

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

IN THE MATTER OF APPLICATIONS)
57555, 61893 AND 63277 FILED TO)
CHANGE THE MANNER AND PLACE OF)
USE OF THE WATERS OF THE)
TRUCKEE RIVER, STOREY AND)
WASHOE COUNTIES, NEVADA.)

RULING
5744

GENERAL

I.

Application 57555 was filed on May 1, 1992, by the Town of Fernley to change the place and manner of use of 64.19 acre-feet annually, a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*.¹ The application proposes to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use within the Fernley Utilities water service area. The point of diversion remained at Derby Dam located within the N½ SW¼ of Section 19, T.20S., R.23E., M.D.B.&M. The existing places of use are 22 separate parcels of land as identified below:

Parcel 1 - 0.2489 acres NE¼ NE¼, Section 19, T.20N., R.25E., M.D.B.&M.

Parcel 2 - intentionally left blank

Parcel 3 - 0.50 acres NW¼ NE¼, Section 13, T.20N., R.24E., M.D.B.&M.

Parcel 4 - 0.19 acres NE¼ SE¼, Section 24, T.20N., R.24E., M.D.B.&M.

Parcel 5 - intentionally left blank

Parcel 6 - 0.15 acres NE¼ SE¼, Section 24, T.20N., R.24E., M.D.B.&M.

Parcel 7 - 0.20 acres NE¼ SE¼, Section 24, T.20N., R.24E., M.D.B.&M.

Parcel 8 - 0.23 acres NE¼ SE¼, Section 24, T.20N., R.24E., M.D.B.&M.

Parcel 9 - 0.30 acres NW¼ SE¼, Section 24, T.20N., R.24E., M.D.B.&M.

Parcel 10 - 0.2489 acres NW¼ SE¼, Section 12, T.20N., R.24E., M.D.B.&M.

¹ Final Decree, *United States v. Orr Water Ditch Co.*, In Equity, Docket No. A-3 (D. Nev. Sept. 4, 1944).

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Parcel 11 - 1.25 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 12 - 0.2489 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 13 - intentionally left blank
Parcel 14 - 0.23 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
Parcel 15 - 0.17 acres N $\frac{1}{2}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 16 - 0.33 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
Parcel 17 - 0.2489 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 18 - 0.14 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 19 - 0.17 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 20 - intentionally left blank
Parcel 21 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 22 - 0.18 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 23 - 0.18 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 24 - 0.19 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 25 - 0.21 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 26 - 8.40 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.²

By letter dated January 20, 2006, the Applicant withdrew the following parcels from consideration under Application 57555: Parcels 1, 10, 11, 17 and 21.³

II.

Application 61893 was filed on February 8, 1996, by the Town of Fernley to change the place and manner of use of 532.4995 acre-feet annually, a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*.⁴ The application proposes to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use within the Fernley Utilities water service area. The point of diversion remained at Derby Dam located within the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 19, T.20S., R.23E., M.D.B.&M. The existing

² Exhibit No. 3. Hereinafter, the exhibits and transcript from the public administrative hearing held on February 7-9, 2006, before representatives of the Office of the State Engineer will be referred to solely by the exhibit number and the transcript page.

³ Exhibit No. 13.

⁴ Exhibit No. 6.

places of use are 75 separate parcels of land as identified below:

- Parcel 1 - 0.9956 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 2 - 0.20 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 3 - 0.21 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 4 - 0.21 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 5 - 0.16 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 6 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 7 - 0.2489 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 8 - 0.2489 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 9 - 0.2489 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 10 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
- Parcel 11 - 0.2489 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 12 - 0.16 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 13 - 0.2489 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 14 - 0.2489 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 15 - 0.20 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 16 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
- Parcel 17 - 0.16 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 18 - 0.16 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 19 - 3.11 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 20 - 0.2489 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 21 - 0.33 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 22 - 0.2489 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 23 - 0.34 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 24 - 0.18 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 25 - 0.2489 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 26 - 9.43 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 11, T.20N., R.24E., M.D.B.&M.
- Parcel 27 - 1.36 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 28 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.

- Parcel 29 - 0.2489 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 30 - 0.60 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 15, T.20N., R.24E., M.D.B.&M.
- Parcel 31 - 4.70 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 32 - 0.2489 acres NW $\frac{1}{2}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 33 - 0.746 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 34 - 0.19 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
- Parcel 35 - 0.2489 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 36 - 0.2489 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 37 - 0.25 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 38 - 0.497 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 39 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 40 - 0.21 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 41 - 0.16 acres NW $\frac{1}{2}$ SW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 42 - 0.11 acres NE $\frac{1}{2}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 43 - 0.2489 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 44 - 0.22 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 45 - 1.53 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- 0.46 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 46 - 20.5 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
- Parcel 47 - 1.0 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
- Parcel 48 - 0.17 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 49 - 0.24 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
- Parcel 50 - intentionally left blank
- Parcel 51 - 0.27 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 52 - 0.16 acres SW $\frac{1}{2}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
- Parcel 53 - 0.2489 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 54 - 0.2489 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
- Parcel 55 - intentionally left blank
- Parcel 56 - 0.40 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.

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Parcel 57 - 0.60 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 58 - 0.50 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 59 - 0.10 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 60 - 0.21 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 61 - 31.79 acres Portion SE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
Parcel 62 - 0.10 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
Parcel 63 - 0.30 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 64 - 0.21 acres SW $\frac{1}{2}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 65 - 2.80 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 66 - 6.53 acres NE $\frac{1}{2}$ SE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
0.96 acres SE $\frac{1}{2}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 67 - 0.18 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 68 - 0.2489 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 69 - 2.63 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
2.35 acres SW $\frac{1}{2}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 70 - 2.961 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 71 - 1.10 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 72 - 0.2489 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 73 - 0.2489 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 74 - 6.68 acres SE $\frac{1}{4}$ SW $\frac{1}{2}$, Section 11, T.20N., R.24E., M.D.B.&M.
Parcel 75 - intentionally left blank
Parcel 76 - 0.2489 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 77 - 2.24 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
Parcel 78 - 0.2489 acres SE $\frac{1}{2}$ SW $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.

By letter dated January 20, 2006, the Applicant withdrew the following parcels from consideration under Application 61893: Parcels 1, 6, 7, 9, 13, 14, 16, 19, 25, 28, 30, 32, 33, 35, 36,

43, 53, 54, 56, 57, 58, 59, 63, 65, 68, 70, 71, 72, 73, 76, 77, and 78.⁵ Pursuant to Exhibit No. 43 and at the administrative hearing, the Tribe withdrew any contentions it has as to Parcels 20, 22, 45, 49 and 74.⁶

III.

Application 63277 was filed on July 24, 1997, by the Town of Fernley to change the place and manner of use of 161.4950 acre-feet annually, a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*.⁷ The Application proposed to change the manner of use from the decreed use of irrigation, storage, power, domestic and other purposes to municipal use within the Fernley Utilities water service area. The point of diversion remained at Derby Dam located within the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 19, T.20S., R.23E., M.D.B.&M. The existing places of use are 41 separate parcels of land as identified below:

Parcel 1 - 0.8 acres	SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 2 - 10.02 acres	SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 3 - 0.2489 acres	SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 4 - 0.70 acres	SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, T.20N., R.24E., M.D.B.&M.
Parcel 5 - 0.2489 acres	NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
Parcel 6 - 0.34 acres	SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 12, T.20N., R.24E., M.D.B.&M.
Parcel 7 - 0.12 acres	SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 8 - 5.67 acres	NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 9 - 0.21 acres	SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 10 - 0.19 acres	SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 11 - 0.21 acres	SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 12 - 0.92 acres	E $\frac{1}{2}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 13 - 0.83 acres	E $\frac{1}{2}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 14 - 0.74 acres	E $\frac{1}{2}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 15 - 1.14 acres	E $\frac{1}{2}$ NWE $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 16 - 0.17 acres	NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.

⁵ Exhibit No. 13.

⁶ Transcript, pp. 96-97; Exhibit No. 43.

Parcel 17 - 0.16 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 18 - 0.17 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 19 - 0.19 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T.20N., R.24E., M.D.B.&M.
Parcel 20 - 0.2489 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 21 - 2.511 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 22 - 0.2489 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 23 - 0.4978 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 24 - 2.2133 acres NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 14, T.20N., R.24E., M.D.B.&M.
Parcel 25 - 1.244 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
Parcel 26 - 0.22 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24 T.20N., R.24E., M.D.B.&M.
Parcel 27 - 0.22 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
Parcel 28 - 0.995 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.
Parcel 29 - 0.497 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 30 - 0.2489 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 31 - 0.2489 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 32 - 0.2489 acres NW $\frac{1}{2}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 33 - 0.2489 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 34 - 0.2489 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 35 - 0.2489 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 36 - 0.43 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 37 - 0.2489 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 38 - 0.2489 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 39 - 0.2489 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 40 - 0.2489 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 19, T.20N., R.25E., M.D.B.&M.
Parcel 41 - 0.995 acres SW $\frac{1}{2}$ NE $\frac{1}{4}$, Section 24, T.20N., R.24E., M.D.B.&M.

By letter dated January 20, 2006, the Applicant withdrew the following parcels from consideration under Application 63277: Parcels 8, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34, 35, 38,

⁷ Exhibit No. 10.

and 41.⁸ Pursuant to Exhibit No. 44, the Tribe withdrew any contentions it has as to Parcels 20, 39, and 40.

IV.

Applications 57555, 61893 and 63277 were timely protested by the United States Bureau of Reclamation (Bureau) and the Pyramid Lake Paiute Tribe of Indians (Tribe) on the following grounds as summarized:⁹

1. Use of water as applied for could have a detrimental effect on the operations of the Newlands Project by reducing the amount of water available to Project users, reducing the conveyance efficiency of the Project and other possible impacts.
2. All underlying Newlands Project water right applications and certificates were approved by the Secretary of the Interior for irrigation use and must be amended by the Secretary before Project water can be used for municipal purposes.
3. Approval by the Secretary of the Interior is not in the interests of the Newlands Project or the United States because it would violate the Secretary's obligations pursuant to the Endangered Species Act, it would violate the Secretary's trust obligation to the Tribe, it would violate the Secretary's obligation to protect and restore the Pyramid Lake fishery, and it would violate the reserved right of the Tribe to the unappropriated water of the Truckee River.
4. Approving the application would conflict with and tend to impair the Tribe's existing water rights because the Tribe is entitled to all water of the Truckee River not subject to valid water rights.
5. Approving the application would be detrimental to the public welfare because it would likely jeopardize the continued existence of Pyramid Lake's two principal fish, which are threatened and endangered, it would prevent or interfere with the conservation of those fish, it would adversely affect the recreational value of Pyramid Lake, and it would interfere with the purposes for which the Pyramid Lake Indian Reservation was established. The application violates the provisions of Nevada law to protect the endangered cui-ui.

⁸ Exhibit No. 13.

⁹ Exhibit No. 4, 5, 8, 9, 11 and 12.

6. The application does not meet the requirements of the agreement between the Bureau of Reclamation and the Tribe because many of the existing places of use were not irrigated between 1984 and 1989.
7. The Applicant does not have the right to use the water on the proposed place of use.
8. The water rights requested for transfer have never been perfected and as such should not be transferred.
9. The water rights sought to be transferred have been abandoned or forfeited and as such should not be transferred
10. The application should be denied because it would increase the consumptive use of water within the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River.
11. The application seeks to transfer water from land that is not impracticable to irrigate and therefore the water rights should not be eligible for transfer.
12. The application should not be approved because the Applicant has not entered into a repayment contract with the United States.
13. The application cannot be approved because federal law does not authorize the proposed use of Newlands Project water.
14. The application should not be approved because the proposed place of use is not within the authorized service area or boundaries of the Newlands Project.
15. The application should not be approved because the Applicant has not obtained permission to use the federal facilities for transportation of the water.
16. The water right sought to be transferred was obtained from a Newlands Project user who, along with the Truckee-Carson Irrigation District, has violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project; thus, approval of the application would violate the Order, Judgment and Decree entered in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).
17. The Tribe will be adversely affected by the granting of the application because it will result in greater diversion of Truckee River water away from Pyramid Lake, it will prevent enforcement of the Operating Criteria and Procedures for the Newlands Project, and it will impair, conflict and

interfere with the Tribe's reserved right to the unappropriated waters of the Truckee River.

18. The proposed use will be from January 1 to December 21 whereas the actual prior use of these various irrigation water rights was limited to the irrigation season. The new use will be less efficient and will adversely affect other water users.

V.

After all parties were duly noticed a public administrative hearing was held before the Office of the State Engineer on February 7-9, 2006.¹⁰

FINDINGS OF FACT

I.

CONTRACT DATES

As to water rights in the Newlands Project, the Ninth Circuit Court of Appeals has held that under Nevada law the forfeiture statute does not apply to water rights that vested before March 22, 1913, or were initiated in accordance with the law in effect prior to that date.¹¹ On the basis of this decision, when the State Engineer examines a change application based on a Newland's Project water right where a protestant has alleged the water right has been forfeited, the State Engineer looks to what is commonly called the contract date, the date on which the original water right application was filed or agreements entered into for use of Newlands Project water to determine whether the water right is subject to the forfeiture provision of Nevada water law.

APPLICATION 57555. As to Application 57555, the State Engineer finds the following contracts dates for the identified parcels:¹²

Parcel 3 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.¹³ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

¹⁰ Official records in the Office of the State Engineer.

¹¹ *U.S. v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1992).

¹² Exhibit No. 16.

¹³ Exhibit Nos. 16, 22, 60 and 61a.

Parcel 4 - August 6, 1917

Parcel 6 - August 6, 1917

Parcel 7 - August 6, 1917

Parcel 8 - August 6, 1917

Parcel 9 - August 6, 1917

Parcel 12 - July 30, 1915

Parcel 14 - August 6, 1917

Parcel 15 - December 20, 1907

Parcel 16 - January 14, 1915

Parcel 18 - July 15, 1915

Parcel 19 - May 14, 1909

Parcel 22 - The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.¹⁴ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 23 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.¹⁵ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 24 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.¹⁶ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

¹⁴ Exhibit Nos. 16, 22, 60 and 61a.

¹⁵ Exhibit Nos. 16, 22, 60 and 61a.

