

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

IN THE MATTER OF APPLICATIONS 84606, )  
84607, 84608, 84609, 84610 AND 84611 FILED )  
TO CHANGE THE POINT OF DIVERSION )  
AND PLACE OF USE OF GROUNDWATER )  
PREVIOUSLY APPROPRIATED WITHIN THE )  
PINE FOREST VALLEY HYDROGRAPHIC )  
BASIN (29), HUMBOLDT COUNTY, NEVADA. )

**INTERIM RULING**

**#6349**

**GENERAL**

**I.**

Application 84606 was filed on December 22, 2014, by Egger Enterprises, LLC to change the point of diversion and place of use of 0.69 cubic feet per second (cfs), not to exceed 498.32 acre-feet annually (afa), which is a portion of the groundwater previously appropriated under Permit 46722, Certificate 13314. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 2, T.43N., R.31E., M.D.B.&M. The proposed place of use is described as being located within portions of the SW $\frac{1}{4}$  of Section 2, T.43N., R.31E., M.D.B.&M. (124.58 acres). Item 15 of the application indicates that the application will remove a portion of the corners and apply them to the proposed place of use and that the remaining portion of the corners will be removed and moved to the Desert Land Entry (DLE) land identified on Sheet 2 of the map submitted with another application. Item 11 of the application indicates that the works or diversion is a center pivot irrigation system that is currently constructed and that the application is correcting the water rights area to current irrigation practices.<sup>1</sup>

**II.**

Application 84607 was filed on December 22, 2014, by Egger Enterprises, LLC to change the point of diversion and place of use of 0.58 cfs, not to exceed 135.00 afa, which is a portion of the groundwater previously appropriated under Permit 25228, Certificate 8444. The proposed point of diversion is described as being located at DLE Well 3 within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 29, T.44N., R.31E., M.D.B.&M. The proposed place of use is described as being located within the SE $\frac{1}{4}$  of Section 20, E $\frac{1}{2}$  of Section 29, E $\frac{1}{2}$  of Section 32, T.44N., R.31E., M.D.B.&M. and the E $\frac{1}{2}$  of Section 5, T.43N., R.31E., M.D.B.&M. (33.75 acres, total of 861.75

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<sup>1</sup> File No. 84606, official records in the Office of the State Engineer.

acres to be irrigated). Item 15 of the application indicates that the application will remove the corners and apply them to the proposed place of use described in support of a DLE application and will irrigate land identified on Sheet 2 of the map submitted with Application 84606. Item 11 of the application indicates that the works or diversion is a center pivot irrigation system that is currently constructed and that the application is correcting the water rights area to current irrigation practices.<sup>2</sup>

### III.

Application 84608 was filed on December 22, 2014, by Egger Enterprises, LLC to change the point of diversion and place of use of 0.60 cfs, not to exceed 141.32 afa, which is a portion of the groundwater previously appropriated under Permit 27563, Certificate 8456. The proposed point of diversion is described as being located at DLE Well 3 within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 29, T.44N., R.31E., M.D.B.&M. The proposed place of use is described as being located within the SE $\frac{1}{4}$  of Section 20, E $\frac{1}{2}$  of Section 29, E $\frac{1}{2}$  of Section 32, T.44N., R.31E., M.D.B.&M. and the E $\frac{1}{2}$  of Section 5, T.43N., R.31E., M.D.B.&M. (35.33 acres, total of 861.75 acres to be irrigated). Item 15 of the application indicates that the application will remove the corners and apply them to the proposed place of use described in support of a DLE application and will irrigate land identified on Sheet 2 of the map submitted with Application 84606. Item 11 of the application indicates that the works or diversion is a center pivot irrigation system that is currently constructed and that the application is correcting the water rights area to current irrigation practices.<sup>3</sup>

### IV.

Application 84609 was filed on December 22, 2014, by Egger Enterprises, LLC to change the point of diversion and place of use of 0.50 cfs, not to exceed 1,281.72 afa, which is a portion of the groundwater previously appropriated under Permit 46722, Certificate 13314. The proposed point of diversion is described as being located at DLE Well 1 within the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 5, T.43N., R.31E., M.D.B.&M. The proposed place of use is described as being located within the SE $\frac{1}{4}$  of Section 20, E $\frac{1}{2}$  of Section 29, E $\frac{1}{2}$  of Section 32, T.44N., R.31E., M.D.B.&M. and the E $\frac{1}{2}$  of Section 5, T.43N., R.31E., M.D.B.&M. (320.43 acres, total of 861.75 acres to be irrigated). Item 15 of the application indicates that the application will remove the corners and

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<sup>2</sup> File No. 84607, official records in the Office of the State Engineer.

<sup>3</sup> File No. 84608, official records in the Office of the State Engineer.

apply them to the proposed place of use described in support of a DLE application and will irrigate land identified on Sheet 2 of the map submitted with Application 84606.<sup>4</sup>

V.

