

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

IN THE MATTER OF APPLICATIONS 51603, 51608,)
51953, 51954, 51955, 51956, 51957, 51958,)
51959, 51960, 51961, 51997, 52021, 52252,)
52335, 52361, 52542, 52543, 52544, 52545,)
52546, 52547, 52548, 52549, 52550, 52551,)
52552, 52553, 52554, 52555, 52570, 52668,)
52669, 52670, 52843, 53659, 53661, 53662,)
53910, 54152, 54594, 54595, 54596, 54714,)
54715, 54882, FILED TO CHANGE THE PLACE OF)
USE OF WATERS HERETOFORE DECREED AND SET)
FORTH IN THE TRUCKEE RIVER AND CARSON RIVER)
DECREES AND APPLICATIONS 51383, 51733,)
51735, 51736, 51737, 51738 FILED TO CHANGE)
THE PLACE OF USE OF WATERS HERETOFORE)
DECREED AND SET FORTH IN THE TRUCKEE RIVER)
AND CARSON RIVER DECREES AND UNDER PERMITS)
47877, 50003, 48472, 47805, 47899, 47869)
AND 47809 RESPECTIVELY, WITHIN THE CARSON)
DESERT, CHURCHILL COUNTY, NEVADA.)

RULING
#3868

GENERAL

I.

The fifty-two (52) applications to change the place of use of decreed water rights under the Truckee River Decree¹ and Carson River Decree,² are the subject matter of this ruling and are set forth in the record.³ The applications represent requests to change the place of use of a portion of decreed water rights on irrigated lands within the Newlands Reclamation Project under the provisions set forth in Orr Ditch and Alpine decrees.⁴

1 Final Decree in United States v. Orr Water Ditch Co., In Equity Docket No. A-3 (D. Nev. 1944), hereinafter referred to as Orr Ditch Decree.

2 Final Decree in United States v. Alpine Land & Reservoir Co., Civil No. D-183 BRT (D. Nev. 1980), hereinafter referred to as Alpine Decree.

3 State of Nevada Exhibit Nos. 71 and 72, public administrative hearing before the State Engineer, April 9, 1991.

4 Orr Ditch Final Decree, p. 88. Alpine Final Decree, pp. 161-162.

II.

Additionally, six (6) of the aforementioned applications were filed to once again change the place of use of portions of various decreed water rights within the Truckee River and Carson River stream systems for which changes had previously been issued. More specifically, Application 51383 was filed to change the place of use of portions of Permit 47822 and Permit 50003;⁵ Application 51733 was filed to change the place of use of a portion of Permit 48472;⁵ and Applications 51735 through 51738 were filed to change the place of use of portions of Permits 47805, 47899, 47869 and 47809, respectively.⁵

III.

Applications 51383, 51608, 51630, 51733, 51735, 51736, 51737, 51738, 51953 through 51961, 51997, 52021, 52252, 52335, 52361, 52542 through 52555, 52570, 52668, 52669, 52670, 52843, 53659, 53661, 53662, 53797 and 53910 were timely protested by the Pyramid Lake Paiute Tribe of Indians on the following grounds:⁶

⁵ State's Exhibit No. 71, public administrative hearing, April 9, 1991.

⁶ In both Orr Ditch and Alpine decrees, the procedures are set forth for accomplishing changes in point of diversion, and place, means, manner or purpose of use. See Footnote 4. The applications and protests have been subject to provisions set forth under the Nevada Water Law, specifically those provisions of Nevada Revised Statutes, Chapter 533. The applications were published in a newspaper of general circulation in the counties of Churchill, Lyon and Washoe as required by NRS 533.360. NRS 533.365 provides that an interested person may file verified protests on an application within 30 days from the date of last publication of the notice of application. See State of Nevada Exhibit 8, public administrative hearing before the State Engineer, February 4th and 5th, 1985. See also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983) ("We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer.") (Emphasis added).

1. Pursuant to federal reclamation law, 43 U.S.C. § 389, said application require the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said applications by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. § § 1531 et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery; and (v) the Truckee-Carson Irrigation District, and, on information and belief, the applicants have not complied and are not in compliance with the rules and regulations of the Secretary of the Interior applicable to the Newlands Project and approval of said applications would encourage further violations of those rules and regulations.