¹⁶ Exhibit Nos. 16, 22, 60 and 61a.

Parcel 25 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.¹⁷ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 26 – January 14, 1915.

APPLICATION 61893. As to Application 61893, the State Engineer finds the following contracts dates for the identified parcels:¹⁸

Parcel 2 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.¹⁹ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 3 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.²⁰ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 4 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.²¹ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 5 – February 16, 1910

¹⁷ Exhibit Nos. 16, 22, 60 and 61a.

¹⁸ Exhibit No. 17.

¹⁹ Exhibit Nos. 16, 22, 60 and 61a.

²⁰ Exhibit Nos. 16, 22, 60 and 61a.

²¹ Exhibit Nos. 16, 22, 60 and 61a.

Parcel 8 – July 30, 1915

Parcel 10 – April 29, 1907

Parcel 11 – January 10, 1946

Parcel 12 – February 16, 1910

Parcel 15 – July 15, 1915

Parcel 17 – July 15, 1915

Parcel 18 – May 14, 1909

Parcel 21 – May 14, 1909

Parcel 23 – January 14, 1915

Parcel 24 – The Protestant alleges the contract date is April 6, 1915. The Applicant's contract summary chart found in Exhibit No. 64 identifies the contract date as December 26, 1914; however, Exhibit No. 65p, which contains the documents related to this parcel does not contain a water right application dated in December 1914, but rather contain the April 6, 1915, Water-right Application. The State Engineer finds the contract date is April 6, 1915.

Parcel 26 – The Tribe's evidence indicates the possible following contracts dates for this parcel: May 14, 1909, and December 18, 1912. The Applicant identifies the May 14, 1909, date as the relevant contract date.²² The documents found in Exhibit No. 20 indicate that the May 14, 1909, document is a Certificate of Filing Water Right Application filed by Emily Davis Barrow, serial number 04032 for water rights on 67 acres identified as Farm Unit D with handwritten in the upper right-hand corner B-2004. The December 18, 1912, Water Right Application indicates the applicants were A.G. Wylde and E.J. Barrow, it is for the same 67 acres and it indicates the same handwritten number of B-2004. The State Engineer finds there is substantial evidence in the Barrow name and the handwritten number B-2004 that ties these documents together to show that a water right was initiated for use on the existing place of use as early as 1909, and finds the contract date is May 14, 1909.

²² Exhibit No. 64.

Parcel 27 – The Protestant alleges the contract date is February 16, 1910. The Applicant identified the contract date as January 29, 1915.²³ A review of the January 29, 1915, document provided in Applicant's Exhibit No. 65r shows that the Water-right Application covers the W½NE¼ of Section 13, while the existing place of use is in the SE¼ NW¼ of Section 13; therefore, the Applicant's document does not cover this existing place of use. The State Engineer finds the contract date is February 16, 1910.

Parcel 29 – January 10, 1946

Parcel 31 – The Tribe's evidence indicates the possible following contract date for this parcel of January 10, 1946. The document found in Exhibit No. 26 indicates that the January 10, 1946, document is an Application for Permanent Water Right filed by Robert and Ruth Thomas number 04032 for water rights on 80 acres 40 of which were then classified as irrigable and more particularly described as Lot 2 and the SE¼ NW¼ of Section 19, T.20N., R.25E., M.D.B.&M. The records of the Nevada Division of State Lands indicate that Lot 2 is comprised of 39.10 acres in the SW¼ NW¼ of Section 19, T.20N., R.25E., M.D.B.&M. If the water right application covers 80 acres in Lot 2 and the SE¼ NW¼, the applicant apparently rounded the 39.10 acres to 40 acres in addition to the 40 acres in the SE¼ NW¼ to describe 80 acres of land. However, the application does not provide any evidence of the location of the 40 acres classed as irrigable. The maps used by the Office of the State Engineer for determining the location of water-righted lands²⁴ show that the SW¼ NW¼ (the section which contains the existing place of use) is covered by 29 acres of applied for water rights and the SE¼ NW¼ is covered by 11 acres of water-righted lands totaling 40 acres of water-righted land, which is the same amount of irrigable land identified in the 1946 application. The 29 acres identified in the SW¼ NW¼ cover the area of the existing place of use. The State Engineer finds there is substantial evidence to indicate the January 10, 1946, water right application is the appropriate application for this existing place of use and finds the contract date is January 10, 1946.

Parcel 34 - April 29, 1907

Parcel 37 – August 6, 1917

²³ Exhibit No. 64 and 65r.

²⁴ See, State Engineer's Ruling No. 4798, pp.24-28, official records in the Office of the State Engineer.

Parcel 38 – January 10, 1946

Parcel 39 – April 29, 1907

Parcel 40 – August 6, 1917

Parcel 41 -February 16, 1910

Parcel 42 –January 14, 1915

Parcel 44 –The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.²⁵ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 46 – January 14, 1915

Parcel 47 –The Tribe's evidence indicates the possible following contracts dates for this parcel: May 13, 1907, October 26, 1914, September 27, 1918, and February 23, 1920. The documents found in Exhibit No. 19 indicate that the May 3, 1907, document is a Certificate of Filing Water Right Application filed by George Laughton, serial number 28/0785 for water rights on 65 acres of irrigable land identified as Farm Unit C with handwritten in the upper right-hand corner B-2038 and the number 272 in connection with homestead entry 1318/0784 and covering the N½ SE¼. The October 26, 1914, Water Right Application indicates the applicant was Charles Brown, it is for 80 acres with 49 acres of irrigable land, it indicates the same handwritten number of B-2038/272 and indicates the homestead application 0784 was assigned to him. The September 27, 1918, document is a Water-right Application filed by Margaret Singleton that covers 40 acres covered by homestead application 0784 that had been assigned to the applicant by Charles Brown with the serial number now being indicated as a subset B-2038-1 and covering the N½ N½ SE¼, which does not include the existing place of use. The February 23, 1920, document is a Water-right Application that also indicates it is an assignment by Margaret Singleton of the 40 acres under homestead entry 0784 under the serial number B-2038-1, which is the N½ N½ SE¼, which does not include the existing place of use. The State Engineer finds there is substantial evidence in homestead entry numbers, the serial numbers and the indication of assignments to tie the May 13, 1907, October 26, 1914,

documents together to show that a water right was initiated for use on the existing place of use as early as 1907, to show that the other two documents do not relate to this existing place of use and finds the contract date is May 3, 1907.

Parcel 48 – August 6, 1917

Parcel 51 – May 14, 1909

Parcel 52 – May 14, 1909

Parcel 60 – The Protestant alleges the contract date is April 6, 1915. The Applicant alleges it is May 14, 1909.²⁶ A review of the Certificate of Filing Water Right Application dated May 14, 1909, in the Applicant's Exhibit No. 65jj shows that it does not cover this existing place of use. It covers land in the NW¼ of Section 15 and this existing place of use is in the NW¼ NE¼ of Section 13. The State Engineer finds the contract date is April 6, 1915.

Parcel 61 – August 6, 1917

Parcel 62 - The Tribe's evidence indicates the possible following contracts dates for this parcel: April 29, 1907, June 8, 1911, and August 20, 1914. The documents found in Exhibit No. 21 indicate that the April 29, 1907, document is a Certificate of Filing Water Right Application filed in the name of Abbie F. Pray in connection with homestead entry number 1287/0778, Farm Unit C. In the upper right-hand corner of the document is handwritten the number B-2054. The June 8, 1911, Certificate of Filing Water-Right Application was filed by Milton Pray for Farm Unit C. The upper right-hand corner of this document indicates a serial number 06170 and also has the hand-written number B-2054 and in the lower left-hand corner of the document it indicates an assignment of homestead entry 0778. The August 20, 1914, document indicates that Milton Pray assigned serial number 06170 and this document also has handwritten on it the number B-2054. The State Engineer finds there is substantial evidence in the Pray name and identification of serial numbers and indication of assignments that ties these documents together to show that a water right was initiated for use on the existing place of use as early as 1907 and finds the contract date is April 29, 1907.

²⁵ Exhibit Nos. 16, 22, 60 and 61a.

²⁶ Exhibit Nos. 64 and 65jj.

Parcel 64 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.²⁷ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 66 - The Tribe's evidence indicates the possible following contracts dates for the 6.53 acre portion of this parcel: May 3, 1907, October 26, 1914, September 27, 1918, and February 23, 1920. The documents found in Exhibit No. 19 indicate that the May 3, 1907, document is a Certificate of Filing Water Right Application filed by George Laughton, serial number 28/0785 for water rights on 65 acres of irrigable land identified as Farm Unit C with handwritten in the upper right-hand corner B-2038 and the number 272 in connection with homestead entry 1318/0784 and covering the N½ SE¼. The October 26, 1914, Water Right Application indicates the applicant was Charles Brown, it is for 80 acres with 49 acres of irrigable land, it indicates the same handwritten number of B-2038/272 and indicates the homestead application 0784 was assigned to him. The September 27, 1918, document is a Water-right Application filed by Margaret Singleton that covers 40 acres covered by homestead application 0784 that had been assigned to the applicant by Charles Brown with the serial number now being indicated as a subset B-2038-1 and covering the N½ N½ SE¼, which does not include the existing place of use. The February 23, 1920, document is a Water-right Application that also indicates it is an assignment by Margaret Singleton of the 40 acres under homestead entry 0784 under the serial number B-2038-1, which is the N½ N½ SE¼, which does not include the existing place of use. The State Engineer finds there is substantial evidence in homestead entry numbers, the serial numbers and the indication of assignments to tie the May 13, 1907, October 26, 1914, documents together to show that a water right was initiated for use on the existing place of use as early as 1907, to show that the other two documents do not relate to this existing place of use and finds the contract date is May 3, 1907.

²⁷ Exhibit Nos. 16, 22, 60 and 61a.

Parcel 66 - The Tribe's evidence indicates the possible following contracts dates for the 0.96 acre portion of this parcel: November 27, 1915, and April 10, 1918. The Applicant's evidence indicates a contract date of February 2, 1910.²⁸ The February 2, 1910, document is a Certificate of Filing Water Right Application filed by Frank Jones for 49 acres of irrigable land in connection with homestead entry No. 04633, serial number 04633. The November 27, 1915, document is a Water-Right Application for the same 49 acres, but the homestead entry number is different, the serial number is B-2094 and the document is signed by Cyrus Hoover. The April 10, 1918, document is another Water-right Application for the same 49 acres, but again the homestead entry number is different, the serial number is B-2094 and barely legible on the bottom of the second page is the name Cyrus Hoover. While the 1915 and the 1918 documents can be tied together, there is nothing that ties the 1910 document to them, but the 1910 document does evidence that a water right was initiated for use on this parcel in 1910. The State Engineer finds the evidence indicates that a water right was first initiated on this parcel on February 2, 1910.

Parcel 67 -- The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.²⁹ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 69 -- The Tribe's evidence indicates the following possible contract dates for both the 2.63 acre and the 2.35 acre portions of the parcel: November 27, 1915, and April 10, 1918. The Applicant provided evidence of a February 2, 1910, contract date.³⁰ The February 2, 1910, document is a Certificate of Filing Water Right Application filed by Frank Jones for 49 acres of irrigable land in connection with homestead entry No. 04633, serial number 04633. The November 27, 1915, document is a Water-Right Application for the same 49 acres, but the homestead entry number is different, the serial number is B-2094 and the document is signed by Cyrus Hoover. The April 10, 1918, document is another Water-right Application for the same 49 acres, but again the homestead entry number is different, the serial number is B-2094 and barely legible on the bottom of

²⁸ Exhibit No. 65nn.

²⁹ Exhibit Nos. 16, 22, 60 and 61a.

the second page is the name Cyrus Hoover. While the 1915 and the 1918 documents can be tied together, there is nothing that ties the 1910 document to them, but the 1910 document does evidence that a water right was initiated for use on this parcel in 1910. The State Engineer finds the evidence indicates that a water right was first initiated on this parcel on February 2, 1910.

APPLICATION 63277. As to Application 63227, the State Engineer finds the following contracts dates for the identified parcels:³¹

Parcel 1 – The Tribe’s evidence indicates the possible following contracts dates for this parcel: November 27, 1915, and April 10, 1918. The Applicant’s evidence indicates a contract date of February 2, 1910.³² The February 2, 1910, document is a Certificate of Filing Water Right Application filed by Frank Jones for 49 acres of irrigable land in connection with homestead entry No. 04633, serial number 04633. The November 27, 1915, document is a Water-Right Application for the same 49 acres, but the homestead entry number is different, the serial number is B-2094 and the document is signed by Cyrus Hoover. The April 10, 1918, document is another Water-right Application for the same 49 acres, but again the homestead entry number is different, the serial number is B-2094 and barely legible on the bottom of the second page is the name Cyrus Hoover. While the 1915 and the 1918 documents can be tied together, there is nothing that ties the 1910 document to them, but the 1910 document does evidence that a water right was initiated for use on this parcel in 1910. The State Engineer finds the evidence indicates that a water right was first initiated on this parcel on February 2, 1910.

Parcel 2 - The Tribe’s evidence indicates the possible following contracts dates for this parcel: November 27, 1915, and April 10, 1918. The Applicant’s evidence indicates a contract date of February 2, 1910.³³ The February 2, 1910, document is a Certificate of Filing Water Right Application filed by Frank Jones for 49 acres of irrigable land in connection with homestead entry No. 04633, serial number 04633. The November 27, 1915, document is a Water-Right Application for the same 49 acres, but the homestead entry number is different, the serial number is B-2094 and

³⁰ Exhibit No. 65nn.

³¹ Exhibit No. 18.

³² Exhibit No. 69a.

³³ Exhibit No. 69a.

the document is signed by Cyrus Hoover. The April 10, 1918, document is another Water-right Application for the same 49 acres, but again the homestead entry number is different, the serial number is B-2094 and barely legible on the bottom of the second page is the name Cyrus Hoover. While the 1915 and the 1918 documents can be tied together, there is nothing that ties the 1910 document to them, but the 1910 document does evidence that a water right was initiated for use on this parcel in 1910. The State Engineer finds the evidence indicates that a water right was first initiated on this parcel on February 2, 1910.