Application 84610 was filed on December 22, 2014, by Egger Enterprises, LLC to change the point of diversion and place of use of 2.42 cfs, not to exceed 1,748.88 afa, which is a portion of the groundwater previously appropriated under Permit 46733, Certificate 11801. The proposed point of diversion is described as being located at DLE Well 2 within the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.44N., R.31E., M.D.B.&M. The proposed place of use is described as being located within the SE $\frac{1}{4}$  of Section 20, E $\frac{1}{2}$  of Section 29, E $\frac{1}{2}$  of Section 32, T.44N., R.31E., M.D.B.&M. and the E $\frac{1}{2}$  of Section 5, T.43N., R.31E., M.D.B.&M. (437.22 acres, total of 861.75 acres to be irrigated). Item 15 of the application indicates that the application will remove the corners and apply them to the proposed place of use described in support of a DLE application and will irrigate land identified on Sheet 2 of the map submitted with Application 84606. Item 11 of the application indicates that the works or diversion will be constructed.<sup>5</sup>

VI.

Application 84611 was filed on December 22, 2014, by Egger Enterprises, LLC to change the point of diversion and place of use of 0.60 cfs, not to exceed 140 afa, which is a portion of the groundwater previously appropriated under Permit 67017. The proposed point of diversion is described as being located at DLE Well 4 within the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 20, T.44N., R.31E., M.D.B.&M. The proposed place of use is described as being located within the SE $\frac{1}{4}$  of Section 20, E $\frac{1}{2}$  of Section 29, E $\frac{1}{2}$  of Section 32, T.44N., R.31E., M.D.B.&M. and E $\frac{1}{2}$  of Section 5, T.43N., R.31E., M.D.B.&M. (35.02 acres, total of 861.75 acres to be irrigated). Item 15 of the application indicates that the application will remove the corners and apply them to the proposed place of use described in support of a DLE application and will irrigate land identified on Sheet 2 of the map submitted with Application 84606. Item 11 of the application indicates that the works or diversion is a center pivot irrigation system that is currently constructed and that the application is correcting the water rights area to current irrigation practices.<sup>6</sup>

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<sup>4</sup> File No. 84609, official records in the Office of the State Engineer.

<sup>5</sup> File No. 84610, official records in the Office of the State Engineer.

<sup>6</sup> File No. 84611, official records in the Office of the State Engineer.

## VII.

Applications 84606, 84607, 84608, 84609, 84610 and 84611 were timely protested by Michael D. Buschelman as agent for Big Creek Ranch, LLC on the grounds that:<sup>1</sup>

The proposed Applications to Change Nos. 84606 through 84611 will conflict with existing rights owned by Big Creek Ranch, LLC. Recent State Engineer crop inventories conducted in 2012 for Pine Forest Valley basin show ground water withdrawals exceed the perennial yield by 14,784 acre-feet annually. The Applicant proposes to move the point of diversion and place of use of 3,945.24 acre-feet annually closer to the Big Creek Ranch, LLC existing certificated ground water rights. The ground water table has already experienced declines and to concentrate more production wells in a limited area of the basin will increase the impacts to the Big Creek Ranch, LLC production wells.

By approving the proposed applications to change, the State Engineer will create more opportunity for interference with the existing wells owned by Big Creek Ranch, LLC.

## VIII.

Applications 84606, 84607, 84608, 84609, 84610 and 84611 were timely protested by Nils Nilson on the grounds that:<sup>1</sup>

1. The applications should be denied because they seek to change portions of existing certificated and permitted water rights that have not irrigated the portions sought to be stripped for over 16 consecutive years and are forfeited or should be canceled.
2. The proposed change will conflict with existing rights and threaten to prove detrimental to the public interest under NRS 533.370(2) because:
  - a. Most recent State Engineer crop inventories (2012) for Pine Forest Valley show that groundwater withdrawals already exceed the perennial yield by 14,784 acre-feet annually (afa) and is causing a substantial lowering of the static water level (5-10 feet at Applicant's wells between 2014-2015 according to personal communication with State Engineer staff). Granting additional withdrawals based on the unused water rights in an over-appropriated and over-pumped basin that is already experiencing substantial water table declines is contrary to the public interest and should be denied;
  - b. The Applicant proposes to use an additional almost 4,000 afa from four new wells that are less than one mile from Nilson's wells, which will cause an unreasonable lowering of the water table and injure existing senior and junior water rights. The State Engineer has denied similar applications in Pine Forest Valley due to the proximity of the new wells (See, Ruling 2169, October 15, 1976). Because the proposed new wells are very close to existing wells, the basin is over-appropriated, and the groundwater table is rapidly declining, the State Engineer should protect existing rights that cannot be satisfied by express conditions;

- c. Portions of the existing water rights these applications seeks to change have not been used for at least five consecutive years, and therefore, they essentially are seeking a new appropriation of water to irrigate additional land, which is prohibited by State Engineer Order 831 (December 1, 1983)...;
  - d. It will be detrimental to the public interest to irrigate more land in Pine Forest Valley based on unused water rights when current groundwater withdrawals already far exceed the perennial yield;
  - e. The applications will aggravate the groundwater level conditions caused by the Applicant's existing heavily concentrated groundwater pumping and substantially increase the pumping costs of Nilson. Allowing an additional nearly 4,000 afa to be withdrawn from the Pine Forest Valley basin will conflict with existing rights and be detrimental to the public interest;
3. The applications should be denied because the Applicant does not own or have the right to use the proposed place of use and its applications under the Desert Land Act are still pending and subject to protest by the Nilsons and others;
  4. Lastly, the Applicant does not have the financial ability and reasonable expectation to construct the works of diversion and apply the water to beneficial use and the applications are speculative, which is contrary to law and public interest;
  5. The State Engineer should deny the applications without a hearing.