3. The approval of said applications by the Secretary of the Interior 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), specifically Section D(4) of the Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project (OCAP), in that: (i) the Truckee-Carson Irrigation District is not in compliance with said OCAP; and (ii) on information and belief, the applicants who are seeking permission to change the use of water within the Newlands Reclamation Project are not in compliance with Sections C(1), C(3), and/or C(5) of said OCAP and/or with the provisions of the decrees in United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev.

1944), and United States v. Alpine Land & Reservoir Co., Equity No. D-183 BRT (D. Nev. 1980).

4. Granting or approving the above referenced applications by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicants do not have vested rights to use the waters of the Truckee River on the proposed places of use described in their applications.

5. Granting or approving the above referenced applications by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

6. On information and belief, said applications involve the transfer of alleged water rights that were never perfected in accordance with federal and state law. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said applications involve the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

8. On information and belief, the applicants are not the true and proper owner of the alleged water rights that are the subject of the transfer applications. The requested transfers should not be considered or granted unless and until the applicants provide satisfactory documentation of

their ownership of the land and water rights that are the subject of the applications.

9. On information and belief, the water rights title records maintained by the Truckee-Carson Irrigation District are not accurate or reliable and those records do not provide a satisfactory basis for documenting or establishing the existence of Project water rights. The requested transfers should not be considered or granted unless and until the Truckee-Carson Irrigation District documents the existence, amount, location and ownership of all water rights within the Newlands Reclamation Project to the satisfaction of both the Nevada State Engineer and the Secretary of the Interior. Alternatively, the requested transfers should not be considered or granted unless and until the existence, amount location and ownership of the water rights that are the subject of these applications are established and documented to the satisfaction of both the Nevada State Engineer and the Secretary of the Interior.

10. On information and belief, said applications should be denied because they 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. On information and belief, said application involves the proposed transfer of alleged water rights from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

12. On information and belief, said applicants have been applying water to some or all of the lands that are the subject of these applications in violation of both state and federal law. By using water on the subject lands before applying for or obtaining a transfer from the Nevada State Engineer, the applicants are in violation of Nevada law and cannot obtain an approved transfer from the State Engineer.

13. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced applications are granted because: (i) they will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) they will prevent the adequate enforcement and encourage the continued violation of the OCAP; and (iii) they will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

Therefore the protestant requests that the above referenced applications be denied and that an order be entered for such relief as the State Engineer deems just and proper.

IV.

Applications 54152, 54594, 54595, 54596, 54714, 54715 and 54882 were timely protested by the Pyramid Lake Paiute Tribe of Indians on the following grounds:⁶

1. Pursuant to federal reclamation law, 43 U.S.C. § 389, said applications require the approval of the Secretary of the Interior which has not been obtained.

2. The approval of said applications by the Secretary of the Interior is not in the interests of the Newlands Reclamation Project or of the United States because: (i) it would violate the Secretary's obligations pursuant to the Endangered Species Act, 16 U.S.C. § § 1531 et seq.; (ii) it would violate the Secretary's trust obligations to the Pyramid Lake Paiute Tribe of Indians; (iii) it would violate the Secretary's duty to protect, preserve and restore the Pyramid Lake fishery for the use and benefit of the Pyramid Lake Paiute Tribe of Indians; and (iv) it would violate the reserved right of the Pyramid Lake Paiute Tribe to the unappropriated waters of the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery.

3. Granting or approving the above referenced applications by the State Engineer and/or the Secretary of the Interior would conflict with and tend to impair the value of the Pyramid Lake Tribe's existing rights to waters of the Truckee River because the Tribe is entitled to the use of all the waters of the Truckee River which are not subject to valid, vested, and perfected rights and the applicants do not have vested rights to use the waters of the Truckee River on the proposed places of use described in their applications.

4. Granting or approving the above referenced applications by the State Engineer would be detrimental to the public welfare in that it would: (i) be likely to jeopardize the continued existence of Pyramid Lake's two principal fish, the endangered cui-ui and the threatened Lahontan cutthroat trout; (ii) prevent or interfere with the conservation of those endangered and threatened species; (iii) take or harm those threatened and endangered species; (iv) adversely affect the recreational value of Pyramid Lake; and (v) interfere with the purposes for which the Pyramid Lake Indian Reservation was established.

