Engineer, August 11, 2004.

land.<sup>206</sup> In Ruling No. 5047, the State Engineer found non-use as to this parcel; however, based on the Federal District Court's Order of April 16, 2001, that bare land by itself does not constitute abandonment, the State Engineer finds the use is not inconsistent with irrigation.

Testimony and evidence were provided at the reopened administrative hearing of two attempts by the Applicant's father or grandfather to either transfer or obtain additional water for those properties being irrigated and such attempts were thwarted by the government.<sup>207</sup> While not every single piece of ground matches up identically to the transfer under consideration, this farm has been in the Harriman family since 1907 and there is adequate evidence that members of the family made attempts to move water in order to get the records into compliance with where the water was being used. If every single 0.07 of an acre parcel has to match up with an earlier attempt to transfer, the Ninth Circuit Court of Appeals' standard has no meaning, because no farmer will ever be able to show that type of detail. These are working farms that changed over time, and farmers were attempting to work through government agencies with poorly drawn maps. The State Engineer does not believe the Ninth Circuit Court of Appeals meant for its standard to have no relevance or real meaning. There is evidence in the record that all the water was continually used.<sup>208</sup>

V.

The State Engineer recommends the Federal District Court affirm this transfer in its entirety based on the grounds that the

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<sup>206</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>207</sup> Exhibit No. 1622 and Transcript, pp. 6742-6770, 6790-6793, public administrative hearing before the State Engineer, August 11, 2004.

<sup>208</sup> Transcript, pp. 6789, public administrative hearing before the State Engineer, August 11, 2004.

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Applicant has proven the standards for lack of intent to abandon established by the law of the case.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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

IN THE MATTER OF APPLICATION 51060)

RULING ON REMAND

GENERAL

**# 5464 - E**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>209</sup> and *Alpine VI*<sup>210</sup> and the Federal District Court's Order of February 25, 2004,<sup>211</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>209</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>210</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>211</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

**FINDINGS OF FACT**

**I.**

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

- of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.
9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
  10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

The Applicant presented the following argument in reference to several applicants and indicated it is applicable to this applicant. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that if he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium" is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and

its agent TCID were in the business of selling water, not transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tracts Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold in part because of pressure to reduce or limit the total irrigable acreage within the Project. The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement. The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including, but not necessarily limited to, what has been referred to in these proceedings as the "A List."

Once the BOR discontinued these "sale" programs, there was no means to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. The Applicant argues that State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>212</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not assert any jurisdiction over the water rights within the Newlands Project prior to the *Alpine* decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that a true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate 20-day time period in April and May 1973.<sup>213</sup>

The State Engineer finds that the rule of the case dictates

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<sup>212</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

<sup>213</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman and Exhibit Nos. 1555 and 1635.

his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

### III.

In State Engineer's Ruling No. 5047, the State Engineer was addressing 12 parcels of land with abandonment claims asserted as to all but Parcel 8 where only a partial abandonment was asserted. In Ruling No. 5047, the State Engineer found using the Applicants' land use descriptions that no water was placed to beneficial use on all the existing places of use, except for a 0.27 acre portion of Parcel 3 that was irrigated, for the 39-year period from 1948 through 1987.

The State Engineer further finds that as to Parcels 1, 2, 7 and 11 the land use is inconsistent with irrigation where it is covered by the farmstead, but not inconsistent with irrigation where it is barren land on the grounds that the Federal District Court has found bare ground does not constitute abandonment. As to Parcels 3, 4, 5, 6, 8, 9, 10 and 12 the land use is inconsistent with irrigation, except for the portions of Parcels 5, 8 and 9 that are covered by on-farm supply ditches and the portion of Parcel 3 that is irrigated.

The Applicant testified that none of the existing places of use are covered by on-farm, dirt-lined supply ditches, but it is really not an issue since the State Engineer accepted and used the Applicants' land use descriptions for his land use determinations.<sup>214</sup>

The Applicant provided evidence that in 1973 his father worked on applying for a transfer and to purchase additional water rights,

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<sup>214</sup> Transcript, pp. 6984-6986, public administrative hearing before the State Engineer, September 21, 2004.

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but the transfer was not approved.<sup>215</sup> The Tribe noted that the application was never completed.

The State Engineer finds no evidence was presented as to the payment of taxes and assessments, but assumes since this farm has been in the family since 1953 and TCID certified ownership of the water rights that they were not lost for failure to pay taxes and assessments. The State Engineer finds no evidence was presented as to continuous use of the water rights. Therefore, the State Engineer finds the Applicant did not meet the standards required by the courts and must recommend the Federal District Court declare the water rights abandoned.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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<sup>215</sup> Transcript, pp. 6979-6984; Exhibit No. 1647, public administrative hearing before the State Engineer, September 21, 2004.

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

IN THE MATTER OF APPLICATION 51231)

RULING ON REMAND

GENERAL

**# 5464 - F**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>216</sup> and *Alpine VI*<sup>217</sup> and the Federal District Court's Order of February 25, 2004,<sup>218</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>216</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>217</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>218</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

The Applicant presented the following argument in reference to several applicants and indicated it is applicable to this applicant. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that is he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium" is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and

its agent TCID were in the business of selling water, not transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tracts Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold in part because of pressure to reduce or limit the total irrigable acreage within the Project. The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement. The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including, but not necessarily limited to, what has been referred to in these proceedings as the "A List."

Once the BOR discontinued these "sale" programs, there was no means to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. The Applicant argues that State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>219</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not assert any jurisdiction over the water rights within the Newlands Project prior to the Alpine decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate 20-day time period in April and May 1973.<sup>220</sup>

The State Engineer finds that the rule of the case dictates

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<sup>219</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

<sup>220</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman and Exhibit Nos. 1555 and 1635.

his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

### III.

In State Engineer's Ruling No. 5005, the State Engineer was addressing three parcels of land all with protest claims of forfeiture and abandonment. The State Engineer found that the contracts applicable to all parcels were dated post-1913; therefore, the forfeiture provision of NRS § 533.060 was applicable.

As to Parcel 1, the State Engineer found that no water was placed to beneficial use on a 4.49 acre portion of the 5.23 acre parcel for a 39-year period prior to the filing of the change application and the land use on the parcel was inconsistent with irrigation. However, 0.74 of an acre was covered by an on-farm, dirt-lined supply ditch.

As to Parcel 2, the State Engineer found that no water was placed to beneficial use on a 0.76 of an acre portion of the 1.10 acre parcel for a 39-year period prior to the filing of the change application and the land use on the parcel was inconsistent with irrigation. The Tribe provided evidence that 0.34 of an acre was irrigated continuously.

As to Parcel 3, the State Engineer found that no water was placed to beneficial use for a 39-year period prior to the filing of the change application and the land use on the parcel was inconsistent with irrigation.