#### IX.

Applications 84606, 84607, 84608, 84609, 84610 and 84611 were timely protested by Rob and Delia Nuffer on the grounds summarized below:<sup>1</sup>

1. The basin is a closed basin and has been for some time.
2. The Eggers have applied for a DLE that would take in 1,100 acres of Bureau of Land Management (BLM) permitted ground of which 450 acres belongs to Woodward Ranch and is part of their BLM permit.
3. It is close to irrigation time and the neighbors near to the Eggers are anticipating evidence of Egger's pumps drawing down their irrigation wells. The water they wish to appropriate or change is directed to these permitted acres.
4. They have filed a formal protest with the office of the Department of Interior in Washington, D.C. and the State office in Reno, Nevada, and allege the BLM actions on this subject have been questionable.

**X.**

On May 21, 2015, the Applicant filed an Answer to the protests. On June 9, 2015, Protestant Nils Nilson filed a response to the Answer. By letter dated June 26, 2015, the Applicant filed a request that the response be stricken as no statute or administrative rule allows a Protestant to file a response or a reply to an Answer.

On July 22, 2015, the State Engineer indicated that issue of forfeiture and/or cancellation is potentially dispositive of the applications and should be considered prior to any other protest ground. Accordingly, the State Engineer requested that the Applicant and Protestant Nils Nilson brief the following issues:

1. The applicability of NRS § 534.090 to certificated base rights, including the submission of any relevant evidence showing use or nonuse of the certificated rights;
2. The applicability of NRS § 533.395 to base right Permit 67017, including submission of any evidence tending to show the lack of, or presence of good faith and reasonable diligence in perfecting the Permit; and
3. In addition to responding to the Protestant Nilson, the State Engineer independently requested that the Applicant include in its response which, at a minimum, documents demonstrating the amount of water pumped and to provide support for the monetary expenditures claimed on extensions of time filed from 2010 to 2015 for Permit 67017 in relation to the cancellation issue.

The Notice provided timeframes for filing an opening, response and reply briefs. The State Engineer held that in light of the ordered briefing the request to strike the Protestant's reply was denied.

**FINDINGS OF FACT**

**I.**

**NECESSITY FOR HEARING**

In support of his Opening Brief, Nilson submits a report prepared by Dwight Smith, PE, PG, of Interflow Hydrology. Mr. Smith's report consists of satellite images obtained from several sources and a discussion of standard visual light and thermal infrared images with an analysis of computed median Normalized Difference Vegetation Index (NDVI) for each irrigation season for the years 1984-2015.

The Applicant argues that Mr. Smith's report contains purported expert testimony and requests the report be stricken because Mr. Smith has not been qualified in this matter as to his opinions and he is not subject to cross-examination by the submission of his report as an attachment to the Opening Brief.

The State Engineer denies Applicant's request to strike Mr. Smith's report; however, the Applicant's arguments regarding the qualification of Mr. Smith to offer expert testimony regarding his analysis and that he be subject to cross-examination is well-taken. The State Engineer finds that as to the admissibility of Mr. Smith's report, and whether the content of the report establishes clear and convincing evidence of forfeiture are issues that require a hearing.<sup>7</sup>

Notwithstanding, the parties make several arguments regarding the interpretation of the forfeiture statute that the State Engineer finds can be disposed of in advance of a hearing on the evidence.

## II.

### **NRS § 534.090 AND ITS APPLICABILITY TO CERTIFICATED RIGHTS**

Subsection 1 of NRS § 534.090 is lengthy. There are four topics relating to forfeiture within the subsection, and the text of each topic is identified below and is referred to within this Ruling as follows:

#### **The Forfeiture Provision:**

Except as otherwise provided in this section, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right or a right for which a certificate has been issued pursuant to NRS 533.425, and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse.

#### **The Four-Year Notice Provision:**

If the records of the State Engineer or any other documents specified by the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of a water right which is governed by this chapter, the

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<sup>7</sup> Forfeiture must be shown by clear and convincing evidence. *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). Although the Applicant asserts that the burden of proof to demonstrate nonuse is on the State (Ans. Br. at 4) the burden of proof lies with the party asserting a forfeiture. Here, Nilson asserted forfeiture in his protests to the change applications, and also filed a separate request to the State Engineer on June 30, 2015, that the water rights be forfeited. Therefore, the burden of proof to show clear and convincing evidence of forfeiture rests with Nilson.

State Engineer shall notify the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail that the owner has 1 year after the date of the notice in which to use the water right beneficially and to provide proof of such use to the State Engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right. If, after 1 year after the date of the notice, proof of resumption of beneficial use is not filed in the Office of the State Engineer, the State Engineer shall, unless the State Engineer has granted a request to extend the time necessary to work a forfeiture of the water right, declare the right forfeited within 30 days. . . . The failure to receive a notice pursuant to this subsection does not nullify the forfeiture or extend the time necessary to work the forfeiture of a water right.

**Reversion to the Source Provision:**

Upon the forfeiture of a right to the use of groundwater, the water reverts to the public and is available for further appropriation, subject to existing rights.

**Finality Provision:**

If, upon notice by registered or certified mail to the owner of record whose right has been declared forfeited, the owner of record fails to appeal the ruling in the manner provided for in NRS 533.450, and within the time provided for therein, the forfeiture becomes final.