Parcel 3 – The Tribe's evidence indicates the possible following contracts dates for this parcel: December 30, 1907, and May 3, 1912. The documents found in Exhibit No. 19 indicate that the December 20, 1907, document is a Certificate of Filing Water Right Application filed by William Miller, serial number 167/0787 for water rights on 80 acres identified as Farm Unit D and homestead entry 781/0786. The May 3, 1912, Certificate of Filing Water-right Application indicates the applicant was Henry Schroeder for water rights for 80 acres identified as Farm Unit D and homestead entry 05773. The State Engineer finds there is no evidence that ties these two documents together, but the December 30, 1907, document indicates that a water right was first initiated on this parcel on December 30, 1907.

Parcel 4 – The Tribe's evidence indicates the possible following contracts dates for this parcel: November 27, 1915 and April 10, 1918.³⁴ The February 2, 1910, document is a Certificate of Filing Water Right Application filed by Frank Jones for 49 acres of irrigable land in connection with homestead entry No. 04633, serial number 04633. The November 27, 1915, document is a Water-Right Application for the same 49 acres, but the homestead entry number is different, the serial number is B-2094 and the document is signed by Cyrus Hoover. The April 10, 1918, document is another Water-right Application for the same 49 acres, but again the homestead entry number is different, the serial number is B-2094 and barely legible on the bottom of the second page is the name Cyrus Hoover. While the 1915 and the 1918 documents can be tied together, there is nothing that ties the 1910 document to them, but the 1910 document does evidence that a water right was initiated for use on this parcel in 1910. The State Engineer finds the evidence indicates that a water right was first initiated on this parcel on February 2, 1910.

Parcel 5 – The Tribe’s evidence indicates the possible following contracts dates for this parcel: April 29, 1907, June 8, 1911, and August 20, 1914. The documents found in Exhibit No. 21 indicate that the April 29, 1907, document is a Certificate of Filing Water Right Application filed in the name of Abbie F. Pray in connection with homestead entry number 1287/0778, Farm Unit C. In the upper right-hand corner of the document is handwritten the number B-2054. The June 8, 1911, Certificate of Filing Water-Right Application was filed by Milton Pray for Farm Unit C. The upper right-hand corner of this document indicates a serial number 06170 and also has the hand-written number B-2054 and in the lower left-hand corner of the document it indicates an assignment of homestead entry 0778. The August 20, 1914, document indicates that Milton Pray assigned serial number 06170 and this document also has handwritten on it the number B-2054. The State Engineer finds there is substantial evidence in the Pray name and identification of serial numbers and indication of assignments that ties these documents together to show that a water right was initiated for use on the existing place of use as early as 1907 and finds the contract date is April 29, 1907.

Parcel 6 – January 14, 1915

Parcel 7 – July 15, 1915

Parcel 9 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.³⁵ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 10 - The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.³⁶ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

³⁵ Exhibit Nos. 16, 22, 60 and 61a.

³⁶ Exhibit Nos. 16, 22, 60 and 61a.

Parcel 11 – The Protestant alleges the contract date is April 6, 1915, and the Applicant alleges it is January 29, 1915, both citing to the same document.³⁷ It appears that the original water right applicant filled out the document on January 29, 1915, as demonstrated by the notary signature, but both documents indicate the Water-right Application was not filed until April 6, 1915. The State Engineer finds the contract date is April 6, 1915.

Parcel 12 - February 16, 1910

Parcel 13 - February 16, 1910

Parcel 14 - February 16, 1910

Parcel 15 - February 16, 1910

Parcel 16 - February 16, 1910

Parcel 17 - February 16, 1910

Parcel 18 – May 14, 1909

Parcel 19 – May 14, 1909

Parcel 20 – The Tribe’s evidence indicates the possible following contracts dates for this parcel: December 31, 1907, and November 22, 1911. The documents found in Exhibit No. 23 indicate that December 31, 1907, document is a Certificate of Filing Water Right Application filed by Stella Melendy for 70 acres of irrigable land identified as Farm Unit F, serial number 190/0763 with handwritten in the upper right-hand corner of the document B-2044, and indicating homestead entry 1502/0762. The November 22, 1911, document is a Certificate of Filing Water-right Application filed by Fred Melendy for Farm Unit F, for 63 acres of irrigable land, homestead entry 06629 and in the upper right-hand corner of the document is handwritten B-20??. In the lower left hand corner of the document it indicates the applicant is the assignee of 0762. The State Engineer finds there is substantial evidence found in the like surnames of the applicants and the assignment of homestead entry 0762 to tie the two documents together and finds the contract date is December 31, 1907.

Parcel 21 - December 20, 1907

Parcel 26 – August 6, 1917

Parcel 27 – August 6, 1917

³⁷ Exhibit Nos. 16, 22, 60 and 61a.

Parcel 36 –The Tribe’s evidence indicates the possible following contracts dates for this parcel: June 17, 1909, May 19, 1910, and May 4, 1914. The documents found in Exhibit No. 26 indicate that the June 17, 1909, document is a Certificate of Filing Water Right Application filed by Thomas Yee, serial number 04085 for water rights on 80 acres identified as Farm Unit A with handwritten in the upper right-hand corner B-2049. Very faintly to the right of serial number 04085 is the number 367. The May 19, 1910, Certificate of Filing Water Right Application indicates the applicant was an assignee of serial number 04085 and it also identifies the number 367, but assigns a new serial number of 05571. The May 4, 1914, Water-Right Application indicates it relates to serial number 05571, includes the handwritten numbers B-2049 and 367. The State Engineer finds there is substantial evidence in the serial numbers and assignment of those numbers that tie these documents together to show that a water right was initiated for use on the existing place of use as early as 1909 and finds the contract date is June 17, 1909.

Parcel 37 –The Tribe’s evidence indicates the possible following contract date for this parcel of January 10, 1946. The document found in Exhibit No. 26 indicates that the January 10, 1946, document is an Application for Permanent Water Right filed by Robert and Ruth Thomas number 04032 for water rights on 80 acres 40 of which were then classified as irrigable and more particularly described as Lot 2 and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, T.20N., R.25E., M.D.B.&M. The records of the Nevada Division of State Lands indicate that Lot 2 is comprised of 39.10 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 19, T.20N., R.25E., M.D.B.&M. If the water right application covers 80 acres in Lot 2 and the SE $\frac{1}{4}$ NW $\frac{1}{4}$, the applicant apparently rounded the 39.10 acres to 40 acres in addition to the 40 acres in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ to describe 80 acres of land. However, the application does not provide any evidence of the location of the 40 acres classed as irrigable. The maps used by the Office of the State Engineer for determining the location of water-righted lands³⁸ show that the SW $\frac{1}{4}$ NW $\frac{1}{4}$ (the section which contains the existing place of use) is covered by 29 acres of applied for water rights and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ is covered by 11 acres of water-righted lands totaling 40 acres of water-righted land, which is the same amount of irrigable land identified in the 1946 application. The 29 acres identified in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ cover the area of the existing place of use. The State Engineer finds there is substantial evidence to indicate the January 10, 1946, water right application

is the appropriate application for this existing place of use and finds the contract date is January 10, 1946.

II.

During the administrative hearing, the Hearing Officer determined that some of the photographs, specifically the 1990 photographs, were of insufficient quality to rise to the level of clear and convincing evidence in the making of land use determinations.³⁹ However, after cross-examination and redirect, the Hearing Officer indicated that every photograph would be reviewed and decisions made as to the quality and sufficiency of the evidence.⁴⁰ Upon review of the evidence, the State Engineer looked at every photograph and reviewed every parcel individually and finds that while one photograph in the middle of a five year period may not have been of sufficient quality to rise to the level of clear and convincing evidence as to making a land use determination, when taking the series of photographs together it became obvious that even though a photograph may have been blurry the land use was the same as on other photographs of better quality. However, in some instances the State Engineer finds the quality of the photographs was just too poor to be making land use determinations as critical as those being made here.

III.

One of the Protestant Tribe's allegations was that the water rights on these parcels were never perfected. However, in the table of contentions provided by Protestant in Exhibit Nos. 43, 44 and 45 lack of perfection is not identified as a protest claim and no evidence or argument was made that any of the water rights under consideration in this ruling were not perfected. The State Engineer finds there is no evidence in support of this protest claim and the claim was not proven as to any parcel under consideration in this ruling and the claim is dismissed.

IV.

The Applicant presented an argument and supporting evidence that addresses the question of dedication of water rights to a municipal water purveyor, in this case the City of Fernley. The question raised is, what is the status of a surface-water right when it is dedicated to the municipal water purveyor without the benefit of a simultaneous change application? Do the doctrines of

³⁸ See, State Engineer's Ruling No. 4798, pp.24-28, official records in the Office of the State Engineer.

³⁹ Transcript, pp. 341-347.

forfeiture or abandonment apply? Is the timeframe that is applicable to forfeiture and/or abandonment tolled or is forfeiture cured?

The Applicant noted that over time the municipality has been amassing smaller quantities of water in order to have a sufficient quantity of water rights to make building a surface-water treatment plant economically feasible. The Applicant, like many other municipalities in the state of Nevada, has not immediately filed change applications on each smaller water right, but rather has waited until it has amassed a sufficient quantity of water rights and then has filed one change application that includes multiple water rights. This is a process which has been allowed and is a rather common practice among utilities in the state of Nevada.

The Applicant argues that case law supports a finding that when a city maintains water rights as a part of its future water supply, that should be considered as a beneficial use of the water. Thus, dedication cures forfeiture, if no claim of forfeiture had been brought prior to the date of the dedication. It argues that as of the date the water rights are dedicated to the city, any claim of forfeiture or abandonment should be cut off. Additionally, if abandonment or forfeiture had not worked as of the date of dedication of the water right, any period of non-use after that date should not be considered.

The Protestant argues that the date by which non-use should be judged is the date the application was filed and the State Engineer should not consider the issue of the date of dedication of the water right to municipal use in any analysis of abandonment or forfeiture.

The State Engineer believes there is some validity in the Applicant's argument; however, he does not agree that dedication can be considered as beneficial use of water and a cure of a forfeiture. However, if the State Engineer had equitable authority, he believes there may be other mitigating circumstances that should be considered when analyzing whether the doctrines of forfeiture and/or abandonment should apply in relation to water rights dedicated to a municipality for current or future growth. In this case, surface-water rights have been dedicated to the City and it has been amassing enough water rights to justify the building of a surface-water treatment plant, which would then blend its ground water and surface water for service to water users.⁴¹ There is

⁴⁰ Transcript, p. 409.

⁴¹ Transcript, pp. 506-510.

concern that its ground-water resources are not adequate to maintain its current population much less future growth. If periods of non-use of the water rights at the former place of use can be counted in the analysis of forfeiture and/or abandonment after the time of dedication, the dedication requirement means nothing, as the water rights could be lost during the period of amassing sufficient rights, building the treatment plant and filing the change application. Once the water right is dedicated there is obviously no continued use at the existing place of use. Additionally, other considerations include the fact that will-serve commitments have been issued based on those dedicated water rights.⁴²

The State Engineer notes the issue of dedication of water rights and the application of the doctrines of forfeiture and abandonment to dedicated water rights is a case of first impression. In this case, the State Engineer is addressing changes of Newlands Project from irrigation to municipal use. The State Engineer finds this new issue again presents the State Engineer with the problem that general rules developed in the *Alpine* and *Orr Ditch* cases that addressed one fact pattern, changes of irrigation to irrigation in Newlands Project farmlands, are problematic when they are used in another factually dissimilar situation such as planned municipal development.

The Protestant argues, based on the series of *Alpine* cases, that once it has shown an extended 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 the Truckee-Carson Irrigation District that such transfers were not permitted. However, a question in this case is whether a person dedicating a water right to a municipality would have had any reason to contemplate applying to or inquiring of the Truckee-Carson Irrigation District or the Bureau of Reclamation about the dedication. Therefore, the State Engineer finds the general rules may not fit the circumstances here and he will look to the general analysis as to abandonment and finds abandonment is a question of fact to be determined from all the surrounding circumstances and some consideration of the dedication certainly should factor in to any analysis of forfeiture and as to whether there was an intent to abandon the water right.

⁴² Transcript, pp. 512-524; Exhibit Nos. 58, 62, 66.

In regard to previous cases considering changes to Newlands Project water rights, the Ninth Circuit Court of Appeals held that, if the transfer was an intrafarm transfer, an equitable exemption from forfeiture might be appropriate.⁴³ However, the Court's analysis was limited to changes from irrigation to irrigation on a single farm unit within the Newlands Project and from there adopted standards that would not be applicable under the fact pattern presented in these transfers. These transfers are not irrigation to irrigation within the Newlands Project, but rather are transfers from irrigation to municipal use. In *Alpine V*, the Ninth Circuit found that given that the law abhors a forfeiture, *see, Town of Eureka*, 826 P.2d at 952, that equity should operate in certain limited situations. Perhaps equity should act as to forfeiture and/or abandonment in the case of dedication of water rights for municipal use, because these municipalities have to be able to plan for their future, and in Nevada part of that future is based on the conversion of agricultural water rights to municipal use, and municipalities have been allowed to collect groups of small water rights and file one single application in order to facilitate a less cumbersome process. One application is more effective to process than 80 applications and dedication presents a unique issue. However, at this time the State Engineer is without equitable authority to uphold an exception from the harsh provisions of the forfeiture law, but believes it should be a factor for consideration.

As to abandonment, the State Engineer finds any period of non-use at the existing place of use that occurs after the dedication of the water rights will not figure into the analysis of the period of non-use, because the dedication demonstrates the intent to transfer title of that water right from the original owner to the municipality and an intent to use the water right. The State Engineer finds that given that the law abhors a forfeiture and dedication of the water rights presents a unique situation, that dedication tolls the period of non-use at the original place of use for the purposes of forfeiture and abandonment, as it is a necessary step towards the filing of a change application. However, the State Engineer finds dedication does not cure forfeiture, as the concept of cure goes to actual beneficial use of the water.

⁴³ *U.S. v. Alpine Land & Reservoir*, 291 F3rd 1062 (9th Cir. 2002). (“Alpine V”.)

V.

APPLICATION 57555

Application 57555 was filed on May 1, 1992.