The Applicants alleged the transfer was an intrafarm transfer, but failed in their petition to submit any of the evidence to support said claim; therefore, the State Engineer denied the request to consider the transfer an intrafarm transfer and concluded in Ruling No. 5005 that the water rights appurtenant to 4.49 acres in Parcel 1, 0.76 of an acre in Parcel 2 and all of Parcel 3 were forfeited and abandoned. The State Engineer allowed

for the transfer of 0.74 of an acre from Parcel 1 and 0.34 of an acre from Parcel 2.

The Applicants appealed the State Engineer's decision that the transfer was not an intrafarm transfer and on August 7, 2002, the Federal District Court remanded the decision to the State Engineer to consider if the transfer was an intrafarm transfer upon the Applicants providing the missing documentation. After the matter was remanded, the Applicants' legal counsel requested the State Engineer withhold acting to provide time for additional consideration of whether the Applicants would pursue the matter on remand or not. At the hearing on remand, the Applicants provided the documentation to show this in an intrafarm transfer.<sup>221</sup> The State Engineer finds the evidence supports the claim that these are intrafarm transfers.

#### IV.

In 1974 the Applicants went to TCID to inquire about obtaining additional duty and were told no and were told there was no chance to sell, buy or transfer water at that time because of litigation.<sup>222</sup> At the time said inquiry was made they did not inquire about transferring water because they did not know they needed to transfer any water rights.<sup>223</sup>

As to the 0.74 of an acre in Parcel 1 that was covered by an on-farm, dirt-lined supply ditch the Applicant testified that they always ran cattle on the ditch for winter and fall feed.<sup>224</sup> The State Engineer finds that in Nevada native diversified grasses are

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<sup>221</sup> Exhibit No. 1646, Transcript, p. 6954, public administrative hearing before the State Engineer, September 21, 2004.

<sup>222</sup> Transcript, p. 6957, public administrative hearing before the State Engineer, September 21, 2004.

<sup>223</sup> Transcript, p. 6968, public administrative hearing before the State Engineer, September 21, 2004.

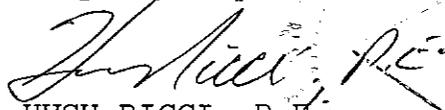
<sup>224</sup> Transcript, pp. 6963-64, public administrative hearing before the State Engineer, September 21, 2004.

irrigated all over the state as pasture; therefore, the State Engineer finds the ditch in Parcel 1 is used as pasture demonstrating beneficial use of water.

v.

The State Engineer finds the Applicants did not meet the test for an equitable exemption from forfeiture for an intrafarm transfer or and did not meet the standards established to avoid abandonment. The State Engineer would recommend the Federal District Court affirm State Engineer's Ruling No. 5005 as to Application 51231, except that the State Engineer has also been informed that the Applicants have chosen to participate in the AB 380 program by obtaining matching water for the 0.74 of an acre occupied by the on-farm supply. Therefore, no recommendation is made at this time.

Respectfully submitted,

  
HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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

IN THE MATTER OF APPLICATIONS 51237)

RULING ON REMAND

GENERAL

**# 5464 - G**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>225</sup> and *Alpine VI*<sup>226</sup> and the Federal District Court's Order of February 25, 2004,<sup>227</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>225</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>226</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>227</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

**FINDINGS OF FACT**

**I.**

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

Based on testimony and evidence presented, the Applicant provided the following in its closing argument and proposed order. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed the evidence and testimony to be presented at the hearing on remand, it did factor into this decision, because the State Engineer is under the belief that if he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's factual summary and argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the evidence and argument before them.

Said factual summary and argument indicates:

Pursuant to the Reclamation Act of June 17, 1902, the United States Department of Interior withdrew lands in Churchill and Lyon Counties in the State of Nevada, for what is now the Newlands

Project.<sup>228</sup> The project purpose was to conserve and divert water from the Truckee and Carson Rivers for flood control and irrigation purposes. In order to initially determine the acreage eligible to receive water delivery from the Project, the Bureau of Reclamation classified acreage within the Project boundaries within six classes.<sup>229</sup> Class 1-4 lands were considered irrigable and Classes 5 and 6 were considered non-irrigable. However, Class 5 lands were considered to be reclaimable and could be reclassified. The first irrigable classification determinations were documented in a drawing referred to as the 1913 Irrigable Area Map (aka funny papers).<sup>230</sup>

With regard to conserving and efficiency, Reclamation exchanged vested (pre-Project) water rights within the Project boundaries for Project water storage delivery contracts to landowners in the form of "Permanent Water Right Contracts" (hereinafter "vested contracts").<sup>231</sup> Those holding vested contracts were not required to pay construction charges, only the annual operation and maintenance costs for Project deliveries. The first vested contract issued by Reclamation to a Newlands Project landowner was on January 8, 1907, to G.E. Burton and W.F. Kaiser. The last vested contract was signed on July 21, 1919, by J.W. Freeman. In total, the United States exchanged 22,148 acres of vested (pre-Project) water rights for storage delivery contracts from the Project. Most vested contracts had an attached drawing showing generally where the water was used by the landowner at the

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<sup>228</sup> Exhibit No. 1521, public administrative hearing before the State Engineer, August 9, 2004.

<sup>229</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

time of the exchange.<sup>232</sup>

In addition to these first contracts, Reclamation issued 45,207 acres of Permanent Water Right Contracts referred to as "Application Lands" (hereinafter "application contracts") for those willing to pay for the construction, operation and maintenance of the Project in return for receiving water delivery from the Project onto homestead lands not previously irrigated. These application contracts were issued between 1903 and 1926.<sup>233</sup>

In 1926, Reclamation entered into a repayment contract with the Truckee-Carson Irrigation District (TCID) to take over ownership and management of the Newlands Project pursuant to the contract terms.<sup>234</sup> Once the contract was signed, TCID (instead of Reclamation) began accepting applications for "Non-Application Lands" (hereinafter "non-application contracts").<sup>235</sup> These lands were withdrawn and classified as irrigable by Reclamation but were not homesteaded before 1926.<sup>236</sup> These non-application contracts were first approved by TCID and then forwarded to Reclamation for final approval.<sup>237</sup> The process for issuing water right delivery contracts involved the following steps: (1) Landowner made application to TCID; (2) Application was required to include all lands classified as irrigable by Reclamation in the Lot; (3) TCID referred application to Reclamation; (4) Reclamation confirmed that all lands applied for were classified irrigable. Lands in the

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Exhibit No. 1518, public administrative hearing before the State Engineer, August 9, 2004.

<sup>235</sup> Exhibit No. 1512, public administrative hearing before the State Engineer, August 9, 2004.

<sup>236</sup> Exhibit No. 1514, public administrative hearing before the State Engineer, August 9, 2004.