Protestant Nilson asserts that portions of the water rights the Applicant seeks to change include certificated and permitted water rights that have not been used for over 18 consecutive years, and are forfeited or should be canceled. In response, the Applicant denies Nilson's assertions that portions of the rights sought to be changed have been forfeited or should be cancelled.

Both parties have made arguments regarding whether the rights are forfeited, whether the Four-Year Notice provision applies, and whether the Applicant has substantially used the rights in order to avoid forfeiture. Because the State Engineer determined above that a hearing is necessary on the parties' evidence, the State Engineer finds that he cannot determine in this Interim Ruling whether the rights are forfeited or cancelled. However, the arguments regarding notice and substantial use are examined below.

### III.

#### WHAT NOTICE, IF ANY, IS REQUIRED TO BE GIVEN BY THE STATE ENGINEER

In *Hawley v. Kansas Dept. of Agriculture*, 132 P.3d 870 (Kan. 2006) (*Hawley*), the Kansas Supreme Court analyzed whether the notice provision in the Kansas' forfeiture statute was a condition precedent to forfeiture of the water right where evidence existed that there was nonuse in excess of the statutory period of five years for a forfeiture. Kansas' notice provision and the time to establish forfeiture are similar to Nevada's forfeiture statute. As well, *Hawley* discusses the language in Nevada's original forfeiture statute and it discussed *In re Manse Spring*, 60 Nev. 280, 108 P.2d 311 (1940), in its analysis. Thus, the State Engineer finds *Hawley* instructive in this case because the Applicant's argument parallels the analysis of *Hawley*; namely, the Applicant here argues that even if Nilson's evidence purports to show nonuse of the water for 18 consecutive years, the State Engineer must serve the Applicant with a notice pursuant to the Four-Year Provision as a condition precedent to declaring a forfeiture.

#### A. The *Hawley* Decision

In *Hawley*, the court examined the language of a Kansas statute concerning a notice that was required to be given to water right owners whose water rights were in danger of being forfeited for nonuse.<sup>8</sup> Kansas' notice provision, passed in 1999, required that where nonuse had occurred for three successive years, the chief engineer was required to notify the water right holder that nonuse had occurred for three successive years, and that if nonuse occurred for five successive years, the right could be terminated (three-year notice).<sup>9</sup> Prior to forfeiting the right, the chief engineer was required to hold a hearing. As it pertains to the specific water right in *Hawley*, in 2002, the chief engineer determined that the water right had not been used from 1971-2002, and no cause for nonuse had been shown. Accordingly, the chief engineer set the matter for a hearing prior to declaring a forfeiture. The water right holder challenged the proceeding, arguing that Kansas' Division of Water Resources (KDWR) has failed to serve a three-year notice, which notice was a condition precedent to declaring a forfeiture. KDWR

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<sup>8</sup> Notably, the nonuse in *Hawley* occurred both prior to, and after the passage of the Kansas notice requirement, whereas here all of the purported nonuse occurred after the passage of Nevada's the Four Year Notice Provision in 1995. Nevertheless, the State Engineer finds the discussion of the statutory interpretation in *Hawley* sound as to the proper interpretation that should be given to NRS § 534.090.

<sup>9</sup> The Kansas notice also advised an owner the right may not be forfeited if the owner showed nonuse due to a statutorily defined sufficient causes for nonuse. Nevada diverges from Kansas in this respect as Nevada has no statutorily defined reasons to excuse nonuse, although there are enumerated reasons to request an extension of time to prevent a forfeiture. NRS § 534.090(2).

responded, arguing that the three-year notice provision only applied to a limited class of water rights where the water had gone unused for three, but less than five successive years; therefore, the only notice required was the notice of hearing.

The matter proceeded to a hearing and the hearing officer agreed with KDWR. The hearing officer held that the plain language of the statute required that a notice be sent to owners who had reported three years of nonuse, and that the notice would be sent at the point that the user could avoid a forfeiture of the right after five years of nonuse.<sup>10</sup> The hearing officer found that there had been nonuse for 32 consecutive years and therefore rejected the argument of the water right owner that a three-year notice was required. Further, although the hearing officer found the language of the statute was plain, the *arguendo* applied rules of construction to reach the same result that no three-year notice was required. The hearing officer found that it would be unreasonable and would render the notice provision meaningless to require a notice after the passage of five years of nonuse. She reasoned that “[b]y the time the five-year period has expired, the controlling facts are set. Either water was used or not, and there was either due and sufficient cause or not. After the five-year period has passed, there is no opportunity to alter those facts. The notice [provision] could not help an owner whose five-year period was already over.”<sup>11</sup> Thus, she found that a three-year notice was required at the point in time where a user could knowingly act to avoid forfeiture *while that goal could still be accomplished*.<sup>12</sup>

On appeal, the district court reversed, and on appeal to the Kansas Supreme Court, the court reversed again siding with the hearing officer. The Supreme Court agreed that the plain and unambiguous language of the statute did not require that a three-year notice be served where the hearing officer found over 32 consecutive years of nonuse. Further, although the court found that the language of the statute was plain, it applied rules of statutory construction to reach the same result. The court found that service of a three-year notice after over 30 years nonuse would be useless and meaningless because the water right terminated after five years of nonuse. The court reiterated the rule of construction that there is a presumption that the legislature does not intend to enact useless or meaningless legislation.<sup>13</sup>

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<sup>10</sup> The Kansas statute used the word abandonment; however, the court engaged in an extensive analysis, concluding that the act was one for forfeiture for nonuse, rather than abandonment.