Parcel 3 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁴⁴ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁴⁵ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as bare land and drain ditch. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as bare land. The water right on this parcel was dedicated to the City of Fernley on June 14, 1991.⁴⁶ Upon review of the aerial photographs it can be seen that this existing place of use is a strip of land between two sections of highway. From 1977 through the 1991 there is nothing in these photographs that resembles use of the land for irrigation. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use never appears to change over time and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 4 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁴⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁴⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1985 the land use was described as bare land. In 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 13, 1991.⁴⁹ The 1985, 1988 and 1989 photographs clearly show the area around the existing place of use as being developed as a residential neighborhood, but perhaps this particular parcel had not yet had a

⁴⁴ Exhibit No. 42.

⁴⁵ Exhibit No. 27.

⁴⁶ Exhibit No. 59.

⁴⁷ Exhibit No. 42.

⁴⁸ Exhibit No. 27.

⁴⁹ Exhibit No. 59.

house built on it, but the existing place of use is clearly not irrigated. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 6 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁵⁰ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁵¹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 24, 1991.⁵² The 1985, 1988 and 1989 photographs clearly show the area around the existing place of use as being developed as a residential neighborhood, but perhaps this particular parcel had not yet had a house built on it, but the existing place of use is clearly not irrigated. The State Engineer finds the Protestant has proved five consecutive years of non-use. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

⁵⁰ Exhibit No. 42.

⁵¹ Exhibit No. 27.

⁵² Exhibit No. 59.

Parcel 7 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁵³ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁵⁴ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on July 2, 1991.⁵⁵ The State Engineer questions why the 1977 description is natural vegetation when Parcels 4 and 6 are in the exact same area and that in 1977 the land use was described as irrigation, while noting that for purposes of this analysis it is not that important. The 1985, 1988, 1989, 1990 and 1991 photographs clearly show the area around the existing place of use as being developed as a residential neighborhood and this particular parcel appears to have had a house built on it at least by 1988 showing that the place of use is clearly not irrigated. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 8 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁵⁶ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁵⁷ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 9, 1991.⁵⁸ The 1985, 1988 and 1989 photographs clearly show the area around the existing place of use as being developed as a residential neighborhood, but perhaps this particular parcel had not yet had a house built on it, but the existing

⁵³ Exhibit No. 42.

⁵⁴ Exhibit No. 27.

⁵⁵ Exhibit No. 59.

⁵⁶ Exhibit No. 42.

⁵⁷ Exhibit No. 27.

⁵⁸ Exhibit No. 59.

place of use is clearly not irrigated. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 9 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁵⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁶⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 26, 1991.⁶¹ The 1985, 1988, 1989, 1990 and 1991 photographs clearly show the existing place of use has been developed as part of a residential neighborhood and a house existed on the existing place of use since at least 1985. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 12 – The contract date is July 30, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁶² The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁶³ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as farmyard. In 1985, 1988,

⁵⁹ Exhibit No. 42.

⁶⁰ Exhibit No. 27.

⁶¹ Exhibit No. 59.

⁶² Exhibit No. 42.

⁶³ Exhibit No. 27.

1989, 1990, 1991 and 1992 the land use was described as farm structures. The water right on this parcel was dedicated to the City of Fernley on July 16, 1991.⁶⁴ Upon review of the 1977 photograph the State Engineer finds the photograph is not clear enough to make any land use determination and discounts the witness's testimony that the land use is a farmyard, and upon review of the 1985 and 1988 photographs, the State Engineer agrees there is sort of structure on a portion of the parcel and no portion of the existing place of use appears to be irrigated, but the quality of the photographs is not very good and not adequate to make land use determinations as critical as those being made here.

The 1989 photograph is much too blurry to make any accurate land use determination. While some sort of structure is visible in the 1990 and 1991 photographs the photographs are too blurry to make an adequate land use determination as to what is really taking place on the rest of the existing place of use. The State Engineer finds the Protestant has not proved five consecutive years of non-use by clear and convincing evidence; and therefore, has not proven its claims of forfeiture and/or abandonment.

Parcel 14 – The contract date is August 6, 1917. As to this parcel, the Tribe's allegations are forfeiture and abandonment.⁶⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁶⁶ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on August 5, 1991.⁶⁷ The 1985, 1988, 1989, 1990 and 1991 photographs clearly show the existing place of use has been developed as part of a residential neighborhood and a house existed on the existing place of use since at least late 1980s. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a

⁶⁴ Exhibit No. 59.

⁶⁵ Exhibit No. 42.

⁶⁶ Exhibit No. 27.

⁶⁷ Exhibit No. 59.

declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 15 – The contract date is December 20, 1907. As to this parcel, the Tribe’s allegation is abandonment.⁶⁸ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁶⁹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1985, 1988, 1989, 1990, 1991 and 1992 the land use on the existing place of use is described as residential. The water right on this parcel was dedicated to the City of Fernley on April 26, 1991.⁷⁰ Upon review of the 1977 aerial photograph, the State Engineer finds the existing place of use is clearly a residential parcel and the land use remains the same through all the other years of photographs.

The *Alpine* cases have held that 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. 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

The State Engineer finds the evidence of non-use spans 19 years and the Protestant has proved a use inconsistent with irrigation. However, the State Engineer finds the dedication of the water right to the City of Fernley prior to any claim of abandonment is substantial evidence of a lack of intent to abandon the water right and finds the water right is not subject to a declaration of abandonment.

⁶⁸ Exhibit No. 42.

⁶⁹ Exhibit No. 27.

⁷⁰ Exhibit No. 59.

Parcel 16 – The contract date is January 14, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁷¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁷² which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 30, 1991.⁷³ The 1977 photograph shows the existing place of use clearly as a residential parcel. The 1985, 1988, 1989, 1990 and 1991 photographs while being a lesser than desirable quality, that is blurry, still clearly show the existing place of use has been developed as a residential neighborhood. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is January 15, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 18 – The contract date is July 15, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁷⁴ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁷⁵ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use on the existing place of use was described as irrigated and on-farm supply ditch. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on March 15, 1991.⁷⁶ Upon review of the 1977 photograph, the State Engineer does not question the land use description. The remaining photographs, while somewhat blurry, show the area has been cleared for residential development, but it is not clear if a house had been built on this specific existing place of use. The State Engineer finds the Protestant has proved five consecutive years of non-use prior the dedication of the water right. While there may not be photographs for five

⁷¹ Exhibit No. 42.

⁷² Exhibit No. 27.

⁷³ Exhibit No. 59.

⁷⁴ Exhibit No. 42.

⁷⁵ Exhibit No. 27.

⁷⁶ Exhibit No. 59.

consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is January 15, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 19 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.⁷⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁷⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use on the existing place of use was described as irrigated. In 1985, 1988, 1989, 1990, 1991 and 1992 the land use on the existing place of use is described as residential. The water right on this parcel was dedicated to the City of Fernley on April 26, 1991.⁷⁹ Upon review of the 1977 aerial photograph, the State Engineer does not question the land use description. Review of the 1985, 1988, 1989, 1990 and 1991 photographs, while all blurry, all do show a residential area covering this existing place of use.

The State Engineer finds the Protestant has proved a period of non-use prior to the dedication of the water right and prior to the filing of the change application. From 1985 through 1991 the land use is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use and finds the Protestant has proved a use inconsistent with irrigation. However, the State Engineer finds the dedication of the water right to the City of Fernley prior to any claim of abandonment is substantial evidence of a lack of intent to abandon the water right and finds the water right is not subject to a declaration of abandonment.

Parcel 22 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁸⁰ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁸¹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and drain ditch. In

⁷⁷ Exhibit No. 42.

⁷⁸ Exhibit No. 27.

⁷⁹ Exhibit No. 59.

⁸⁰ Exhibit No. 42.

⁸¹ Exhibit No. 27.

1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on July 11, 1991.⁸² Upon review of the 1977 aerial photograph, the State Engineer does not question the land use description. Review of the 1985, 1988, 1989, 1990 and 1991 photographs, while all blurry, all do show a residential area covering this existing place of use. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 23 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁸³ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁸⁴ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and drain ditch. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 26, 1991.⁸⁵ Upon review of the 1977 aerial photograph, the State Engineer does not question the land use description. Review of the 1985, 1988, 1989, 1990 and 1991 photographs, while all blurry, all do show a residential area covering this existing place of use. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

⁸² Exhibit No. 59.

⁸³ Exhibit No. 42.

⁸⁴ Exhibit No. 27.

⁸⁵ Exhibit No. 59.

Parcel 24 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁸⁶ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁸⁷ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and drain ditch. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 24, 1991.⁸⁸ Upon review of the 1977 aerial photograph, the State Engineer does not question the land use description. Review of the 1985, 1988, 1989, 1990 and 1991 photographs, while all blurry, all do show a residential area covering this existing place of use. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 25 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁸⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁹⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and drain ditch. In 1985, 1988, 1989, 1990, 1991, and 1992 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 26, 1991.⁹¹ Upon review of the 1977 aerial photograph, the State Engineer does not question the land use description. Review of the 1985, 1988, 1989, 1990 and 1991 photographs, while all blurry, all do show a residential area covering this existing place of use. The State Engineer finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right. While there may not be

⁸⁶ Exhibit No. 42.

⁸⁷ Exhibit No. 27.

⁸⁸ Exhibit No. 59.

⁸⁹ Exhibit No. 42.

⁹⁰ Exhibit No. 27.

⁹¹ Exhibit No. 59.

photographs for five consecutive years, the land use from 1985 through 1991 is clearly not irrigated land and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 26 –The contract date is January 14, 1915. As to this parcel, the Tribe’s allegations are partial forfeiture and partial abandonment.⁹² The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”⁹³ which are its’ witnesses analyses from aerial photographs of the land use on the existing place of use. In 1977, 1985, 1988, 1989, and 1990 it described the land use as irrigated and farm structures. In 1991 and 1992 the land use was described as bare land. The State Engineer notes that the 1992 land use description was from a photograph taken after the application was filed on May 1, 1992. The water right on this parcel was dedicated to the City of Fernley on May 10, 1991.⁹⁴

The State Engineer is concerned as to the quality of the aerial photographs used to attempt to make land use descriptions as critical as those being made here. The Nevada Supreme Court requires the evidence provided in support of a forfeiture allegation must rise to the level of clear and convincing evidence. Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.⁹⁵ To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.⁹⁶ The Tribe provided evidence that at least 4.22 acres of the 8.40 acres requested for transfer was irrigated through 1990.⁹⁷ As to the remaining portion of the existing place of use, a review of Exhibit No. 30b, the 1977 aerial photograph, the evidence does not rise to the level of clear and convincing evidence. There is tree canopy on the remaining portion of the existing place of use and under some of that tree canopy it looks very

⁹² Exhibit No. 42.

⁹³ Exhibit No. 27.

⁹⁴ Exhibit No. 59.

⁹⁵ 1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

⁹⁶ *Id.* at 239.

⁹⁷ Exhibit No. 40.

similar to the area described as irrigated; otherwise it is impossible to tell what comprises the existing land use. As to the 1985 aerial photograph found in Exhibit No. 30cc, the land use does not appear to change from 1977, as is true for the 1988 aerial photograph found in Exhibit No. 30z. As to the 1989 and 1990 aerial photographs found in Exhibit Nos. 30x and 30s, respectively, they also are of too poor a quality to make any accurate land use descriptions. While they appear to be reflective that the land use is similar to that found in the 1977, 1985 and 1988 aerial photographs, the quality is really not adequate to rise the level of assurance the State Engineer believes is warranted in making land use descriptions as important as those being made here. The 1991 aerial photograph found in Exhibit No. 30 does appear to more accurately reflect the land use description of bare land, but the farm structures previously described that were not distinguishable under the tree canopy are no longer present. The State Engineer finds there is not clear and convincing evidence as to the remaining 4.18 acres to support a finding of either forfeiture or abandonment; therefore, the Protestant has not proven its claims of forfeiture and/or abandonment.

VI.

APPLICATION 61893

Application 61893 was filed on February 8, 1996.

During the administrative hearing, the Hearing Officer determined that some of the photographs, specifically the 1992 and 1993 photographs, were of insufficient quality to rise to the level of clear and convincing evidence in the making of land use determinations and there were not photographs of five consecutive years.⁹⁸ However, as previously noted, later in the hearing after cross-examination and redirect the Hearing Officer indicated every photograph would be reviewed and decisions made to the quality and sufficiency of the evidence. Upon review of the evidence, the State Engineer looked at every photograph and reviewed every parcel individually and finds that while one photograph in the middle of a five year period may not have been of sufficient quality to rise to the level of clear and convincing evidence as to making a land use determination, when taking the series of photographs together it became obvious that even though blurry the land use was the same as on other photographs of better quality. However, in some instances the State

⁹⁸ Transcript, pp. 341-347.

Engineer finds the quality of the photographs was just too poor to be making land use determinations as critical as those being made here.

Parcel 2 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.⁹⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁰⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 27, 1993.¹⁰¹ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of evidence of five consecutive years of non-use (1989-1993); therefore, the Protestant did not prove a five-year period of non-use prior to the dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 3 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁰² The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁰³ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described bare land. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 27, 1993.¹⁰⁴ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of evidence of five consecutive years of non-use (1989-1993); therefore, the Protestant did

⁹⁹ Exhibit No. 43.

¹⁰⁰ Exhibit No. 28.

¹⁰¹ Exhibit No. 63.

¹⁰² Exhibit No. 43.

¹⁰³ Exhibit No. 28.

¹⁰⁴ Exhibit No. 63.

not prove a five-year period of non-use prior to the dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of non-use adequate to support of finding of abandonment.

Parcel 4 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁰⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁰⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and bare land. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 27, 1993.¹⁰⁷ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of evidence of five consecutive years of non-use (1989-1993); therefore, the Protestant did not prove a five-period of non-use prior to the dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 5 –The contract date is February 16, 1910. As to this parcel, the Tribe’s allegation is abandonment.¹⁰⁸ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁰⁹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 17, 1992.¹¹⁰ Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the

¹⁰⁵ Exhibit No. 43.

¹⁰⁶ Exhibit No. 28.

¹⁰⁷ Exhibit No. 63.

¹⁰⁸ Exhibit No. 43.

¹⁰⁹ Exhibit No. 28.

¹¹⁰ Exhibit No. 63.

running of evidence of any prolonged period of non-use (1989-1993); therefore, the Protestant did not prove a prolonged period of non-use prior to the dedication of the water right sufficient to support of finding of abandonment.