<sup>237</sup> Exhibit Nos. 1516, 1517, 1521, 1528, public administrative hearing before the State Engineer, August 9, 2004.

application not irrigable would not receive Reclamation approval. Class 5 lands not approved would be instructed by Reclamation and/or TCID to lease or buy water from TCID so that the Landowner might use the water on the "non-irrigable" classed land to establish actual irrigability. These "reclaimed Class 5 lands" could then be reclassified (Class 1-4) and become eligible to receive a non-application contract; (5) Once approved, TCID recorded the non-application contract at the County Recorders Office. TCID actually issued 9,261 acres of non-application contracts during this period. The last non-application contract was issued on December 8, 1964.

In 1953, Reclamation agreed to sell small land parcels "Small Tract Sale" containing irrigable land within the Project owned by the United States.<sup>238</sup> These were withdrawn lands not yet patented. Contracts for Small Tract Sales provided that the irrigable portions of land sold would be granted a water storage delivery contract upon application to TCID. Even though Reclamation inquired occasionally to TCID regarding the status of various small tract owners, 530 acres of the 1,233 irrigable acres within these small tracts were never granted water storage delivery contracts. Beginning in 1984, the owners of those lands that never received water storage delivery contracts, but for which the landowner (1) had purchased both the land and right to water delivery from the Project and (2) had perfected storage water for irrigation, were informed of a change in procedure. TCID instructed them to obtain recognition of their right to use project storage waters on their purchased lands within the Project by means of a transfer before the Nevada State Engineer instead of through an application to Reclamation or TCID for a contract.

This change in procedure for obtaining storage water delivery from the Project likely occurred for financial reasons. As a

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<sup>238</sup> Exhibit Nos. 1512, 1513, 1514, 1525, 1539, public administrative hearing before the State Engineer, August 9, 2004.

result of an amendment dated June 14, 1944, to the 1926 contract between the U.S. and TCID, provision for repayment of the then \$500,000 deficit portion on the construction obligation was computed on the basis of \$54 an acre. By 1964, Reclamation and TCID had issued approximately 54,471 acres of application and non-application contracts which produced sufficient revenue to repay the construction charges against the Project. The last \$3,291.64 was satisfied by issuing only 61 acres of the 86 acres on the application of Charles F. McCuskey.<sup>239</sup>

Because sufficient water storage delivery contracts had been sold to repay the construction obligation to the United States, Reclamation took the position that no new water delivery contracts could be issued. However, this position failed to take into account the following facts: (1) TCID had available for reissuance about 1,500 acres of storage water delivery contracts returned to it by reason of foreclosures on unpaid assessments; (2) many acres previously receiving water storage delivery were now replaced by roads, corrals, and buildings; (3) the United States Navy was enlarging its base and purchasing large tracts of land within the Project some holding water delivery contracts; and (4) some storage water delivery contracts were placed in a suspended or non-pay class because the landowners were not able to increase crop production on these lands to make them profitable. Reclamation suggested that these storage water right contracts could be transferred to other irrigable lands within the Project.<sup>240</sup>

At that time, Reclamation and TCID began negotiating on various items including the problem of "irrigated, non-water righted lands" within the Project. "Irrigated, non-water righted lands" were lands receiving storage water delivery from TCID for

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<sup>239</sup> Exhibit No. 1519, public administrative hearing before the State Engineer, August 9, 2004.

<sup>240</sup> Exhibit Nos. 1519, 1522-24, 1526-28, 1531-32, 1543, 1545, 1547-48, 1550-52, 1572-82, public administrative hearing before the State Engineer, August 9, 2004.

which a storage water contract had not been issued. The negotiated agreement later became known as the "9 Point Agreement." This was a global settlement, but as it pertained to "transfer" of water (amending storage water delivery contracts to describe different lands) it was negotiated (1) to allow TCID to sell 1,000 acres of new water storage delivery contracts; and (2) to allow TCID to "transfer" (more appropriately to amend existing water storage delivery contracts) from those 1,500 acres of described storage water delivery contracts to other irrigable and productive lands. Issuance of the new contracts and amending ("transferring") other contracts for storage water delivery to 2,500 acres would have covered the lands of farmers who had requested new storage water right contracts since the United States moratorium on the issuance of new water right contracts on December 11, 1964. This list of landowners was attached to the "9 Point Agreement" as Appendix A. It later became known as the "A List."<sup>241</sup>

Because the federal district court has assumed jurisdiction of the Carson River for purposes of adjudicating the rights therein under the Alpine Decree, the State continued to abstain from exercising jurisdiction within the Newlands Project to issue or transfer water rights.<sup>242</sup>

In 1972, after 8 years of negotiations on the "9 Point Agreement," rules were finally approved by TCID and Reclamation to process the issuance of new storage water delivery contracts and the storage water delivery contract amendments (aka "transfers"). Before any storage water delivery could occur under these new and amended contracts, the landowner was required to use water delivery from any described lands under his existing storage water delivery contracts that he was either not irrigating on his farm unit (intrafarm), that was associated with less productive lands, or

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<sup>241</sup> *Id.*

<sup>242</sup> Testimony of Peter Morros, public administrative hearing before the State Engineer, August 9, 2004.

that was associated with lands left idle or lands under improvement such as corrals, homes, and stack yards.<sup>243</sup> If the Landowner still did not have sufficient storage water delivery contracts to cover his irrigated acreage after amending his existing storage water delivery contracts intrafarm, he was eligible to buy additional storage water delivery contracts through TCID (authorized new or reissued). These "transfer" applications required Reclamation's approval. The "A List" provided the priority in making the few "transfers" that occurred.

In 1972, Operating Criteria and Procedures ("OCAP") for Federal Facilities in the Truckee-Carson River Basins was modified by the District of Columbia and forwarded to the Department of Interior to establish the operating criteria and procedures for TCID.<sup>244</sup>

Pursuant to the "9 Point Agreement," TCID processed and sent to Reclamation "transfer" applications for many Landowners. Between April 27, 1973, and May 15, 1973, a twenty-day period, Reclamation approved 29 individual "transfer" applications for approximately 850 acres of land.<sup>245</sup> On May 22, 1973, Reclamation suspended approval of any "transfer" applications.<sup>246</sup> TCID continued to accept "transfer" applications for the purpose of amending storage water delivery contracts and forwarded them to Reclamation for a period of time. However, Reclamation refused

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<sup>243</sup> Testimony of Ernest Shank, public administrative hearing before the State Engineer, August 9, 2004.

<sup>244</sup> Exhibit Nos. 1553-54, public administrative hearing before the State Engineer, August 10, 2004.

<sup>245</sup> Testimony of Ernest Shank and Exhibit Nos. 1529-30, 1555-56, public administrative hearing before the State Engineer, August 9 and 10, 2004.