<sup>11</sup> 132 P.3d at 876 (emphasis original).

<sup>12</sup> *Id.* (emphasis original).

<sup>13</sup> *Id.* at 888.

1. *The language of Nevada's Forfeiture Provision is clear that a forfeiture occurs after five years of nonuse.*

In construing statutes, courts seek to give effect to the legislature's intent, and in so doing, courts first look to the plain language of the statute. *A.F. Const. Co. v. Virgin River Casino Corp.*, 118 Nev. 699, 56 P.3d 887 (2002). Here, Nevada's Forfeiture Provision, broken down into its relevant parts, plainly demonstrates that (1) except as otherwise provided by other subsections; (2) after April 15, 1967; (3) a water right owner's failure to beneficially use all or part of his water right for five successive years; (4) for the purpose for which the right is acquired or claimed; (5) results in a forfeiture. The phrase "except as otherwise provided in this section" refers to other subsections which may interrupt a forfeiture including: (1) that an extension of time has been requested prior to the lapse of the fifth consecutive year of nonuse (*see* NRS § 534.090(2));<sup>14</sup> or, (2) that nonuse occurred prior to July 1, 1983, due to center pivot irrigation, requiring that a special notice be given prior to a declaration of forfeiture by the State Engineer (*see* NRS § 534.090(3)).<sup>15,16</sup> The statute is clear that a right may be forfeited in its entirety, or in part to the extent of the portion not used.

2. *The plain language of the Four-Year Notice Provision is determinative when a notice is required; in addition, rules of statutory construction support that a Four-Year Notice is not required for most of the rights at issue here.*

The relevant language of the Four-Year Notice Provision requires that the State Engineer send a notice where records of the State Engineer or other records demonstrate there is "at least four consecutive years, but less than five consecutive years, of nonuse of all or any part of a water right," including certificated and adjudicated or unadjudicated rights. The Notice Provision is equally plain that "the failure to receive a notice pursuant to this subsection does not nullify the forfeiture or extend the time necessary to work the forfeiture of a water right." The Notice Provision is likewise clear that a notice can be given as to all or any part of a water right not used.

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<sup>14</sup> No requests for extension of time have been filed by the Applicant.

<sup>15</sup> A special notice provision applying to nonuse of rights due to center pivot irrigation prior to 1983 is discussed in a separate section below, as it applies relevant rights in this proceeding.

<sup>16</sup> *See* A.B. 435 (1995), amended language previously referred directly to subsections 2 and 3 (extensions or center pivot irrigation); *and see* *Town of Eureka*, 108 Nev. at fn. 2.

Applying these rules of construction and reading the Four-Year Notice and Forfeiture Provisions together demonstrates that the State Engineer sends a notice when records demonstrate at least four consecutive years, but less than five consecutive years of nonuse. If there are five consecutive years of nonuse, the right is subject to a claim of forfeiture or proceeding to declare the water right forfeited. The statute is equally clear that the failure to receive a notice does not nullify the forfeiture or extend the time necessary to work the forfeiture of a water right.<sup>17</sup>

To accept the Applicant's argument that a notice is required in this case prior to a declaration of forfeiture is contrary to the plain language of statute. Eighteen years of purported nonuse is not "at least four consecutive years, but less than five consecutive years." Instead, 18 consecutive years is more than five consecutive years, and therefore the Four-Year Notice Provision does not apply.

Moreover, applying rules of statutory construction leads to the same result. "It is a well-recognized tenet of statutory construction that multiple legislative provisions be construed as a whole, and where possible, a statute should be read to give plain meaning to all of its parts." *Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 169-70 (2000); *Sheriff v. Morris*, 99 Nev. 109, 117, 659 P.2d 852 (1983) ("It is equally fundamental that statutes should be construed in order to validate each provision of the statute." ); *Board of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102 (1983) ("Courts must construe statutes and ordinances to give meaning to all of their parts and language. The court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation." (Internal citations omitted).)

To find in this case that Four-Year Notice is a condition precedent to any declaration of forfeiture renders the Notice Provision a nullity because it ignores the qualifier of "at least four consecutive years, but less than five consecutive years." As well, such a reading would also invalidate the phrase at the end of the Notice Provision that a failure to receive notice does not

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<sup>17</sup> Although NRS § 534.090(1) refers to multiple notices including the Four-Year Notice and the forfeiture notice, the legislative history is clear that this provision refers to the Four-Year Notice. See Hearing on A.B. 435, Before the Senate Committee on Natural Resources, 68<sup>th</sup> Leg. (June 9, 1995) (remarks by Senator James that the bill has to say what happens if someone does not get a notice after 4 years where pumpage records are kept; inquiring whether that means the State Engineer cannot forfeit the right, and State Engineer Turnipseed stating it does not, that the right is forfeited); and see Memorandum from the Legislative Counsel Bureau to Senator Mike McGinness (June 12, 1995) within the compiled legislative history, affirming that the Four-Year Notice is intended to be informational and that failure to receive a notice does not nullify or extend the time for a forfeiture to take effect.

nullify the forfeiture or extend the time necessary to work the forfeiture of a water right. Under the Applicant's argument, the failure of the Applicant to receive a notice *would* nullify a forfeiture that occurred after five consecutive years of nonuse, and *would* extend the time necessary to work the forfeiture from 5 years to over 18 years. The result is that this interpretation also renders the Forfeiture Provision itself a nullity.