Parcel 8 – The contract date is July 30, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹¹¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹¹² which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989 the land use was described as inconclusive. In 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as bare land. The water right on this parcel was dedicated to the City of Fernley on April 24, 1992.¹¹³ Upon review of the 1989 photograph, the State Engineer agrees the photograph is too blurry to make any conclusive land use determination. Upon review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs, the State Engineer finds he does not agree with the Protestant’s land use interpretations and finds, while the photographs are blurry, the land use at the existing place of use appears to be irrigated lands. The State Engineer finds he is discounting the Protestant’s evidence that the land use is bare land and finds the Protestant has not proved five consecutive years of non-use by clear and convincing evidence; therefore, the Protestant has not proven its claim of forfeiture and/or abandonment.

Parcel 10 – The contract date is April 29, 1907. As to this parcel, the Tribe’s allegation is abandonment.¹¹⁴ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹¹⁵ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on June 29, 1992.¹¹⁶ Upon review of all the photographs, the State Engineer finds they are all too blurry as

¹¹¹ Exhibit No. 43.

¹¹² Exhibit No. 28.

¹¹³ Exhibit No. 63.

¹¹⁴ Exhibit No. 43.

¹¹⁵ Exhibit No. 28.

¹¹⁶ Exhibit No. 63.

to this parcel to make any land use determination that rises to the level of clear and convincing evidence of the land use on the existing place of use. Therefore, the Protestant did not prove its claim of abandonment.

Parcel 11 – The contract date is January 10, 1946. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹¹⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹¹⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as bare land. The water right on this parcel was dedicated to the City of Fernley on December 28, 1992.¹¹⁹ Upon review of all the photographs, the State Engineer finds they are all too blurry as to this parcel to make any land use determination that rises to the level of clear and convincing evidence of the land use on the existing place of use. The State Engineer finds the Protestant did not prove its claim of forfeiture and/or abandonment.

Parcel 12 – The contract date is February 16, 1910. As to this parcel, the Tribe’s allegation is abandonment.¹²⁰ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹²¹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on November 16, 1992.¹²² Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of any prolonged period of non-use; therefore, the Protestant did not prove a prolonged period of non-use prior to the dedication of the water right sufficient to support of finding of abandonment.

¹¹⁷ Exhibit No. 43.

¹¹⁸ Exhibit No. 28.

¹¹⁹ Exhibit No. 63.

¹²⁰ Exhibit No. 43.

¹²¹ Exhibit No. 28.

¹²² Exhibit No. 63.

Parcel 15 – The contract date is July 15, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹²³ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹²⁴ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on October 5, 1992.¹²⁵ Review of the 1989 photograph shows it is too blurry to make a definitive land use determination, but it does appear to be an area being developed as a residential area; however, the evidence does not rise to the level of clear and convincing. In this instance, the 1990, 1991, 1992, 1993, 1994 and 1995 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a period of non-use prior to the dedication of the water right sufficient to support of finding of either forfeiture or abandonment.

Parcel 17 – The contract date is July 15, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹²⁶ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹²⁷ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 2, 1993.¹²⁸ Review of the 1989 photograph indicates the area does appear to be one that is being developed as a residential area; however, it is too blurry to make a definitive land use determination; however, the evidence does not rise to the level of clear and convincing. In this instance, the 1990, 1991, 1992, 1993, 1994 and 1995 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a five- year period of non-use

¹²³ Exhibit No. 43.

¹²⁴ Exhibit No. 28.

¹²⁵ Exhibit No. 63.

¹²⁶ Exhibit No. 43.

¹²⁷ Exhibit No. 28.

¹²⁸ Exhibit No. 63.

prior to dedication of the water right sufficient to support of finding of forfeiture and did not prove a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 18 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.¹²⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹³⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 13, 1992.¹³¹ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of any prolonged period of non-use; therefore, the Protestant did not prove a prolonged period of non-use prior to dedication of the water right sufficient to support of finding of abandonment.

Parcel 21 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.¹³² The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹³³ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 28, 1993.¹³⁴ Review of the 1977 photograph shows this existing place of use as a corner lot within a subdivision, but it does not appear that a house is on the lot, noting that the quality of the photograph as to this particular parcel is not that good and that there is no evidence of land use between the 1977 photograph and the 1989 photograph. Therefore, the State Engineer finds there is not clear and convincing evidence of the land use between those times. Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs all show a residential area covering this existing place of use. The State Engineer finds the Protestant proved a period of non-use (1989-1993) prior to dedication of the water right; however, this is not a prolonged period of non-use and the water right was

¹²⁹ Exhibit No. 43.

¹³⁰ Exhibit No. 28.

¹³¹ Exhibit No. 63.

¹³² Exhibit No. 43.

¹³³ Exhibit No. 28.

¹³⁴ Exhibit No. 63.

dedicated to the City of Fernley prior to the assertion of any claim of abandonment and as such there is a demonstration of a lack of intent to abandon the water right.

Parcel 23 – The contract date is January 14, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹³⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹³⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on December 20, 1993.¹³⁷ Review of the 1989 photograph shows it is very blurry, but it does appear to be an area being developed as a residential area. In this instance the 1990, 1991 and 1992 photographs all show a residential area covering this existing place of use. The State Engineer does not believe the existing place of use is on the photograph referenced for 1993, but the 1994 photograph shows the same residential area covering this existing place of use. While problems were pointed out with the quality of some of the photographs,¹³⁸ the State Engineer finds in this instance they are of sufficient quality to show the land use on the existing place of use and finds the Protestant has proved five consecutive years of non-use prior to the dedication of the water right and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is January 14, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 24 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹³⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁴⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel

¹³⁵ Exhibit No. 43.

¹³⁶ Exhibit No. 28.

¹³⁷ Exhibit No. 63.

¹³⁸ Transcript, pp. 340-341.

¹³⁹ Exhibit No. 43.

¹⁴⁰ Exhibit No. 28.

was dedicated to the City of Fernley on January 6, 1994.¹⁴¹ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a prolonged period of non-use prior to dedication of the water right sufficient to support a finding of either forfeiture or abandonment.

Parcel 26 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.¹⁴² The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁴³ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated, natural vegetation and canal. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 16, 1994.¹⁴⁴ Review of the 1989 aerial photograph, while being quite blurry, does appear to demonstrate that multiple buildings cover the existing place of use and it is certainly not an irrigated area. Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs show the existing place of use is covered by a residential area. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of a prolonged period of non-use; therefore, the Protestant did not prove a prolonged period of non-use prior to dedication of the water right sufficient to support a finding of abandonment.

Parcel 27 – The contract date is February 16, 1910. As to this parcel, the Tribe’s allegation is abandonment.¹⁴⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁴⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and farm structures. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 25, 1994.¹⁴⁷ Review of the 1989 aerial

¹⁴¹ Exhibit No. 63.

¹⁴² Exhibit No. 43.

¹⁴³ Exhibit No. 28.

¹⁴⁴ Exhibit No. 63.

¹⁴⁵ Exhibit No. 43.

¹⁴⁶ Exhibit No. 28.

¹⁴⁷ Exhibit No. 63.

photograph does not support the land use determination of residential. The photograph is of insufficient quality to make any accurate land use determination as to this parcel. The parcel while not as green as some of the other irrigated fields does not appear to be occupied by any structures. In the 1990 photograph, the northern portion of the parcel appears similar to irrigated fields to the west that are clearly seen on the 1989 photograph. The 1991, 1992, 1993 and 1994 photographs are again inconclusive as to any land use determination. The State Engineer finds the Protestant has not proved a prolonged period of non-use by clear and convincing evidence of non-use; and therefore, has not proven its claim of abandonment.

Parcel 29 – The contract date is January 10, 1946. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁴⁸ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁴⁹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on December 16, 1993.¹⁵⁰ Review of the 1989, while noting it is blurry, appears to show the existing place of use is an area covered by large residential lots; however, it also appears there may be some small areas of irrigated land on those parcels. The State Engineer finds this photograph does not rise to the level of clear and convincing evidence for making an accurate land use determination. The same is true as to the 1990, 1991 and 1992 photographs, particularly since it is difficult to tell exactly where this existing place of use is on the photographs and as seen in the 1992 photograph there is what appears to be a small patch of irrigated ground in the area. The State Engineer finds the Protestant has not proved five consecutive years of non-use by clear and convincing evidence; and therefore, has not proven its claim of abandonment.

¹⁴⁸ Exhibit No. 43.

¹⁴⁹ Exhibit No. 28.

¹⁵⁰ Exhibit No. 63.

Parcel 31 – The contract date is January 10, 1946. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁵¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁵² which are its’ witnesses analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, and 1990 it described the land use as irrigated and bare land. In 1991, 1992, 1993, 1994 and 1995 the land use was described as bare land. The water right on this parcel was dedicated to the City of Fernley on April 13, 1994.¹⁵³

The Protestant’s evidence describing the entire parcel as bare land begins in the summer of 1991. Having that as the starting point of zero for counting five consecutive years of non-use, the first full year would have been mid-1991 to mid-1992, year two would have been mid-1992 to mid-1993, year three would have been mid-1993 to mid-1994, year four would have been mid-1994 to mid-1995, and year five would have been mid-1995 to mid-1996; however, the application was filed on February 8, 1996. Thus, the Protestant did not prove five consecutive years of non-use as to the entire parcel of land. While the Protestant alleged that in the years 1977, 1989 and 1990 the land use was a portion irrigated and a portion bare land, there was no evidence provided to show which portion of the parcel the Protestant alleges was irrigated and which portion was bare land. The State Engineer finds the Protestant did not prove five consecutive years of non-use by clear and convincing evidence to any specifically identifiable portion of Parcel 31 to support a finding of forfeiture and did not prove a prolonged period of non-use adequate to support a finding of abandonment; therefore, the Protestant did not prove its claims of forfeiture or abandonment.

Parcel 34 - The contract date is April 29, 1907. As to this parcel, the Tribe’s allegation is abandonment.¹⁵⁴ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁵⁵ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 13, 1994.¹⁵⁶

Upon review of all the photographs, the State Engineer finds, while some are blurry, the existing

¹⁵¹ Exhibit No. 43.

¹⁵² Exhibit No. 28.

¹⁵³ Exhibit No. 63.

¹⁵⁴ Exhibit No. 43.

¹⁵⁵ Exhibit No. 28.

¹⁵⁶ Exhibit No. 63.

place of use is obviously within a residential area and there is no appearance of irrigation. The Applicant provided evidence that all of the taxes and assessments had been paid.¹⁵⁷ The State Engineer finds the Protestant has proved a period of non-use by clear and convincing evidence of non-use prior to the dedication of the water right and the use is inconsistent with irrigation; however, the water right was dedicated to the City of Fernley prior to any claim of abandonment precluding an intent to abandon the water right.

Parcel 37 –The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁵⁸ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁵⁹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on March 1, 1994.¹⁶⁰ Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs show the existing place of use is an area covered by a residential development. The State Engineer finds there is not clear and convincing evidence for the years 1977 – 1989 to support any claim of forfeiture and/or abandonment. The State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a five-year period of non-use prior to dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of on-use adequate to support a finding of abandonment.

Parcel 38 – The contract date is January 10, 1946. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁶¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁶² which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as bare land. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this

¹⁵⁷ Transcript, pp. 556-563; Exhibit No. 71.

¹⁵⁸ Exhibit No. 43.

¹⁵⁹ Exhibit No. 28.

¹⁶⁰ Exhibit No. 63.

¹⁶¹ Exhibit No. 43.

¹⁶² Exhibit No. 28.

parcel was dedicated to the City of Fernley on April 29, 1993.¹⁶³ Review of the 1989 photograph, while noting it is blurry, appears to show the existing place of use is an area covered by large residential lots; however, it also appears there may some small areas of irrigated land on those parcels. The State Engineer finds this photograph does not rise to the level of clear and convincing evidence for making an accurate land use determination. The same is true as to the 1990, 1991 and 1992 photographs, particularly since it is difficult to tell exactly where this existing place of use is on the photographs and as seen in the 1992 photograph there is what appears to be a small patch of irrigated ground in the area. The State Engineer finds the Protestant did not prove a five-year period of non-use prior to dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of on-use adequate to support a finding of abandonment.

Parcel 39 – The contract date is April 29, 1907. As to this parcel, the Tribe’s allegation is abandonment.¹⁶⁴ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁶⁵ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on July 19, 1993.¹⁶⁶ Upon review of all the photographs, the State Engineer finds they are all too blurry as to this parcel to make any land use determination that rises to the level of clear and convincing evidence of the land use on the existing place of use. The State Engineer finds the Protestant did not prove a prolonged period of non-use adequate to support a finding of abandonment; therefore, it did not prove its claim of abandonment.

Parcel 40 - The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁶⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁶⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right

¹⁶³ Exhibit No. 63.

¹⁶⁴ Exhibit No. 43.

¹⁶⁵ Exhibit No. 28.

¹⁶⁶ Exhibit No. 63.

¹⁶⁷ Exhibit No. 43.

¹⁶⁸ Exhibit No. 28.

on this parcel was dedicated to the City of Fernley on January 12, 1994.¹⁶⁹ Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs show the existing place of use is an area covered by a residential development. The State Engineer finds there is not clear and convincing evidence for the years 1977 – 1989 to support any claim of forfeiture and/or abandonment. The State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a period of non-use prior to dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 41 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.¹⁷⁰ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"¹⁷¹ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on December 20, 1993.¹⁷² Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of a prolonged period of non-use; therefore, the Protestant did not prove a prolonged period of non-use prior to dedication of the water right sufficient to support of finding of abandonment.

Parcel 42 – The contract date is January 14, 1915. As to this parcel, the Tribe's allegations are forfeiture and abandonment.¹⁷³ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"¹⁷⁴ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as bare land. In 1989, 1990, 1991, 1992, and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on December 28, 1993.¹⁷⁵ Review of the 1989 photograph shows it

¹⁶⁹ Exhibit No. 63.

¹⁷⁰ Exhibit No. 43.

¹⁷¹ Exhibit No. 28.

¹⁷² Exhibit No. 63.

¹⁷³ Exhibit No. 43.

¹⁷⁴ Exhibit No. 28.