<sup>246</sup> Exhibit Nos. 1534, 1557-58, public administrative hearing before the State Engineer, August 10, 2004.

approval.<sup>247</sup>

In September 1973, Reclamation sent TCID notice that it was terminating the 1926 contract. The Secretary of Interior's letter canceling the 1926 contract and taking over supervisory management of the Project was published in the local paper. Therefore, the information that no "transfers" (amendments to storage water delivery contracts) would be allowed in the Project was disseminated to the public at large.<sup>248</sup> In 1975, TCID received a letter from Reclamation notifying it that "Interior was no longer considering the "9 Point Agreement."<sup>249</sup>

In 1980, Reclamation hired an engineering firm to study and determine which lands within the Project were receiving storage water delivery. Available irrigability classification maps, original applications for storage water delivery, and ledger cards noting water delivery as they existed in TCID's files were used in this process. Clyde-Criddle-Woodland, Inc. verified water delivery and use within each quarter/quarter section of the Project ("Criddle Report") using this method.<sup>250</sup> Chilton Engineering issued a report verifying that 73,672 acres were deemed to be the total water right contracts issued within the Newlands Project.

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<sup>247</sup> Exhibit Nos. 1534-45, 1541, 1558, 1561, public administrative hearing before the State Engineer, August 10, 2004.

<sup>248</sup> Exhibit Nos. 1537-38, public administrative hearing before the State Engineer, August 10, 2004.

<sup>249</sup> Exhibit Nos. 1539, 1540, 1561-62, 1564-65, public administrative hearing before the State Engineer, August 10, 2004.

<sup>250</sup> Exhibit Nos. 1567, 1570, public administrative hearing before the State Engineer, August 10, 2004.

Through the decades between 1970 and 1980 and into the 1980's after the *Alpine*<sup>251</sup> decision and *Nevada v. U.S.*,<sup>252</sup> the "A List" grew to about 4,000 acres requiring changes in the described areas requiring storage water delivery. The final Decree issued in *Alpine* finally secured the Nevada State Engineer's jurisdiction to process transfers for changes in place of use within the Project.

On March 13, 1984, TCID held a lottery to prioritize 135 individuals on the "A List" who were seeking storage water delivery contracts. TCID sold storage water delivery contracts that had been authorized or returned to approximately the first 60 individuals on the list. Many individuals purchased storage water delivery contracts from neighbors.<sup>253</sup>

Between 1980-84, due to the existing subdivisions of the farms, it became increasingly difficult for engineering staff at TCID to divide storage water delivery contracts among parceled lands. Thus, TCID commenced to make storage water delivery drawings match the 1:400 scale of Reclamation's Property and Structures maps. Revisions were done using the 1913 Irrigable Area maps, 1972 revisions of water right drawings, 1948 and 1974 photographs, and 1903-64 water right applications.<sup>254</sup> There were no field investigations or physical surveys used as a basis for these maps. They were drawn only for purposes of allocating storage water delivery contracts between properties that were divided. These drawings were later taken and copied by

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<sup>251</sup> *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (1983), cert. denied, 464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983).

<sup>252</sup> *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983).

<sup>253</sup> Exhibit Nos. 1542, 1549, public administrative hearing before the State Engineer, August 10, 2004.

<sup>254</sup> Exhibit Nos. 1501, 156768, 15709, public administrative hearing before the State Engineer, August 10, 2004.

Reclamation. Never intended to become such, they are now referred to as "water rights maps."

In order to decide who ought to file transfers with the Nevada State Engineer, TCID took these "water right maps" and overlaid them with the Bureau of Reclamation's annual aerial photographs. When these two did not match, it was assumed that a transfer needed to be filed. From these drawings, TCID and private engineering firms prepared transfer maps for the landowners to accompany transfer applications filed with the Nevada State Engineer.

The Applicant argues that because jurisdiction did not lie with the Nevada State Engineer to make transfers within the Newlands Project until the final decree in *Alpine*, relevant attempts to transfer as required by the 9th Circuit are those that were attempted after the date of *Alpine*, in 1983. The Applicant argues that "water rights maps" in this proceeding shall be considered drawings and not the best evidence of the existing and proposed places of use, rather the Applicant's testimony shall be the best evidence.

The State Engineer finds that the rule of the case dictates his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world. The State Engineer finds the "water rights maps" were not used to indicate the proposed places of use and are the best evidence of the authorized or recognized existing places of use.

### III.

In State Engineer's Ruling No. 4798, the State Engineer had one parcel under consideration and the only protest claim now under consideration is abandonment. The Tribe provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use" and in a table titled Post-1984 Land Use Descriptions for Existing Place(s)

of Use<sup>255</sup> which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980, 1984, 1985, 1986 and 1987 the land use on this parcel was described as a road, bare land, natural vegetation. At the 1988 administrative hearing, the Applicant described the land use in both 1948 and 1988 as barren land.<sup>256</sup> At the reopened administrative hearing, the Tribe described the land use as drain ditch, irrigated and natural vegetation.<sup>257</sup>

In Ruling No. 4798, the State Engineer noted that the Applicant did not agree that the Tribe's witness had properly located himself on the aerial photographs as to the existing place of use,<sup>258</sup> and the Applicant remain steadfast that the Tribe's witness is not aligning himself properly to the surveyed property corners.<sup>259</sup> The Applicant has had the land surveyed and believes those survey marks correspond with a blue line ignored by the Tribe's witness on the aerial photographs for lining up the transparency that he used to determine the existing place of use. The Applicant testified that the existing place of use is not under a road and that when they bought the property in 1965 the existing place of use was clover being irrigated as pasture.<sup>260</sup> However, at both the 1997 hearing and the reopened hearing in August 2004,

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<sup>255</sup> Exhibit Nos. 432 and 433, public administrative hearing before the State Engineer, September 23, 1997.

<sup>256</sup> Exhibit No. 424, public administrative hearing before the State Engineer, September 23, 1997.

<sup>257</sup> Exhibit No. 1631, public administrative hearing before the State Engineer, August 11, 2004.

<sup>258</sup> Transcript, pp. 2875-2895, public administrative hearing before the State Engineer, September 23, 1997.

<sup>259</sup> Transcript, pp. 6834 - 6835, public administrative hearing before the State Engineer, August 11, 2004.

<sup>260</sup> Transcript, pp. 2888-2889, public administrative hearing before the State Engineer, September 23, 1997.

the Applicant indicated that there is a drain ditch in the middle of the existing place of use. The Applicant testified that several years after the purchase of the property they relevelled it and moved the water to the proposed place of use.<sup>261</sup>

The State Engineer found in that ruling that the Tribe did not sufficiently prove to the State Engineer that its witness had properly located the existing place of use making suspect the land use determinations and that he would accept the Applicant's description of the existing place of use. The State Engineer is not sufficiently convinced that any of the land use descriptions are completely accurate. Both sides agree there is a drain ditch in the middle of the existing place of use and the Tribe's witness quantified that as occupying 1.0 acre of land.<sup>262</sup> But the State Engineer does not believe the quantifications as to the other portions of the existing place of use rise to the level of clear and convincing evidence based on the Applicant's testimony that the Tribe's witness was not properly aligned with the actual land survey. The State Engineer finds that the Tribe did not prove its case of non-use as to specifically identifiable areas of land by clear and convincing evidence, except for the 1.0 acre occupied by the drain ditch. At the reopened administrative hearing, the Hearing Officer indicated that she did not believe the hearings were reopened for the purpose of allowing the Tribe to again present its evidence in chief as to non-use of the water right. However, the State Engineer notes that the Applicant testified that a drain ditch occupies the center of the existing place of use.