The Applicant states that Nilson's argument ignores the mandatory language of the statute regarding the issuance of a notice; however, the State Engineer finds that Applicant's argument ignores the plain language of statute concerning the timing of when a notice is required.<sup>18</sup>

Moreover, the rules of statutory construction require that a statute be construed so as to avoid absurd or unreasonable results. *Eller Media Co. v. City of Reno*, 118 Nev. 767, 770, 59 P.3d 437 (2002). Accepting the Applicant's argument would create an absurd result because the intent of the notice to allow a water right owner to save his water right from being forfeited *prior to* the passage of the five-year period identified in the statute. In that way, the State Engineer agrees with Nilson in that the Four-Year Notice Provision is intended to be informational, or as a courtesy, to alert a water right owner whose right is in danger of being forfeited to attempt to avoid forfeiture by resuming use or to seek an extension of time *prior to* the lapse of the fifth consecutive year. The Four-Year Notice Provision does not halt the occurrence of a forfeiture, nor does it extend the time to avoid a forfeiture by extending the consecutive five-year period to some other longer period of time.

Finally, to accept the Applicant's argument would also render subsection (3) of the statute surplusage under the facts of this case. *See One 1978 Chevrolet Van v. County of Churchill*, 97 Nev. 510, 512, 634 P.2d 1208 (1981) ("[N]o part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequence can properly be avoided" (Citation omitted).) NRS § 534.090(3) states:

If the failure to use the water pursuant to subsection 1 is because of the use of center-pivot irrigation before July 1, 1983, and such use could result in a forfeiture of a portion of a right, the State Engineer shall, by registered or certified

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<sup>18</sup> The Applicant cites Ruling 5545 to argue that the State Engineer has stated that the four-year notice provision does not apply only in cases where the nonuse occurred prior to 1995 when the provision was enacted. Thus, the question presented was whether the four-year notice applied retroactively prior to 1995, and the State Engineer concluded it did not. The facts of Ruling 5545 are inapposite to these applications, and the State Engineer finds that Applicant has misapplied the conclusions reached in that Ruling in the arguments here. *See Applicant Response at 9-10.*

mail, send to the owner of record a notice of intent to declare a forfeiture. The notice must provide that the owner has at least 1 year after the date of the notice to use the water beneficially or apply for additional relief pursuant to subsection 2 before forfeiture of the owner's right is declared by the State Engineer.

Both parties agree that the water rights covering Section 34 used center-pivot irrigation prior to July 1, 1983.<sup>19</sup> Therefore, the State Engineer finds that prior to any declaration of forfeiture of the unused portion of the rights in Section 34, the State Engineer is required to send to the owner of record a notice meeting the requirements of NRS § 534.090(3). Then, for these rights, the Applicant may resume use or apply for an extension of time pursuant to NRS § 534.090(2).

Notwithstanding that such a notice under NRS § 534.090(3) is required for some of the Applicant's rights, the Applicant's argument attempts to bootstrap the requirements of subsection (3) as applying to the remainder of the rights outside Section 34. The rights involving pivot corners not located in Section 34 are subject to NRS § 534.090(1), and based on the analysis set forth above, the State Engineer finds that a Four-Year Notice is not required for those rights.<sup>20</sup>

#### IV.

#### CLARIFICATION OF THE RESUMPTION OF USE DOCTRINE

The Applicant also cites to the Nevada Supreme Court's decision in *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992), arguing that substantial use of the water rights after the statutory period of nonuse cures claims to forfeiture so long as no claim or proceeding of forfeiture has begun. The Applicant reasons that if substantial use never ceased, nonuse never occurred there is no forfeiture to cure.<sup>21</sup>

Nilson responds that the Applicant's strained reading of *Eureka* misapplies the holding of that case and is contrary to the plain language of the forfeiture statute. Further, Nilson argues that because the statute allows for partial forfeiture, the statute would be undercut by allowing only partial use of a water right to avoid forfeiture of the entire right.

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<sup>19</sup> Nilson Op. Br. at 2, fn. 3; and Applicant Response at 11.

<sup>20</sup> Indeed, subsections (1) and (3) differ in that the Four-Year Notice under subsection (1) recognizes that a forfeiture has not yet occurred by the passage of five consecutive years of non-use; whereas subsection (3) recognizes that a forfeiture has occurred by five consecutive years of non-use; however, the Legislature has determined that these rights be afforded the opportunity to resume use or seek extensions of time, prior to the unused portion of the right be declared forfeit.

<sup>21</sup> Applicant Response at 6.

Returning to the rules of statutory construction, the State Engineer again reiterates that the plain language of NRS § 534.090 refers to partial forfeiture in the Forfeiture Provision, and to the service of a notice regarding all or *any part* of a right not used pursuant to the Notice Provision. It is clear that partial forfeiture is permissible under Nevada law. To accept the Applicant's argument that only substantial use of the total water right avoids a forfeiture would run afoul of the plain language of the statute. In order to harmonize the plain language of NRS § 534.090(1) and *Town of Eureka*, the State Engineer finds that a proper interpretation means that substantial use of whatever portion of the right that is subject to forfeiture may cure the right: meaning, if the entire right has gone unused, substantial use of the entire right; or, if a portion of the right has gone unused, then substantial use of that portion of the right.<sup>22</sup>