¹⁷⁵ Exhibit No. 63.

is very blurry, but it does appear to be an area being developed as a residential area. However, in the 1977 photograph there are no structures built and only a road and cul-de-sac are in existence and there is no evidence between 1977 and 1989 to indicate whether water was used in the area or not. The State Engineer finds there is not clear and convincing evidence for the years 1977 – 1989 to support any claim of forfeiture and/or abandonment. In this instance the 1990, 1991, 1992 and 1994 photographs all show a residential area covering this existing place of use. While problems were pointed out with the quality of some of the photographs,¹⁷⁶ the State Engineer finds in this instance they are of sufficient quality to show the land use on the existing place of use and finds the Protestant has proved five consecutive years of non-use and the State Engineer finds this is clear and convincing evidence of non-use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of the five consecutive years of non-use; therefore, the Protestant did not prove a period of non-use prior to the dedication of the water right sufficient to support a finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 44 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁷⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁷⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on January 28, 1994.¹⁷⁹ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. The State Engineer finds there is not clear and convincing evidence for the years 1977 – 1989 to support any claim of forfeiture and/or abandonment. The State Engineer finds the Protestant has proved five consecutive years of non-use (1989-1994) and the State Engineer finds this is clear and convincing evidence of non-use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of the five consecutive years of non-use; therefore, the

¹⁷⁶ Transcript, pp. 340-341.

¹⁷⁷ Exhibit No. 43.

¹⁷⁸ Exhibit No. 28.

¹⁷⁹ Exhibit No. 63.

Protestant did not prove a period of non-use prior to the dedication of the water right sufficient to support a finding of forfeiture or a prolonged period of on-use adequate to support a finding of abandonment.

Parcel 46 – The contract date is January 14, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁸⁰ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁸¹ which are its’ witnesses analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated, farm structures, bare land, on-farm supply ditch and canal. In 1989, 1990, 1991, 1993, 1993 and 1994, the land use is described as bare land and canal. The water right on this parcel was dedicated to the City of Fernley on March 18, 1994.¹⁸² No photograph or land use description was provided for 1995. The State Engineer again notes a concern with the quality of the copies of the aerial photographs being presented to support the land use descriptions. Every time the aerial photographs are being copied they are losing resolution and becoming blurry and distinctive features such as furrows that may have been seen are being lost. The Protestant’s witnesses testified that as to the land use in 1997 that 2/3rds – “just eyeballing it”¹⁸³ - was irrigated. The State Engineer finds there is not clear and convincing evidence for the years 1977 – 1989 to support any claim of forfeiture and/or abandonment. However, by 1989 the land use description no longer has any indication of irrigation. The State Engineer’s review of the aerial photographs is that the 1989 photograph is far to blurry to make any land use description that can rise to the level of clear and convincing evidence and all of the photographs from 1989 through 1995 do not appear to be visually distinct from the 1977 photograph. The 1990 photograph has the same lack of resolution and was taken in December. As to the 1991 photograph, while the field is not green as are some others in the photograph, the existing place of use looks very similar to the field just to the left, which very much looks like land that has been in recent production due to vertical lines. If the photograph was of better resolution these lines would be easier to see and the State Engineer believes they indicate irrigated fields. Reviewing the 1992 photograph, the existing place of use appears much like fields in the lower

¹⁸⁰ Exhibit No. 43.

¹⁸¹ Exhibit No. 28.

¹⁸² Exhibit No. 63.

¹⁸³ Transcript, p. 246.

right-hand portion of the photograph, which are more obviously fields in recent production and again the quality of the photograph is not adequate to rise to the level of clear and convincing evidence to support land use determinations as critical as those the State Engineer is being asked to make. The 1993 photograph barely covers any of the existing place of use and again appears to have been taken in the winter as demonstrated by the long shadows being cast by the trees. The 1994 photograph is again of questionable quality to make these types land use determinations. The State Engineer finds he is discounting the testimony provided by the Protestant's witness and finds the Protestant did not prove five years of non-use by clear and convincing evidence sufficient to support a finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 47 – The contract date is May 3, 1907. As to this parcel, the Tribe's allegation is abandonment.¹⁸⁴ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁸⁵ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 25, 1994.¹⁸⁶ Upon review of the 1989 photograph, the State Engineer finds the quality of the photograph is too poor to make any conclusive land use determination particularly since the area around what may be a rural residential structure looks much like the irrigated fields nearby. Review of the 1990 photograph is indeterminate in light of the finding above, because the photograph is obviously taken in the winter and it cannot be determined if any of the area on this existing place of use may be irrigated or not. The 1991, 1992 and 1993 photographs present similar type problems. The 1994 photograph is too dark and blurry and the 1995 photograph is again not determinative. The State Engineer finds the Protestant has not proved a prolonged period of non-use by clear and convincing evidence of non-use adequate to support of finding of abandonment.

¹⁸⁴ Exhibit No. 43.

¹⁸⁵ Exhibit No. 28.

¹⁸⁶ Exhibit No. 63.

Parcel 48 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁸⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁸⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1989, 1990, 1991, 1992, 1993, 1994 and 1995 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on December 30, 1993.¹⁸⁹ Review of the 1989, 1990, 1991, 1992, 1993, 1994 and 1995 photographs show the existing place of use is an area covered by a residential development. The State Engineer finds the Protestant has proved five consecutive years of non-use (1989-1995) and the State Engineer finds this is clear and convincing evidence of non-use; however, the State Engineer finds the evidence insufficient between 1977 and 1989 to prove non-use of the water right during that period of time. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of the five consecutive years of non-use; therefore, the Protestant did not prove a five-year period of non-use prior to the dedication of the water right sufficient to support a finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 51 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.¹⁹⁰ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁹¹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on December 28, 1993.¹⁹² Review of the 1977, 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. The State Engineer finds the Protestant has proved a period of non-use prior to dedication of the water right and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds the Protestant has proved a use

¹⁸⁷ Exhibit No. 43.

¹⁸⁸ Exhibit No. 28.

¹⁸⁹ Exhibit No. 63.

¹⁹⁰ Exhibit No. 43.

¹⁹¹ Exhibit No. 28.

¹⁹² Exhibit No. 63.

inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of intent to abandon the water right.

Parcel 52 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.¹⁹³ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁹⁴ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 20, 1994.¹⁹⁵ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of a prolonged period of non-use and as such there is a demonstration of a lack of intent to abandon the water right and the Protestant did not prove a prolonged period of non-use prior to dedication of the water right sufficient to support a finding of abandonment.

Parcel 60 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁹⁶ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”¹⁹⁷ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 20, 1994.¹⁹⁸ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a five-year period of non-use prior to dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

¹⁹³ Exhibit No. 43.

¹⁹⁴ Exhibit No. 28.

¹⁹⁵ Exhibit No. 63.

¹⁹⁶ Exhibit No. 43.

¹⁹⁷ Exhibit No. 28.

¹⁹⁸ Exhibit No. 63.

Parcel 61 – The contract date is August 6, 1917. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.¹⁹⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁰⁰ which are its’ witnesses analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated, on-farm supply ditch and natural vegetation. The area that was described as natural vegetation is mostly that portion of the western portion of the existing place of use and most of the eastern portion was irrigated.²⁰¹ In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as bare land. The water right on this parcel was dedicated to the City of Fernley on May 9, 1994, which is a month before the running of the five-years demonstrated by the 1994 photograph.²⁰² After reviewing the aerial photographs, the State Engineer agrees with the Protestant’s description of bare land from 1989 through the filing of the change application. However, the 1977 photograph shows most of the area as irrigated and there is insufficient evidence to delineate any specific portion that may not have been irrigated. The State Engineer finds the Protestant proved five years of non-use from mid-1989 through the filing of the change application in early 1996. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a five-year period of non-use prior to the dedication of the water right sufficient to support of finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 62 - The contract date is April 29, 1907. As to this parcel, the Tribe’s allegation is abandonment.²⁰³ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁰⁴ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 6, 1994.²⁰⁵ Review of the 1989 photograph shows that the

¹⁹⁹ Exhibit No. 43.

²⁰⁰ Exhibit No. 28.

²⁰¹ Transcript, pp. 261-263.

²⁰² Exhibit No. 63.

²⁰³ Exhibit No. 43.

²⁰⁴ Exhibit No. 28.

²⁰⁵ Exhibit No. 63.

aerial photograph is of insufficient quality to be able to make any reasonably accurate land use determination. The same can be said of the 1990 photograph. The 1990, 1991, 1992, 1993 and 1994 photographs appear to show a rural type residential area; however, the photographs are too blurry to really make any accurate determination that all the land use is residential. The State Engineer finds the Protestant did not prove a prolonged period of non-use by clear and convincing evidence; therefore, the Protestant did not prove its claim of abandonment.

Parcel 64 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.²⁰⁶ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁰⁷ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 11, 1994.²⁰⁸ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a five-year period of non-use prior to dedication of the water right sufficient to support a finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 66 - The contract date is May 3, 1907. As to this 6.53-acre parcel, the Tribe’s allegation is abandonment.²⁰⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²¹⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as structures. In 1989, 1990, 1991, 1992 and 1993 the land use was described as bare land and residential. In 1994 and 1995 the land use was described as residential and road. The water rights on the two parcels comprising Parcel 66 were dedicated to the City of Fernley on May 13, 1994, and March 11, 1994.²¹¹ Upon review of the 1977 aerial photograph the State Engineer finds he does not agree with the Protestant’s land use

²⁰⁶ Exhibit No. 43.

²⁰⁷ Exhibit No. 28.

²⁰⁸ Exhibit No. 63.

²⁰⁹ Exhibit No. 43.

²¹⁰ Exhibit No. 28.

²¹¹ Exhibit No. 63.

description of structures, but rather finds the existing place of use looks like an agricultural field. Review of the 1989 aerial photograph gives the State Engineer pause, as the photograph in this area is not of very good quality, but noting the existing place of use does not appear to be an irrigated field. However, the State Engineer would not agree with the determination of the land use of residential as to the photograph is just not of sufficient quality to make that determination. Review of the 1990 photograph shows the photograph was taken in the winter and looks to have outlines of agricultural fields. The 1991, 1992 and 1993 photographs have the same problem as the area that looks to have been or is fields is similar in color to other fields in the photographs. The 1994 photograph is too dark to make an accurate land use determination; however, by 1995, the land use is obviously not in irrigation. The State Engineer finds the Protestant did not prove a prolonged period of non-use by clear and convincing evidence of non-use; therefore, the Protestant did not prove its claim of abandonment.

Parcel 66 – The contract date is February 2, 1910. As to this 0.96-acre parcel, the Tribe’s allegation is abandonment.²¹² The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²¹³ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation, irrigated. In 1990, 1991 and 1992 the land use was described as natural vegetation. In 1993 the land use was described as bare land and in 1994 and 1995 the land use was described as residential. The water rights on the two parcels comprising Parcel 66 were dedicated to the City of Fernley on May 13, 1994, and March 11, 1994.²¹⁴ Upon review of the 1977 aerial photograph the State Engineer finds he does not agree with the Protestant’s land use description of natural vegetation and irrigation, but rather finds the existing place of use looks like an agricultural field. Review of the 1990 photograph shows the photograph was taken in the winter and looks to have outlines of agricultural fields. The 1991, 1992 and 1993 photographs have the same problem as the area that looks to have been or is fields is similar in color to other fields in the photographs. The 1994 photograph is too dark to make an accurate land use determination; however, by 1995, the land use is obviously not in irrigation. The State Engineer finds the Protestant did not prove a prolonged period of non-use by clear and

²¹² Exhibit No. 43.

²¹³ Exhibit No. 28.

convincing evidence of non-use; therefore, the Protestant did not prove its claim of abandonment.

Parcel 67 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.²¹⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²¹⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1990, 1991, 1992, 1993 and 1994 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 19, 1994.²¹⁷ Review of the 1989, 1990, 1991, 1992, 1993 and 1994 photographs all show a residential area covering this existing place of use. However, the State Engineer finds the water right was dedicated to the City of Fernley prior to the running of five consecutive years of non-use; therefore, the Protestant did not prove a five-year period of non-use prior to dedication of the water right sufficient to support a finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

Parcel 69 – The contract date is February 2, 1910. As to this parcel, the Tribe’s allegation is abandonment.²¹⁸ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²¹⁹ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1990 and 1991 the land use was described as natural vegetation. In 1994 and 1995 the land use was described as bare land. The water right on this parcel was dedicated to the City of Fernley on May 19, 1994.²²⁰ Upon review of the photographs, the State Engineer agrees with the Protestant’s land use descriptions and finds no water was placed to beneficial on this parcel from at least 1977 to the time of dedication of the water right and the filing of the application.

The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²²¹

²¹⁴ Exhibit No. 63.

²¹⁵ Exhibit No. 43.

²¹⁶ Exhibit No. 28.

²¹⁷ Exhibit No. 63.

²¹⁸ Exhibit No. 43.

²¹⁹ Exhibit No. 28.

²²⁰ Exhibit No. 63.

²²¹ Transcript, pp. 555-563, Exhibit No. 71.

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. The State Engineer finds there is evidence of non-use spanning 17 years prior to the dedication of the water right. However, the Protestant did not prove a use inconsistent with irrigation and there is evidence of the payment of taxes and assessments and dedication of the water right; therefore, the State Engineer finds the Protestant did not prove its claim of abandonment.

VII.

APPLICATION 63277

Application 63277 was filed on July 24, 1997.

During the administrative hearing, the Hearing Officer determined that some of the photographs, specifically the 1996 photographs, were of insufficient quality to rise to the level of clear and convincing evidence in the making of land use determinations; however, the Hearing Officer also indicated that even with that general statement every parcel would be evaluated to determine the sufficiency of the evidence.²²² Upon review of the evidence, the State Engineer looked at every photograph and reviewed every parcel individually and finds that while one photograph in the middle of a five year period may not have been of sufficient quality to rise to the level of clear and convincing evidence as to making a land use determination, when taking the series of photographs together it became obvious that the land use was the same as on other photographs of better quality. However, in some instances the State Engineer finds the quality of the photographs was just too poor to be making land use determinations as critical as those being made here.

²²² Transcript, pp. 341-347.