In Ruling No. 4798, the State Engineer found that the water right requested for transfer under Application 51237 was in Applicants' ownership, and most, if not all, of the water was being

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<sup>261</sup> Transcript, pp. 2889-2892, public administrative hearing before the State Engineer, September 23, 1997.

<sup>262</sup> Transcript, p. 6833, public administrative hearing before the State Engineer, August 11, 2004.

used by the Applicant prior to the filing of the transfer application. The State Engineer further found that the evidence did not demonstrate that the land use on the existing place of use at the time of the transfer application was inconsistent with irrigated agriculture and the Applicants was using some, if not all, of the water subject of this application, precluding a claim of an intent to abandon the water right. The State Engineer now finds that the evidence demonstrates that most of the land use is not inconsistent with irrigated agriculture, except for that portion occupied by the drain ditch.

The Applicant presented testimony that when they releveled the field around 1969 or 1970 inquiry was made at TCID if they could move water and were told that they needed to have the property surveyed and that the TCID engineer had to move the water rights to the proposed place of use for them.<sup>263</sup> However, at the reopened hearing, the Applicants testified that they used the water at the existing place of use until the early 1980's when a portion of the property was conveyed to the Applicant's daughter and the water was used on the proposed place of use after 1982.

The State Engineer now finds that the evidence demonstrates that most of the land use is not inconsistent with irrigated agriculture, except for that portion occupied by the drain ditch. The State Engineer finds that due to the discrepancy as to whether the Tribe's witness was properly aligned to the land survey, the Tribe did not prove non-use by clear and convincing evidence as to the remaining portions of the existing place of use. The State Engineer finds the water was continually used (but for 1.5 acres of land incorrectly mapped).<sup>264</sup> The State Engineer finds that all

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<sup>263</sup> Transcript, pp. 2890 - 2891, public administrative hearing before the State Engineer, September 23, 1997.

<sup>264</sup> Transcript, pp. 6808-6822, public administrative hearing before the State Engineer, August 11, 2004, wherein a discussion was had as to some of the proposed place of use being a drain where it cannot be used.

Ruling  
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taxes and assessments were paid.<sup>265</sup>

The State Engineer recommends the Federal District Court find that the Tribe has not proved non-use as to specifically identifiable grounds belonging to the Applicant by clear and convincing evidence and find that the Applicant proved a lack of intent to abandon the water rights, and overrule the protest and affirm the State Engineer's decision granting the transfer.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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<sup>265</sup> Exhibit Nos. 1628 and 1629, public administrative hearing before the State Engineer, August 11, 2004.

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

IN THE MATTER OF APPLICATION 51608)

RULING ON REMAND

GENERAL

**#5464 - H**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>266</sup> and *Alpine VI*<sup>267</sup> and the Federal District Court's Order of February 25, 2004,<sup>268</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>266</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>267</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>268</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

The Applicant presented the following in its closing argument. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that is he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium" is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and its agent TCID were in the business of selling water, not

transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tract Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold in part because of pressure to reduce or limit the total irrigable acreage within the Project. The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement. The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including, but not necessarily limited to, what has been referred to in these proceedings as the "A List." Once the BOR discontinued these "sale" programs, there was no means

to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. The Applicant argues that State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>269</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not assert any jurisdiction over the water rights within the Newlands Project prior to the *Alpine* decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that a true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate 20-day time period in April and May 1973.<sup>270</sup>

The State Engineer finds that the rule of the case dictates his decision making in this matter; however, the factual scenario

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<sup>269</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

<sup>270</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman and Exhibit Nos. 1555 and 1635.

presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

### III.

In State Engineer's Ruling No. 5047, the State Engineer originally had nine parcels of land from which water was being transferred under consideration. As noted in the ruling, Parcels 3, 4, 6 & 8 were withdrawn in their entirety. Also, 2.00 acres were withdrawn from Parcel 5, and 0.05 of an acre was withdrawn from Parcel 7. The State Engineer has been informed that, as to the 0.80 of an acre that remains in Parcel 5 and the 0.25 of an acre that remains in Parcel 7, the permittee is participating in the AB 380 matching program and has obtained matching water; therefore, as far as the State Engineer is concerned as to these parcels the matter should be fully resolved, and recommends the Federal District Court overrule the protest and affirm the granting of the transfer. Therefore, the only parcels under consideration in this ruling are Parcels 1, 2 and 9.

The State Engineer reopened the administrative hearing as to Application 51608 on August 10, 2004. As to Parcels 1, 2 and 9 the Tribe's remaining allegation is abandonment. The State Engineer has already found the contracts pre-date 1913; therefore, the water rights are not subject to the forfeiture provision of NRS § 533.060.

As to Parcel 1 - as found in Ruling No. 5047, the Tribe's evidence indicated that from 1948 through 1987 the land use was described as a delivery ditch and drain ditch. At the 1991 administrative hearing, the Applicant described the land use in both 1948 and 1989 as a ditch and road.

As to Parcel 2 - as found in Ruling No. 5047, the Tribe's evidence indicated that from 1948 through 1977 the existing place of use was in irrigation, but that from 1980 through the filing of the application in 1987 the land use was described as a farm yard. At the 1991 administrative hearing, the Applicant described the

land use in both 1948 and 1989 as a stackyard.

As to Parcel 9 - as found in Ruling No. 5047, the Tribe's evidence indicated that from 1948 through 1987 the land use was described as a farm yard. At the 1991 administrative hearing, the Applicant described the land use in both 1948 and 1989 as a farmstead and stackyard.

The State Engineer finds as to Parcels 1 and 9 that no water was placed to beneficial use for the 39-year period from 1948 through 1989 and that the land use was inconsistent with irrigation. The State Engineer finds as to Parcel 2 that no water was placed to beneficial use for the 7-year period from 1980 through 1987 and the land use was inconsistent with irrigation.

The State Engineer finds the Applicant paid the taxes and assessments.<sup>271</sup> The State Engineer finds that a predecessor-in-interest to this Applicant attempted to straighten out the location of water rights on parts of this farm in 1973, but not specifically as to Parcels 1, 2 and 9.<sup>272</sup> The State Engineer finds the Applicant was on the board of the Truckee-Carson Irrigation District (TCID) from 1974 through 1998 and was aware that if he attempted to file for a transfer that it would not be allowed.<sup>273</sup> The State Engineer finds testimony was presented that the proposed places of use had been irrigated since at least the time the Applicant purchased this specific farm.<sup>274</sup> The State Engineer finds this Applicant was on the lottery list to obtain either a new water right or a transfer from TCID to obtain water for ground he

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<sup>271</sup> Transcript, pp. 6608-6609, public administrative hearing before the State Engineer, August 10, 2004.