A careful reading of *Town of Eureka* supports this interpretation. In *Eureka*, the Town filed a change application for 640.0 acre-feet, which was protested on the ground that the water right had been forfeited. After a hearing, the State Engineer determined that 200.0 acre-feet had been used in one year during the five year period, and therefore the State Engineer approved the application for 200.0 acre-feet and declared the remaining 440.0 acre-feet forfeited. The Supreme Court adopted the resumption of use doctrine, stating that "substantial use of water rights after the statutory period of nonuse 'cures' claims to forfeiture so long as no claim or proceeding of forfeiture has begun." The Court held that the record contained little evidence on how much use the Town or its predecessors had made of the water after the period of nonuse and remanded the matter to the State Engineer for further proceedings to determine whether the Town had cured the forfeiture by substantial use of water after the period of nonuse.<sup>23</sup>

The Applicant's argument is self-defeating in another aspect. The *resumption* of use doctrine, as the name implies assumes resumption of use of water previously gone un-used. This is not continued use of only a portion of the right. Indeed, the Applicant has not asserted it has

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<sup>22</sup> Notably, the *Eureka* case did not provide any guidance on what is considered "substantial" use. The State Engineer finds he need not answer that question here as the Applicant has not alleged it has resumed use of the pivot corners, instead arguing that it has substantially used the rights *in toto*. As already explained, the State Engineer rejects this interpretation.

<sup>23</sup> The State Engineer found that the 1987 Diamond Valley Crop and Water Survey showed that the parcel of land that the Town had purchased was irrigated by a center-pivot covering 135 acres of the total 160 acres, which is 84% use. The State Engineer found that this use of water in 1987, which was after the five-year period of nonuse, but prior to the forfeiture proceedings, represented substantial use of the water under Permit 20478, Certificate 6243 and held the application for extension of time to prevent forfeiture should be approved.

resumed use of any pivot corners, which are the *portions* of the rights that Nilson contends are forfeited.

Next, Nilson argues that even if the Applicant is allowed to cure a forfeiture now, a cure cannot be accomplished pursuant to the pending change applications, but that Egger must resume beneficial use from the point of diversion, in the manner of use, and within the place of use described in the certificate. The State Engineer finds this question necessarily turns on a determination that the rights are, or are not forfeited, prior to any consideration of the change applications. The State Engineer finds that NRS § 533.040 does allow for rights to be changed, and because the law abhors a forfeiture, the State Engineer does not read the resumption of use doctrine so strictly so as to prevent a party from filing a change application in order to resume use, in the event it is determined the rights are not forfeited. *See Desert Irr., Ltd. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997) (The concept of beneficial use is singularly the most important public policy underlying the water laws of Nevada and many of the western states.) However, the State Engineer reiterates an important point that a change application filed without an extension of time on the base right does not halt or cure a forfeiture. *See Preferred Equities v. State Engineer*, 119 Nev. 384, 75 P.3d 380 (2003) (noting that if Appellant could not make use of water at the certificated location the proper process was to request extension under NRS § 534.090(2), in addition it's pending change application). Assuming *arguendo*, Nilson's argument that nonuse has occurred for 18 consecutive years, the period within which the Applicant could have filed an extension of time pursuant to NRS § 534.090(2), has already lapsed.<sup>24</sup>

## V.

### **RIGHT OF ENTRY UNDER DESERT LAND ENTRY APPLICATIONS**

The Applicant asserts that the pending Desert Land Entry (DLE) applications cannot move forward until the water use permits allowing irrigation on the DLE described place of use are issued by the State Engineer. By letter dated December 9, 2014, the BLM indicated to the Eggers that they needed to obtain a water right permit(s) that identified the manner of use, place of use, and duty available for the irrigation of the lands that are subject to the DLE applications.<sup>25</sup> The BLM indicated that the water right permit information was needed for the BLM to classify the subject lands for agricultural use because a determination must be made that

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<sup>24</sup> *See* NRS § 534.090(1) (the State Engineer extend the time necessary to work a forfeiture if the request is made *before the expiration* of the time necessary to work a forfeiture).

<sup>25</sup> File No. 84606, official records in the Office of the State Engineer.

agriculture use would represent the highest and best use of the lands in accordance with 43 CFR § 2430.5(a).

The State Engineer finds that for nearly 50 years, the State Engineer and the BLM have worked together in processing DLE entry applications with related state water right applications. The process involved BLM first determining whether the lands were classified and right of entry could be granted, prior to the water right permits being considered by the State Engineer.<sup>26, 27</sup> The State Engineer notes that the position taken by BLM in its December 2014 letter represents a change of this procedure; or, the State Engineer posits that newer BLM staff may not be aware of how the DLE/water right applications have been handled over the decades between the BLM and the Office of the State Engineer.