Parcel 1 – The contract date is February 2, 1910. As to this parcel, the Tribe’s allegation is abandonment.²²³ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²²⁴ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 and 1992 the land use was described as natural vegetation. In 1993 the land use was described as bare land and in 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 22, 1996.²²⁵ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²²⁶ Upon review of the 1977 aerial photograph, the State Engineer believes this existing place of use is west and outside of the area described in Parcel 66 under Application 61893 where the State Engineer did not agree with the Protestant’s land use description. Upon review of the 1992 and 1993 photographs, the State Engineer finds it can not be determined if the land use is native vegetation or bare land. The existing place of use is barely covered by the 1994 photograph, the 1995 photograph is too dark to make any accurate land use determination and the 1996 photograph is too blurry to make any accurate land use determination. While it does not appear the area was irrigated, the State Engineer finds the photographs as to this parcel do not rise to the level of clear and convincing evidence to support a land use determination as critical as those being made here. Therefore, the State Engineer finds the Protestant did not prove its claim of abandonment.

Parcel 2 - The contract date is February 2, 1910. As to this parcel, the Tribe’s allegation is abandonment.²²⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²²⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1992, 1993, 1995, 1996 and 1997 the land use was described as natural vegetation. The water right on this parcel was dedicated to the City of Fernley on February 11, 1994.²²⁹ The Applicant provided testimony and evidence that all the taxes and assessments are

²²³ Exhibit No. 44.

²²⁴ Exhibit No. 29.

²²⁵ Exhibit No. 67.

²²⁶ Transcript, pp. 555-563, Exhibit No. 71.

²²⁷ Exhibit No. 44.

²²⁸ Exhibit No. 29.

²²⁹ Exhibit No. 67.

current as to the existing place of use.²³⁰ Upon review of all the aerial photographs, the State Engineer finds the Protestant has proved a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use.

However, 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'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.

The State Engineer finds the Protestant has proved a period of non-use prior to the dedication of the water right, but the use is not inconsistent with irrigation and there is evidence of the payment of taxes and assessments and the water right was dedicated to the City prior to any allegation of abandonment; therefore, there is no evidence of an intent to abandon the water right and the Protestant has not proven its claim of abandonment.

Parcel 3 – The contract date is either December 30, 1907, or May 3, 1912. As to this parcel, the Tribe's allegation is abandonment.²³¹ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²³² which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated and farm structures. In 1989 the land use was described as inconclusive and in 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 10, 1996.²³³ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²³⁴ Upon review of the 1992, 1993, 1994, 1995, 1996 and 1997 photographs, the State Engineer finds that none of them are of sufficient quality as to this parcel to make an accurate land use determination and the Protestant has not proved a prolonged period of non-use by clear and convincing evidence. Therefore, the State Engineer finds the Protestant has not proven its claim of abandonment.

²³⁰ Transcript, pp. 555-563, Exhibit No. 71.

²³¹ Exhibit No. 44.

²³² Exhibit No. 29.

²³³ Exhibit No. 67.

²³⁴ Transcript, pp. 555-563, Exhibit No. 71.

Parcel 4 – The contract date is February 2, 1910. As to this parcel, the Tribe’s allegation is abandonment.²³⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²³⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as natural vegetation. The water right on this parcel was dedicated to the City of Fernley on February 16, 1996.²³⁷ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²³⁸

Upon review of all the aerial photographs, the State Engineer finds the Protestant has proved a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right. However, 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’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.

The State Engineer finds the Protestant has proved a period of non-use prior to the dedication of the water right, but the use is not inconsistent with irrigation and there is evidence of the payment of taxes and assessments and the water right was dedicated to the City prior to any allegation of abandonment; therefore, there is no evidence of an intent to abandon the water right and the Protestant has not proven its claim of abandonment.

Parcel 5 – The contract date is April 29, 1907. As to this parcel, the Tribe’s allegation is abandonment.²³⁹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁴⁰ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1992, 1996 and 1997 the land use was described as natural vegetation. The water right on this parcel was dedicated to the City of Fernley on March 12, 1996.²⁴¹ The Applicant provided testimony and evidence that all the taxes and assessments are

²³⁵ Exhibit No. 44.

²³⁶ Exhibit No. 29.

²³⁷ Exhibit No. 67.

²³⁸ Transcript, pp. 555-563, Exhibit No. 71.

²³⁹ Exhibit No. 44.

²⁴⁰ Exhibit No. 29.

²⁴¹ Exhibit No. 67.

current as to the existing place of use.²⁴² The map that accompanied Application 63277 indicates that the existing place of use is on the north side of the diagramed road. Upon review of the photographs, the State Engineer notes that none of the 1990 series of aerial photographs are of very good quality, but having said that, it still can be seen on all of them that while south of the road there are irrigated fields north of the road such fields do not exist. The Protestant's witness identifies the land use on the existing place of use as natural vegetation, but all that can really be said is that it appears to be an area with a tree canopy, but there certainly is no indication of irrigation on the north side of the road.

The State Engineer finds the Protestant has proved a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use. However, 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'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.

The State Engineer finds the Protestant has proved a period of non-use prior to the dedication of the water right, but the use is not inconsistent with irrigation and there is evidence of the payment of taxes and assessments and the water right was dedicated to the City prior to any allegation of abandonment; therefore, there is no evidence of an intent to abandon the water right and the Protestant has not proven its claim of abandonment.

Parcel 6 – The contract date is January 14, 1915. As to this parcel, the Tribe's allegations are forfeiture and abandonment.²⁴³ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁴⁴ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1992, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on November 9, 1995.²⁴⁵ The Applicant provided testimony and evidence that all the taxes and assessments are

²⁴² Transcript, pp. 555-563, Exhibit No. 71.

²⁴³ Exhibit No. 44.

²⁴⁴ Exhibit No. 29.

²⁴⁵ Exhibit No. 67.

current as to the existing place of use.²⁴⁶

Upon review of the 1977 aerial photograph it can be clearly seen that the existing place of use is in a row of residential units. The 1989 and 1997 photographs are quite blurry and the 1994 photograph is quite dark, but the row of residential units can still be discerned. The units can also be seen on the 1992 photograph. The State Engineer finds the Protestant has proved five consecutive years of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right. The State Engineer finds since the contract date is January 14, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 7 – The contract date is July 15, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.²⁴⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁴⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 2, 1995.²⁴⁹ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁵⁰

Upon review of the photographs, while the 1989 photograph is blurry it can be seen the area is a developing residential area. The 1992 while dark still demonstrates the same residential area, which is fairly clearly seen on the 1993 photograph. The quality of the 1994, 1995, 1996 and 1997 photographs are not that good, but the residential area is still visible. The State Engineer finds the Protestant has proved five consecutive years of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right. The State Engineer finds since the contract date is July 15, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

²⁴⁶ Transcript, pp. 555-563, Exhibit No. 71.

²⁴⁷ Exhibit No. 44.

²⁴⁸ Exhibit No. 29.

²⁴⁹ Exhibit No. 67.

²⁵⁰ Transcript, pp. 555-563, Exhibit No. 71.

Parcel 9 – The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.²⁵¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁵² which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on May 16, 1995.²⁵³ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁵⁴

Upon review of the photographs, while the quality of the photographs is not that good, they still clearly demonstrate the existing place of use is within a well-developed residential area. The State Engineer finds the Protestant has proved five consecutive years of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 10 - The contract date is April 6, 1915. As to this parcel, the Tribe’s allegations are forfeiture and abandonment.²⁵⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁵⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as canal and irrigated. In 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on June 13, 1995.²⁵⁷ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁵⁸

²⁵¹ Exhibit No. 44.

²⁵² Exhibit No. 29.

²⁵³ Exhibit No. 67.

²⁵⁴ Transcript, pp. 555-563, Exhibit No. 71.

²⁵⁵ Exhibit No. 44.

²⁵⁶ Exhibit No. 29.

²⁵⁷ Exhibit No. 67.

²⁵⁸ Transcript, pp. 555-563, Exhibit No. 71.

Upon review of the photographs, while the quality of the photographs is not that good, they still clearly demonstrate the existing place of use is within a well-developed residential area. The State Engineer finds the Protestant has proven five consecutive years of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 11 - The contract date is April 6, 1915. As to this parcel, the Tribe's allegations are forfeiture and abandonment.²⁵⁹ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁶⁰ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on August 15, 1995.²⁶¹ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁶²

Upon review of the photographs, while the quality of the photographs is not that good, they still clearly demonstrate the existing place of use is within a well-developed residential area. The State Engineer finds the Protestant has proven five consecutive years of non-use and the State Engineer finds this is clear and convincing evidence of non-use. The State Engineer finds since the contract date is April 6, 1915, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 12 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.²⁶³ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁶⁴ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994 the land use was described as residential and bare land. In 1996 and 1997 the land use was described as

²⁵⁹ Exhibit No. 44.

²⁶⁰ Exhibit No. 29.

²⁶¹ Exhibit No. 67.

²⁶² Transcript, pp. 555-563, Exhibit No. 71.

²⁶³ Exhibit No. 44.

²⁶⁴ Exhibit No. 29.

residential. The water right on this parcel was dedicated to the City of Fernley on March 8, 1995.²⁶⁵ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁶⁶

Questions were raised during the hearing as to the characterization of a portion of the existing place of use being residential, because as the Protestant's witness oriented the existing place of use it cuts through the roof of a house, and if that orientation was slightly off, the land use would have been bare land until 1994 as to Parcels 12 and 13 and until 1996 as to Parcels 14 and 15.²⁶⁷ However, using either description, the State Engineer finds the Protestant has proven a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right.

However, 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.

This parcel presents another difficult determination because of the question of whether the existing place of use is all bare land or is covered partially by a house. Either way, the land was not used for irrigation. The State Engineer finds due to the question of the accurate identification of the existing place of use on the aerial photographs, the State Engineer is unable to make the determination of the land use by clear and convincing evidence, because if the land use is completely bare land abandonment is not applicable. Therefore, the Protestant has not adequately proven its claim of abandonment as to this parcel.

²⁶⁵ Exhibit No. 67.

²⁶⁶ Transcript, pp. 555-563, Exhibit No. 71.

²⁶⁷ Transcript, pp. 355-358.

Parcel 13 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.²⁶⁸ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁶⁹ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994 the land use was described as residential and bare land. In 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on March 8, 1995.²⁷⁰ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁷¹

Questions were raised during the hearing as to the characterization of a portion of the existing place of use being residential, because as the Protestant's witness oriented the existing place of use it cuts through the roof of a house, and if that orientation was slightly off, the land use would have been bare land until 1994 as to Parcels 12 and 13 and until 1996 as to Parcels 14 and 15.²⁷² However, using either description, the State Engineer finds the Protestant has proven a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use.

However, 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.

This parcel presents another difficult determination because of the question of whether the existing place of use is all bare land or is covered partially by a house. Either way, the land was not used for irrigation. The State Engineer finds due to the question of the accurate identification of the existing place of use on the aerial photographs, the State Engineer is unable to make the

²⁶⁸ Exhibit No. 44.

²⁶⁹ Exhibit No. 29.

²⁷⁰ Exhibit No. 67.

²⁷¹ Transcript, pp. 555-563, Exhibit No. 71.

²⁷² Transcript, pp. 355-358.

determination of the land use by clear and convincing evidence, because if the land use is completely bare land abandonment is not applicable. Therefore, the Protestant has not adequately proven its claim of abandonment as to this parcel.

Parcel 14 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.²⁷³ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁷⁴ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994 the land use was described as residential and bare land. In 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on March 8, 1995.²⁷⁵ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁷⁶

Questions were raised during the hearing as to the characterization of a portion of the existing place of use being residential, because as the Protestant's witness oriented the existing place of use it cuts through the roof of a house, and if that orientation was slightly off, the land use would have been bare land until 1994 as to Parcels 12 and 13 and until 1996 as to Parcels 14 and 15.²⁷⁷ The State Engineer finds the Protestant has proven a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right.

However, 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.

²⁷³ Exhibit No. 44.

²⁷⁴ Exhibit No. 29.

²⁷⁵ Exhibit No. 67.

²⁷⁶ Transcript, pp. 555-563, Exhibit No. 71.

²⁷⁷ Transcript, pp. 355-358.

This parcel presents another difficult determination because of the question of whether the existing place of use is all bare land or is covered partially by a house. Either way, the land was not used for irrigation. The State Engineer finds due to the question of the accurate identification of the existing place of use on the aerial photographs, the State Engineer is unable to make the determination of the land use by clear and convincing evidence, because if the land use is completely bare land abandonment is not applicable. Therefore, the Protestant has not adequately proven its claim of abandonment as to this parcel.

Parcel 15 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.²⁷⁸ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁷⁹ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994 the land use was described as residential and bare land. In 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on March 8, 1995.²⁸⁰ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁸¹

Questions were raised during the hearing as to the characterization of a portion of the existing place of use being residential, because as the Protestant's witness oriented the existing place of use it cuts through the roof of a house, and if that orientation was slightly off, the land use would have been bare land until 1994 as to Parcels 12 and 13 and until 1996 as to Parcels 14 and 15.²⁸² The State Engineer finds the Protestant has proven a period of non-use and the State Engineer finds this is clear and convincing evidence of non-use prior to the dedication of the water right.

However, 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.

²⁷⁸ Exhibit No. 44.

²⁷⁹ Exhibit No. 29.

²⁸⁰ Exhibit No. 67.

²⁸¹ Transcript, pp. 555-563, Exhibit No. 71.

²⁸² Transcript, pp. 355-358.

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.

This parcel presents another difficult determination because of the question of whether the existing place of use is all bare land or is covered partially by a house. Either way, the land was not used for irrigation. The State Engineer finds due to the question of the accurate identification of the existing place of use on the aerial photographs, the State Engineer is unable to make the determination of the land use by clear and convincing evidence, because if the land use is completely bare land abandonment is not applicable. Therefore, the Protestant has not adequately proven its claim of abandonment as to this parcel.

Parcel 16 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.²⁸³ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁸⁴ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1995 and 1996 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on August 15, 1995.²⁸⁵ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁸⁶

Upon review of the photographs, it can be seen that the existing place of use is part of a well-developed residential area from at least 1989.

However, 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.

²⁸³ Exhibit No. 44.

²⁸⁴ Exhibit No. 29.

²⁸⁵ Exhibit No. 67.

²⁸⁶ Transcript, pp. 555-563, Exhibit No. 71.

The State Engineer finds the Protestant has proven a period of non-use and the use is inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of an intent to abandon the water right.

Parcel 17 - The contract date is February 16, 1910. As to this parcel, the Tribe's allegation is abandonment.²⁸⁷ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"²⁸⁸ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1995 and 1996 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on April 11, 1995.²⁸⁹ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁹⁰

Upon review of the photographs, it can be seen that the existing place of use is part of a well-developed residential area from at least 1989.