<sup>272</sup> Exhibit No. 1592.

<sup>273</sup> Transcript, p. 6595, public administrative hearing before the State Engineer, August 10, 2004.

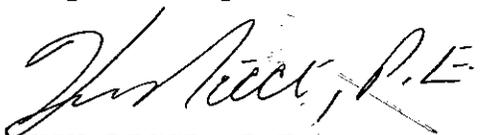
<sup>274</sup> Transcript, p. 6592, public administrative hearing before the State Engineer, August 10, 2004.

was irrigating that was not water righted.<sup>275</sup> The State Engineer finds while this Applicant did not file an application or inquire about the filing of an application to transfer water to for these parcels, he demonstrated that he was aware from being on the TCID board that he could not obtain such a transfer. The State Engineer finds there is sufficient evidence taking the totality of the circumstances to demonstrate that this Applicant did not abandon his water rights.

**III.**

The State Engineer recommends the Federal District Court affirm the State Engineer's decision overruling the protest and granting Application 51608.

Respectfully submitted, .



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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<sup>275</sup> Transcript, pp. 6597, 6610, public administrative hearing before the State Engineer, August 10, 2004.

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

IN THE MATTER OF APPLICATION 51734)

RULING ON REMAND

GENERAL

**# 5464 - I**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>276</sup> and *Alpine VI*<sup>277</sup> and the Federal District Court's Order of February 25, 2004,<sup>278</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>278</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
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the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

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7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

The Applicant presented the following argument in reference to several applicants and indicated it is applicable to this applicant. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that is he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium" is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and

its agent TCID were in the business of selling water, not transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tract Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold in part because of pressure to reduce or limit the total irrigable acreage within the Project. The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement. The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including, but not necessarily limited to, what has been referred to in these proceedings as the "A List."

Once the BOR discontinued these "sale" programs, there was no means to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. The Applicant argues that State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>279</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not assert any jurisdiction over the water rights within the Newlands Project prior to the *Alpine* decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that a true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate 20-day time period in April and May 1973.<sup>280</sup>

The State Engineer finds that the rule of the case dictates

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<sup>279</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

<sup>280</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman and Exhibit Nos. 1555 and 1635.

his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

### III.

In State Engineer's Ruling No. 5047, the State Engineer was addressing three parcels of land and protest claims of forfeiture and abandonment as to Parcels 1 and 2, and only abandonment as to Parcel 3. The State Engineer found there was not clear and convincing evidence of non-use of the water right as to Parcel 1. The State Engineer found the contract date precluded a claim of forfeiture as to Parcel 2, and found that no water was placed to beneficial use for the 14-year period from 1973 to 1987. As to Parcel 3, the State Engineer found that no water was placed to beneficial use, except for the 0.46 of an acre covered by an on-farm, dirt-line supply ditch for the 40-year period from 1948 through 1987.

It is the State Engineer's understanding that the Applicant is participating in the AB 380 program with respect to a portion of Parcel 1, but he finds it not relevant to this remand in light of the finding that the Tribe did not prove its claim of non-use. The Tribe agreed at the hearing on remand that Parcel 1 is no longer at issue.<sup>281</sup> Therefore, the only issue remaining is the abandonment claims as to Parcels 2 and 3.

As to Parcel 2, the Tribe described the land use as a farm yard and the Applicant described it as corrals and stackyard. The State Engineer finds these descriptions are fairly consistent and this is a use inconsistent with irrigation.

As to Parcel 3, the Tribe described the land use as an on-farm supply ditch, natural vegetation and a road and the Applicant described it as roads and ditches. The Tribe quantified the on-

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<sup>281</sup> Transcript, p. 7100, public administrative hearing before the State Engineer, October 19, 2004.

farm supply ditch as covering 0.46 of an acre of the 3.25 acres comprising the place of use. The State Engineer finds the on-farm supply ditch and natural vegetation are not uses inconsistent with irrigation, but the road is a use inconsistent with irrigation. The Applicant's witness indicated that along the southern portion of the existing place of use was a drain ditch and along the eastern portion was a supply ditch, and that cattle would graze the forage off those ditches.<sup>282</sup> Further testimony was provided that the quarter/quarter section in which this existing place of use exists is a true 40-acre quarter and 40 acres of water right existed on the quarter/quarter.<sup>283</sup>

At the hearing on remand, the Applicant appears to want to argue that drain ditches should fall under the category of on-farm, dirt-lined supply ditches; therefore, the State Engineer should allow the Applicant to show beneficial use of water on the drain ditch. The State Engineer refers to the General Findings of Fact Applicable to All Applications Under Consideration in State Engineer's Ruling No. 5047 and specifically Finding IX in which the State Engineer notes that waste ditches and drains were not considered part of the irrigable acreage. The State Engineer never made a finding that drain ditches were considered irrigable areas, and the matter was not remanded for determinations of beneficial use on drain ditches as that determination was not made by the State Engineer in the decisions that led to this latest remand. The State Engineer did not reopen hearings to allow new issues to be introduced, but rather the hearings were reopened only to consider the matters remanded. Further, the purpose of the remand was not to revisit the State Engineer's land use determinations. The State Engineer affirms his original findings and recommends the

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<sup>282</sup> Transcript, pp. 7079-7089, public administrative hearing before the State Engineer, October 19, 2004.

<sup>283</sup> Transcript, pp. 7092-7093, public administrative hearing before the State Engineer, October 19, 2004.

Federal District Court also affirm those findings.

The State Engineer finds the Applicant's witness demonstrated beneficial use of the 0.46 of an acre occupied by the on-farm supply ditch. The State Engineer finds that in Nevada native diversified grasses are irrigated all over the state as pasture; therefore, the State Engineer finds the on-farm, supply ditch in Parcel 3 is used as pasture demonstrating beneficial use of water on that land.

#### IV.

The State Engineer finds evidence was presented that the Applicant was on the "A List," which is a demonstration that he inquired about the possibility of obtaining a transfer of water and the general testimony and evidence demonstrates that attempt was thwarted by the BOR.<sup>284</sup> While the transfer or purchase indicated on the "A List" does not identically match up with those proposed under Parcels 2 and 3, it is still an indication that at some point in time the Applicant inquired about moving water on his farm but did not accomplish the actual transfer or purchase. Testimony was presented that the taxes and assessments had been paid of the water rights;<sup>285</sup> however, no evidence was presented as to continual use of the water; therefore, has not met the standards established by the court.

#### V.

The State Engineer recommends the Federal District Court find that the Applicant has abandoned the water right requested for transfer under Application 51734, except that 0.46 of an acre

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<sup>284</sup> Transcript, pp. 7113-7117, 7126-7128, 7137-7138, public administrative hearing before the State Engineer, October 19, 2004.