For that reason, on March 10, 2016, the State Engineer sent the BLM a letter concerning BLM's December 2014 letter where the State Engineer informed the BLM of the longstanding procedure between the two agencies, and requested that the BLM consider its position concerning the Eggers' DLE applications and that the BLM take action on them. The State Engineer's request to the BLM was based upon the State Engineer's interpretation of Nevada water law, which requires that a determination by BLM be made first. A water right application is a request to develop a specific amount of water from a specific point of diversion for a specific use within a well defined place of use. A basic foundation of Nevada water law is that an applicant must be able to demonstrate a beneficial use for the water. Nevada Revised Statute § 533.035 provides that beneficial use shall be the basis, the measure and the limit of the right to the use of

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<sup>26</sup> For example, Application 14948 was approved on April 7, 1960, after the BLM notified the State Engineer on July 22, 1959, that the land was classified and the land entry application allowed. Application 18621 was approved July 22, 1960, after the land was classified and the land entry application was granted on April 13, 1960. Application 20000 was approved August 19, 1963, after the BLM notified the State Engineer on December 22, 1960, that the land entry was allowed. Application 31536 was approved September 27, 2005, after the BLM notified the State Engineer the land had been classified as suitable for entry (notably this example is from a case handled by the same law firm now representing the Applicant here). Application 46687 was approved on July 10, 1984, after the BLM notified the State Engineer on February 24, 1984, that the land entry was allowed. Application 73563 was approved on October 6, 2008, after the BLM notified the State Engineer that entry had been allowed on July 17, 2008.

<sup>27</sup> By office memo dated August 24, 1955, then current State Engineer Hugh Shamberger initiated the policy that if all the water right filings application requirements had been complied with, and if sufficient unappropriated water existed without impairing the value of existing rights, a permit would be issued under the water right application following the allowance of the land entry. Mr. Shamberger indicated that under the BLM regulations at that time, a land entry applicant was not required to furnish evidence of a water right until such time as he had been informed by the BLM that his entry could be allowed.

water, and NRS § 533.060 provides that the right to use water must be limited and restricted to as much as may be necessary when reasonably and economically used for a beneficial purpose. Nevada Revised Statute § 533.070 provides that the quantity of water that may be appropriated is limited to such water as shall be reasonably required for the beneficial use to be served. Finally, NRS § 533.370 requires that an applicant provide the State Engineer with proof satisfactory of his intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence and the financial ability and reasonable expectation to actually construct the work and apply the water to the intended beneficial use with reasonable diligence.

The position the BLM has taken makes it impossible for a water right applicant to comply, or the State Engineer to determine that a water right application complies with Nevada law before the land has been classified and right of entry granted by BLM. This fact has been recognized by the BLM itself in prior Interior Board of Land Appeal Decisions.<sup>28</sup>

On April 8, 2016, the State Engineer received a reply from the BLM, wherein the BLM stated it would return to the established practice and proceed with analyzing the Eggers' DLE applications. Because the BLM has restarted the process of reviewing the Eggers' applications the State Engineer will not rule on the DLE protest issue in this Interim Ruling; however, the State Engineer found it necessary to reaffirm the State's position that the State Engineer will not consider granting a water right application until the BLM has indicated that the land has been classified as suitable for agricultural entry, thus allowing the State Engineer to determine whether or not there is a high likelihood that the water right applicant will be able to demonstrate beneficial use of the water it seeks to appropriate.

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<sup>28</sup> See IBLA 92-323 (January 18, 1993) (discussing the requirements of 43 C.F.R. § 2521.2(d) stating "or, in States [such as Nevada] where no permit or right to appropriate water is granted until the land embraced within the application is classified as suitable for desert-land entry or the entry is allowed, a showing that the applicant is otherwise qualified under State law to secure such permit or right" (brackets original); 150 IBLA 378 (October 6, 1999) (same); and see also 141 IBLA 236 (November 18-1997) (noting that BLM classified the land as suitable for agricultural purposes and then allowed the applicant 1 year to obtain from the State a water permit).

## CONCLUSIONS OF LAW

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>29</sup>

### II.

The State Engineer concludes that where there has been four consecutive years, but less than five consecutive years of non-use, a Four-Year Notice is required pursuant to NRS § 534.090(1); however, the failure to receive a notice does not nullify a forfeiture or extend the time necessary to work a forfeiture.

### III.

The State Engineer concludes that where non-use in excess of five consecutive years has occurred, a Four-Year Notice is not required.

### IV.

The State Engineer concludes that only rights that have gone unused for five consecutive years because of the use of center-pivot irrigation before July 1, 1983, are entitled to a notice of intent to declare a forfeiture, allowing the owner to avoid forfeiture of the unused portion by resuming beneficial use or applying for an extension of time.

### V.

The State Engineer concludes that water rights are subject to partial forfeiture, and that the resumption of use doctrine requires resumption to beneficial use on all or any portion of the right that has gone unused, whether it be the entire right or part of a right.

### VI.

The State Engineer concludes that Nevada water law requires that an Applicant demonstrate right of entry has been obtained in order to act on water right application for DLE land, and that the process established between the BLM and State Engineer gives recognition to that requirement.

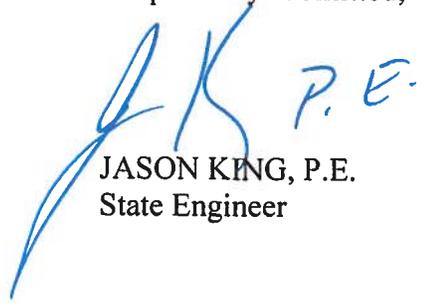
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<sup>29</sup> NRS Chapters 533 and 534.

**RULING**

No ruling is made on the protest issues to change Applications 84606, 84607, 84608, 84609, 84610 and 84611, unless otherwise specifically provided for hereinabove. A hearing date concerning the applications and protests will be forthcoming.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'JK P.E.', is written over the typed name and title.

JASON KING, P.E.  
State Engineer

Dated this 20th day of  
July, 2016.