However, 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.

The State Engineer finds the Protestant has proved a period of non-use and the use is inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of an intent to abandon the water right.

²⁸⁷ Exhibit No. 44.

²⁸⁸ Exhibit No. 29.

²⁸⁹ Exhibit No. 67.

²⁹⁰ Transcript, pp. 555-563, Exhibit No. 71.

Parcel 18 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.²⁹¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁹² which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on August 15, 1995.²⁹³ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁹⁴

Upon review of the photographs, it can be seen that the existing place of use is part of a well-developed residential area from at least 1989.

However, 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.

The State Engineer finds the Protestant has proved a period of non-use and the use is inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of an intent to abandon the water right.

Parcel 19 – The contract date is May 14, 1909. As to this parcel, the Tribe’s allegation is abandonment.²⁹⁵ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”²⁹⁶ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1996 and 1997 the land use was described as residential. The water right on this parcel was

²⁹¹ Exhibit No. 44.

²⁹² Exhibit No. 29.

²⁹³ Exhibit No. 67.

²⁹⁴ Transcript, pp. 555-563, Exhibit No. 71.

²⁹⁵ Exhibit No. 44.

²⁹⁶ Exhibit No. 29.

dedicated to the City of Fernley on August 15, 1995.²⁹⁷ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.²⁹⁸

Upon review of the photographs, it can be seen that the existing place of use is part of a well-developed residential area from at least 1989.

However, 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.

The State Engineer finds the Protestant has proved a period of non-use and the use is inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of an intent to abandon the water right.

Parcel 21 - The contract date is December 20, 1907. As to this parcel, the Tribe's allegation is abandonment.²⁹⁹ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"³⁰⁰ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977, 1989, 1992, 1993, 1994, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 21, 1996.³⁰¹ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.³⁰²

Upon review of the photographs, it can be seen that the existing place of use is part of a well-developed residential area from at least 1989.

²⁹⁷ Exhibit No. 67.

²⁹⁸ Transcript, pp. 555-563, Exhibit No. 71.

²⁹⁹ Exhibit No. 44.

³⁰⁰ Exhibit No. 29.

³⁰¹ Exhibit No. 67.

³⁰² Transcript, pp. 555-563, Exhibit No. 71.

However, 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.

The State Engineer finds the Protestant has proved a period of non-use and the use is inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of an intent to abandon the water right.

Parcel 26 – The contract date is August 6, 1917. As to this parcel, the Tribe's allegations are forfeiture and abandonment.³⁰³ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"³⁰⁴ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on February 28, 1995.³⁰⁵ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.³⁰⁶

Upon review of the photographs, while the quality of the 1989 and 1992 photographs are blurry, the existing place of use is obviously within a developing residential area. The same is visible in the other photographs. The State Engineer finds the Protestant has proved five consecutive years of non-use (1989-1995) and the State Engineer finds this is clear and convincing evidence of non-use prior to dedication of the water right. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 27 – The contract date is August 6, 1917. As to this parcel, the Tribe's allegations are

³⁰³ Exhibit No. 44.

³⁰⁴ Exhibit No. 29.

³⁰⁵ Exhibit No. 67.

³⁰⁶ Transcript, pp. 555-563, Exhibit No. 71.

forfeiture and abandonment.³⁰⁷ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”³⁰⁸ which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as natural vegetation. In 1989, 1992, 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on August 1, 1995.³⁰⁹ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.³¹⁰

Upon review of the photographs, while the quality of the 1989 and 1992 photographs are blurry, the existing place of use is obviously within a developing residential area. The same is visible in the other photographs. The State Engineer finds the Protestant has proved five consecutive years of non-use (1989-1995) and the State Engineer finds this is clear and convincing evidence of non-use prior to dedication of the water right. The State Engineer finds since the contract date is August 6, 1917, the water right is subject to the forfeiture provision of Nevada water law and is subject to a declaration of forfeiture making any analysis of abandonment unnecessary.

Parcel 36 – The contract date is June 19, 1909. As to this parcel, the Tribe’s allegation is abandonment.³¹¹ The Tribe provided evidence in Table 2 – “Land Use Descriptions for Existing Places of Use”³¹² which are its witness’s analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989, 1992, 1993, 1994, 1996 and 1997 the land use was described as a road. The water right on this parcel was dedicated to the City of Fernley on April 26, 1995.³¹³ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.³¹⁴

³⁰⁷ Exhibit No. 44.

³⁰⁸ Exhibit No. 29.

³⁰⁹ Exhibit No. 67.

³¹⁰ Transcript, pp. 555-563, Exhibit No. 71.

³¹¹ Exhibit No. 44.

³¹² Exhibit No. 29.

³¹³ Exhibit No. 67.

³¹⁴ Transcript, pp. 555-563, Exhibit No. 71.

Upon review of the photographs, it can be seen in most of the photographs that the existing place of use has been a road since 1989 noting that the quality of the 1992 and 1994 photographs were discounted at the administrative hearing.³¹⁵

However, 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.

The State Engineer finds the Protestant has proved a period of non-use and the use is inconsistent with irrigation. However, the water right was dedicated to the City of Fernley prior to any claim of abandonment; thus, there is no evidence of an intent to abandon the water right.

Parcel 37 – The contract date is January 10, 1946. As to this parcel, the Tribe's allegations are forfeiture and abandonment.³¹⁶ The Tribe provided evidence in Table 2 – "Land Use Descriptions for Existing Places of Use"³¹⁷ which are its witness's analyses from aerial photographs of the land use on the existing place of use. In 1977 the land use was described as irrigated. In 1989 and 1992, the land use is described as bare land. In 1993, 1994, 1995, 1996 and 1997 the land use was described as residential. The water right on this parcel was dedicated to the City of Fernley on July 3, 1995.³¹⁸ The Applicant provided testimony and evidence that all the taxes and assessments are current as to the existing place of use.³¹⁹

Upon review of the photographs, the State Engineer notes the Hearing Officer discounted the 1989 photograph due to poor quality and the State Engineer does not agree with the 1993, 1994, 1995, 1996 and 1997 land use descriptions, as the land use does not change from that found in the 1992 photograph and finds bare land is a better description of the land use on this existing place of

³¹⁵ Transcript, pp. 362-364, 401-406.

³¹⁶ Exhibit No. 44.

³¹⁷ Exhibit No. 29.

³¹⁸ Exhibit No. 67.

³¹⁹ Transcript, pp. 555-563, Exhibit No. 71.

use. The State Engineer finds since the 1989 photograph is of insufficient quality to make any accurate land use determination and the first photograph is then the 1993 photograph, the Protestant has not proved five consecutive years of non-use prior to the filing of change Application 63277. Therefore, the Protestant did not prove a five-year period of non-use prior to the filing of the change application sufficient to support a finding of forfeiture or a prolonged period of non-use adequate to support a finding of abandonment.

VIII.

A protest issue alleges that the applications should not be approved because the Applicant has not obtained permission to use the federal facilities for transportation of the water. At the administrative hearing the Bureau argued that the City of Fernley must obtain the appropriate approvals for the use of the federal project land or facilities prior to any change in manner or place of use of these water rights. The State Engineer finds the issuance of a water right permit does not waive the requirements that a permit holder obtain other required approvals from State, Federal or local agencies, but does not preclude the granting of a change application.

IX.

The Applicant presented evidence as to water delivery to the Truckee Division for the years 1988 through 1996, and related water shortages.³²⁰ The State Engineer finds no evidence was presented that in any way indicated that any of the parcels under consideration in this ruling were lands that would have been irrigated, but for water shortages.

X.

A protest issue alleges that use of water as applied for could have a detrimental effect on the operations of the Newlands Project by reducing the amount of water available to Project users, reducing the conveyance efficiency of the Project and other possible impacts. No Protestant provided any evidence in support of this protest claim; therefore, the protest claim is dismissed.

XI.

The Bureau alleged that all the underlying Newlands Project water right applications and certificates were approved by the Secretary of the Interior for irrigation use and must be amended by the Secretary before Project water can be used for municipal purposes. The *Orr Ditch Decree*

provides that persons whose rights were adjudicated thereby are entitled to change in the manner provided by the law the point of diversion, place, means, manner or purpose of use of the water to which they are entitled so far as they may do so without injury to the rights of other persons whose rights are fixed by the decree. The State Engineer finds these changes applications were filed under Nevada water law and in accordance with the provisions of the *Orr Ditch Decree* and as such do not require the authorization of the Secretary of the Interior.

XII.

The Bureau alleged that the approval by the Secretary of the Interior is not in the interests of the Newlands Project or the United States because it would violate the Secretary's obligations pursuant to the Endangered Species Act, it would violate the Secretary's trust obligation to the Tribe, it would violate the Secretary's obligation to protect and restore the Pyramid Lake fishery, and it would violate the reserved right of the Tribe to the unappropriated water of the Truckee River. The State Engineer finds no evidence was provided in support of this protest claim and as such the claim is dismissed.

XIII.

The Tribe alleged that approving the application would conflict with and tend to impair the Tribe's existing water rights because the Tribe is entitled to all water of the Truckee River not subject to valid water rights. The State Engineer finds no evidence was provided in support of this protest claim; therefore, the claim is dismissed.

XIV.

The Tribe alleged that approving the application would be detrimental to the public welfare because it would likely jeopardize the continued existence of Pyramid Lake's two principal fish, which are threatened and endangered, it would prevent or interfere with the conservation of those fish, it would adversely affect the recreational value of Pyramid Lake, and it would interfere with the purposes for which the Pyramid Lake Indian Reservation was established and the application violates the provisions of Nevada law to protect the endangered cui-ui. The State Engineer finds no evidence was provided in support of this protest claim; therefore, the claim is dismissed.

³²⁰ Transcript, pp. 476-478.

V.

A Protestant alleged that the application does not meet the requirements of the agreement between the Bureau and the Tribe because many of the existing places of use were not irrigated between 1984 and 1989. The State Engineer finds no evidence was provided in support of this protest claim and it is not the State Engineer's responsibility to enforce an agreement between the Bureau and the Tribe; therefore, the claim is dismissed.

XVI.

A Protestant alleged that the Applicant does not have right to use the water on the proposed place of use. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XVII.

A Protestant alleged that the application should be denied because it would increase the consumptive use of water within the Newlands Project and/or increase the amount of water that is diverted to the Project from the Truckee River. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XIX.

A Protestant alleged that the application seeks to transfer water from land that is not impracticable to irrigate and therefore the water rights should not be eligible for transfer. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XX.

A Protestant alleged that the application should not be approved because the Applicant has not entered into a repayment contract with the United States. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XXI.

A Protestant alleged that the application should not be approved because federal law does not authorize the proposed use of Newlands Project water. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XXII.

A Protestant alleged that the application should not be approved because the proposed place of use is not within the authorized service area or boundaries of the Newlands Project. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XXIII.

A Protestant alleged that the water right sought to be transferred was obtained from a Newlands Project user who, along with the Truckee-Carson Irrigation District, has violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project; thus, approval of the application would violate the Order, Judgment and Decree entered in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XIV.

A Protestant alleged that the Tribe will be adversely affected by the granting of the application because it will result in greater diversion of Truckee River water away from Pyramid Lake, it will prevent enforcement of the Operating Criteria and Procedures for the Newlands Project, and it will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters of the Truckee River. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

XV.

A Protestant alleged that the proposed use will be from January 1 to December 21 whereas the actual prior use of these various irrigation rights water limited to the irrigation season. The new use will be less efficient and will adversely affect other water users. The State Engineer finds no evidence was provided in support of this protest; therefore, the claim is dismissed.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³²¹

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:³²²

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

As to Application 57555, the State Engineer concludes the water rights appurtenant to Parcels 3, 4, 6, 7, 8, 9, 14, 16, 18, 22, 23, 24, 25 and 26 are forfeited. The water rights appurtenant to Parcels 12, 15 and Parcel 19 for a total of 2.65 acre-feet can be changed under Application 57555.

IV.

As to Application 61893, the State Engineer concludes the water rights appurtenant to Parcels 23, 42, 44, 48 and 61 are forfeited. The water rights appurtenant to Parcels 2, 3, 4, 5, 8, 10, 11, 12, 15, 17, 18, 20, 21, 22, 24, 26, 27, 29, 31, 34, 37, 38, 39, 40, 41, 45, 46, 47, 49, 51, 52, 60, 62, 64, 66, 67, 69 and 74 for a total of 290.3 acre-feet can be changed under Application 61893.

V.

As to Application 63277, the State Engineer concludes the water rights appurtenant to Parcels 6, 7, 9, 10, 11, 26 and 27 are forfeited. The water rights appurtenant to Parcels 1, 2, 3, 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 36, 37, 39 and 40 for a total of 91.24 acre-feet can be changed under Application 63277.

³²¹ NRS chapters 533.

³²² NRS 533.370(5).

RULING

The protests to Applications 57555, 61893 and 63277 are hereby upheld in part and overruled in part.

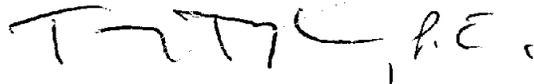
As to Application 57555, the water rights appurtenant to Parcels 3, 4, 6, 7, 8, 9, 14, 16, 18, 22, 23, 24, 25 and 26 are forfeited and the water rights appurtenant to Parcels 12, 15 and 19 totaling of 2.65 acre-feet can be changed.

As to Application 61893, the water rights appurtenant to Parcels 23, 42, 44, 48 and 61 are forfeited and the water rights appurtenant to Parcels 2, 3, 4, 5, 8, 10, 11, 12, 15, 17, 18, 20, 21, 22, 24, 26, 27, 29, 31, 34, 37, 38, 39, 40, 41, 45, 46, 47, 49, 51, 52, 60, 62, 64, 66, 67 and 69 totaling 290.3 acre-feet can be changed.

As to Application 63277, the water rights appurtenant to Parcels 6, 7, 9, 10, 11, 26 and 27 are forfeited and the water rights appurtenant to Parcels 1, 2, 3, 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 36, 37, 39 and 40 totaling 91.24 acre-feet can be changed.

All changes are subject to existing rights and the payment of statutory permit fees.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 31st day of

May, 2007.