<sup>285</sup> Transcript, pp. 7092-7093, public administrative hearing before the State Engineer, October 19, 2004.

Ruling  
Page 10

portion of Parcel 3 covered by the on-farm ditch on the grounds that the Applicant did not meet the standards required by the court.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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

IN THE MATTER OF APPLICATION 52552)

RULING ON REMAND

GENERAL

**# 5464 - J**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>286</sup> and *Alpine VI*<sup>287</sup> and the Federal District Court's Order of February 25, 2004,<sup>288</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
4. A water right holders non-use of a water right is some evidence of an intent to abandon the right and the longer the period of non-use, the greater the likelihood of abandonment. But said non-use is only some evidence of an intent to abandon the right. There is no rebuttable presumption of abandonment under Nevada water law, but a prolonged period of non-use may raise an inference of an intent to abandon.
5. Abandonment is a question of fact to be determined from all

the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
8. In *Alpine VI*, the Ninth Circuit Court of Appeals remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. Only those applications approved on the grounds

of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

9. The Ninth Circuit Court of Appeals has already rejected arguments that filing transfers with the government or TCID was an exercise in futility or that the time frame for forfeiture should be tolled during the moratorium period of 1973 -1984.
10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

The Applicant presented the following argument in reference to several applicants and indicated it is applicable to this applicant. The State Engineer recites the argument nearly verbatim. While the State Engineer allowed evidence and testimony that supports this argument to be presented at the hearing on remand, it did not factor into this decision, because the State Engineer is under the belief that is he does not follow the strict instructions from the Federal District Court the matter could be remanded once again. However, in order to allow the Applicant the opportunity to present it to the court, the State Engineer presents a recitation of the Applicant's argument in order to allow the Federal District Court, and if appealed, the Ninth Circuit Court of Appeals, to have the argument before them.

The Applicant argues that the difficulty with presenting a case based on the analysis set forth in *Alpine V* and *Alpine VI*, and particularly the references therein to the so-called "moratorium" is that it does not reflect the realities of the acquisition and transfer of water rights within the Newlands Project. The BOR and

its agent TCID were in the business of selling water, not transferring water, throughout the entire history of the Project. Initially, the BOR wanted to sell water rights in order to insure the repayment by TCID, under its 1926 contract, of the construction costs of the project. Subsequently, in the 1950's, the BOR and TCID adopted programs to sell water held by the BOR under the "Small Tract Sales" program, and subsequently water rights which had been reacquired by the TCID as a result of foreclosures which occurred primarily during The Depression. Under these programs only a small amount of water rights were sold in part because of pressure to reduce or limit the total irrigable acreage within the Project. The issue was further compounded by the fact that, based upon erroneous mapping which occurred in the early years of the Newlands Project, individual farmers learned during the 1960's and throughout the 1970's, that perhaps they were inadvertently irrigating lands which were designated as "non-water-righted" and conversely, that there was a substantial amount of land within the Project which was water-righted, but not irrigated or they simply wanted to buy water to put more land in production. In order to correct these mapping deficiencies, and to allow individual farmers to irrigate more land, individuals attempted to participate in water purchase programs, such as the Small Tract Sales program, and the sale of water owned by TCID ("Lottery water") to individual farmers who could then move those water rights from non-productive land to land which was subject to irrigation. If an individual applied to purchase water under these programs, he had to "rent" water to irrigate non-water righted land before he could acquire the water under his purchase agreement. The United States imposed a moratorium on the issuance of new water right contracts in December of 1964. There were several individuals who had made inquiry to TCID in order to acquire water rights pursuant to one or other of these programs. Lists were developed with respect to individuals making inquiry, including, but not necessarily limited to, what has been referred to in these proceedings as the "A List."

Once the BOR discontinued these "sale" programs, there was no means to "move" water from "water righted-not irrigated land" to "irrigated-non-water righted land." The critical point is that the water rights held by TCID, or which were situated in parcels which were the subject matter of the "Small Tract Sales," were by and large water rights held in trust by TCID, and it has long been established that those water rights were not subject to forfeiture or abandonment while in the possession and control of the TCID. The Applicant argues that State laws of forfeiture and abandonment were not applicable since the use and relocation of water rights were controlled by the BOR.<sup>289</sup>

The argument continues that most importantly, with respect to this chain of historic events, is the fact that the State of Nevada, and specifically the State Engineer's office, did not assert any jurisdiction over the water rights within the Newlands Project prior to the *Alpine* decision by the 9th Circuit in 1983, as well as the United States Supreme Court ruling in *Nevada v. United States*, also in 1983. Specifically, it is respectfully submitted that Nevada state law relative to abandonment and forfeiture did not apply to water rights within the Project and the State Engineer never exercised jurisdiction over the Newlands Project prior to 1983.

The Applicant argues that testimony was given that a true transfer of water rights, particularly within a commonly-owned farm unit was never authorized or approved by the BOR, from the inception of the Project, up to and including 1983, with the sole exception of 29 transfers which were approved during an approximate 20-day time period in April and May 1973.<sup>290</sup>

The State Engineer finds that the rule of the case dictates

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<sup>289</sup> See, Exhibit Nos. 1635, 1508-1583, public administrative hearing before the State Engineer, August 2004.

<sup>290</sup> See, testimony of Ernie Schank, Ted deBraga, Richard Harriman and Exhibit Nos. 1555 and 1635.

his decision making in this matter; however, the factual scenario presented indicates that the standard established by the Ninth Circuit Court of Appeals is based on a distortion of the real world.

**III.**

In State Engineer's Ruling No. 5005, the State Engineer had four parcels of land under consideration. Since the time of that ruling, the applicant has withdrawn from the permit all but Parcel 3. In Ruling No. 5005, the State Engineer declared the water right appurtenant to Parcel 3 forfeited. Parcel 3 was not an intrafarm decision and there is no issue of an on-farm, dirt-lined ditch. The Applicant requested the opportunity to reopen its hearing on remand, but the State Engineer denied that request on the grounds that the Ninth Circuit Court of Appeals in *Alpine VI* remanded only those transfer applications that had been granted by the State Engineer and affirmed the Federal District Court on the grounds of intrafarm exemption or had issues as to on-farm supply ditches. The Ninth Circuit Court of Appeals has affirmed the Federal District Court to the extent it upheld the State Engineer's rulings denying transfer applications. The State Engineer in denying the Applicant's request to reopen its administrative hearing took the position that only those applications that had either been approved on the grounds of an intrafarm exemption or had issues as to on-farm, dirt-lined ditches were remanded for additional consideration.

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IV.

The State Engineer recommends the Federal District Court affirm the State Engineer's decision.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.

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

IN THE MATTER OF APPLICATION 53662)

RULING ON REMAND

GENERAL

**# 5464 - K**

I.

By order of remand, the State Engineer again has the responsibility to address the "TCID Transfer Cases." This is the result of the Federal District Court's decision in what is commonly known as *Alpine IV* and the Ninth Circuit Court of Appeals' decisions in what are commonly known as *Alpine V*<sup>291</sup> and *Alpine VI*<sup>292</sup> and the Federal District Court's Order of February 25, 2004,<sup>293</sup> which provided that the pending applications in State Engineer's Ruling Nos. 4750, 4798, 4825, 5005 and 5047 were remanded to the State Engineer for express findings and recommendations on the issues of abandonment and forfeiture. The State Engineer was given discretionary authority to reopen any hearings he deemed appropriate to permit the applicants and the United States and the Pyramid Lake Paiute Tribe to present additional evidence limited solely on the issues of forfeiture and abandonment: [Forfeiture - whether the applicant was thwarted by the government in efforts to transfer; Abandonment - whether the applicant attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility.] The State Engineer was given the discretion to affirm his prior rulings if appropriate. The State Engineer was ordered to apply the standards set forth by the court consistent with the holdings in *Alpine IV*, *V* and *VI* and make explicit findings by applying clear and convincing standards, balancing the interests of the applicant with the potential negative consequences to the Tribe. The State Engineer was also provided the discretion to consider evidence that

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<sup>291</sup> 291 F.3d 1062 (9th Cir. 2002).

<sup>292</sup> 340 F.3d 903 (9th Cir. 2003).

<sup>293</sup> *U.S. v. Alpine Land and Reservoir Co.*, D-184-HDM (D. Nev. Feb. 25, 2004) (Minutes of the Court).

an applicant relied on the Federal District Court's prior order to his detriment, that is whether an applicant relied on the exception for intrafarm transfers.

FINDINGS OF FACT

I.

After reviewing *Alpine IV, V and VI* together, the State Engineer finds the law of the case provides the following:

1. The Tribe bears the burden of proving clear and convincing evidence of acts of non-use of the water, of abandonment and an intent to abandon.
2. All transfers of water rights within the Newlands Project are governed by Nevada water law, and neither the U.S. Government nor the Truckee-Carson Irrigation District (TCID) had the power to transfer water rights, unless in accord with Nevada water law.
3. The amalgamation of the water rights for the Newlands Reclamation Project is not the relevant set of water rights when addressing the issue of forfeiture. The landowner cannot claim 1902 as the relevant date as to when said landowner's water rights were initiated. The State Engineer is to look at the specific water rights appurtenant to a specific tract of land and the landowner must demonstrate that he or she took affirmative steps to appropriate water prior to 1913 to be exempted from Nevada's forfeiture statutes. The Ninth Circuit Court of Appeals in *Alpine VI* has affirmed the State Engineer's determination as to the relevant contract dates.
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the surrounding circumstances, which certainly includes the payment of taxes and assessments. If the Tribe provides evidence of a substantial period of non-use combined with improvements on the land inconsistent with irrigation, the payment of taxes and assessments alone will not defeat a claim of abandonment. However, if the Tribe's only evidence is non-use and there is a finding of the payment of taxes and assessments, the Tribe has failed to provide clear and convincing evidence of abandonment. Bare ground by itself does not constitute abandonment. If the Tribe has proved a substantial period of non-use and a use inconsistent with irrigation, in the absence of other evidence, besides the payment of taxes and assessments, the applicant must at a minimum prove continuous use of the water and that he or she attempted unsuccessfully to file for a change in place of use or at least inquired about the possibility and was told by the government or TCID that such transfers were not permitted.

6. If the transfer was an intrafarm transfer, an equitable exemption from forfeiture may be appropriate on a case-by-case basis, if the applicant can show he or she took steps to transfer the water right during the period of non-use, but was thwarted in that attempt by the government or TCID. In making said equitable determinations, the State Engineer should make explicit findings balancing the interests of an applicant with the negative consequences to the Tribe resulting from any increased diversions from Pyramid Lake.
7. On remand, the Ninth Circuit Court of Appeals and the Federal District Court mandated that the State Engineer apply the standards referenced.
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of an intrafarm exemption, or had issues as to on-farm, dirt-lined ditches, were remanded for additional consideration.

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10. The State Engineer is to make individualized findings as to beneficial use as it relates to all parcels where a transfer applicant claimed an appurtenant water right due to passage of water through a ditch. Transportation of water does not create rights in land along the entire course of the ditch; however, there is a possibility that along the course of a ditch, there may be some beneficial use and appurtenant rights if the water is used for lateral root irrigation.

## II.

In State Engineer's Ruling No. 5005, the State Engineer was addressing three parcels of land. The Tribe alleged forfeiture and abandonment as to Parcels 1 and 3, and partial forfeiture and partial abandonment as to Parcel 2. The State Engineer found that all three parcels had contract dates post-1913; therefore, the forfeiture provision of NRS § 533.060 is applicable.

As to Parcel 1, the State Engineer found taking both the Applicant's and Tribe's land use descriptions that the land use was a drain ditch, that no water was placed to beneficial use on that parcel from 1948 to 1989, and the land use is inconsistent with irrigation.

As to Parcel 2, the State Engineer found taking both the Applicant's and Tribe's land use descriptions that no water was placed to beneficial use on 2.08 acres of the 13.70 acres of the existing place of use from 1948 to 1989, and the land use on the 2.08 acres is inconsistent with irrigation.

As to Parcel 3, the State Engineer found taking both the Applicant's and Tribe's land use descriptions that the land use was

a drain ditch, that no water was placed to beneficial use on that parcel from 1948 to 1989, and the land use is inconsistent with irrigation.

At the hearing on remand, the new holder of the water rights argued that drain ditches should fall under the category of on-farm, dirt-lined ditches; therefore, the State Engineer should allow the Applicant to show beneficial use of water on the drain ditch. However, the Applicant did not provide any evidence to support its contention that drain ditches were considered a water-righted area. The State Engineer refers to the General Findings of Fact Applicable to All Applications Under Consideration in State Engineer's Ruling No. 5005 and specifically Finding X in which the State Engineer notes that waste ditches and drains were not considered part of the irrigable acreage. The State Engineer never made a finding that drain ditches were considered irrigable areas, and the matter was not remanded or the hearings reopened to raise new arguments this far into the cases. Further, the purpose of the remand was not to revisit the State Engineer's land use determinations. The State Engineer affirms his original findings and recommends the Federal District Court also affirm those findings, and not accept the new issue that drain ditches are irrigated or irrigable areas.

The State Engineer finds the Applicant did not present any evidence addressing the standards required by the Ninth Circuit Court of Appeals or by the Federal District Court on remand to the State Engineer. The State Engineer recommends the Federal District

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Court find the water rights appurtenant to Parcels 1 and 3 and a portion of Parcel 2 be declared forfeited and abandoned.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT

Dated this 14th day of  
December, 2004.