5. On information and belief, said applications involve the transfer of alleged water rights that were never perfected in accordance with federal and state law. Such alleged water rights cannot and should not be transferred.

6. On information and belief, said applications involve the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.

7. On information and belief, said applications should be denied because they 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.

8. On information and belief, said applications involve the proposed transfer of alleged water rights from

lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands.

9. The applications should not be approved because the applicants have not entered into a repayment contract with the United States.

10. The applications should not be approved because the proposed use of the Newlands Reclamation Project's water rights is not authorized by federal law.

11. The applications should not be approved because the proposed places of use are not within the authorized service area or boundaries of the Newlands Reclamation Project.

12. The applications violate the provisions of Nevada law which protect the endangered cui-ui.

13. The applications should not be approved because the applicants have not obtained permission to use federal facilities for the transportation of the water they are seeking to obtain the transfer.

14. On information and belief, the water rights that are the subject of the applications were obtained from Newlands Project water users who have violated the rules and regulations of the Secretary of the Interior applicable to the Newlands Project. The Truckee-Carson Irrigation District also has violated and is continuing to violate those rules and regulations. Approval of said applications therefore 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).

15. The Pyramid Lake Paiute Tribe of Indians will be adversely affected if the above referenced applications are granted because: (i) they will result in greater diversions of Truckee River water away from Pyramid Lake to the detriment of the threatened and endangered species inhabiting Pyramid Lake; (ii) they will prevent the adequate enforcement and encourage the continued violation of the

Operating Criteria and Procedures for the Newlands Reclamation Project; and (iii) they will impair, conflict and interfere with the Tribe's reserved right to the unappropriated waters from the Truckee River that are needed to maintain, restore and preserve the Pyramid Lake fishery and to fulfill the purposes of the Pyramid Lake Indian Reservation.

Therefore the protestant requests that the above referenced applications be denied and that an order be entered for such relief as the State Engineer deems just and proper.

V.

The United States Department of the Interior petitioned the State Engineer to intervene as an unaligned party in interest.⁷ Intervention was granted on the grounds that there were federal interests in these proceedings that justify standing as a party in interest.⁸

VI.

In accordance with the Stipulation dated September 30, 1985,⁹ the State Engineer requested new evidence from the applicant, protestant and the intervenor.¹⁰ Counsel for the protestant requested an extension of time to submit evidence¹¹ and the request was denied.¹²

7 Interior Exhibit 1, public administrative hearing before the State Engineer, November 26 - 29, 1984.

8 United States v. Alpine Land and Reservoir Co., 697 F.2d at 858. See also transcript of public administrative hearing before the State Engineer, Vol. I., pp. 6-14, November 26 - 29, 1984.

9 State of Nevada Exhibit No. 15, public administrative hearing before the State Engineer, January 16, 1986.

10 State of Nevada Exhibit No. 62, public administrative hearing before the State Engineer, April 9, 1991.

11 State of Nevada Exhibit No. 63, public administrative hearing before the State Engineer April 9, 1991.

12 State of Nevada Exhibit No. 64, public administrative hearing before the State Engineer April 9, 1991.

At the requests of counsel for the protestant and counsel for the intervenor,¹³ a public administrative hearing in the matter of subject applications was held before the State Engineer on April 9, 1991, in Carson City, Nevada.¹⁴ The evidence and testimony from prior public administrative hearings before the State Engineer¹⁵ regarding other applications to change within the Newlands Project were incorporated into the record of this hearing.

FINDINGS OF FACT

I.

In addressing change applications, both Orr Ditch and Alpine decrees specifically set forth the procedure to accomplish changes in the point of diversion, manner, purposes and place of use.

The Orr Ditch Decree provides that:¹⁶

Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of the other persons whose rights are fixed by this decree. (Emphasis added).¹⁷

¹³ State of Nevada Exhibit No's. 66 and 67, public administrative hearing before the State Engineer April 9, 1991.

¹⁴ State of Nevada Exhibit No. 68, public administrative hearing before the State Engineer April 9, 1991.

¹⁵ Public administrative hearings were held before the State Engineer on November 26-29, 1984, February 4, 5, 1985, June 24, 1985, January 16, 1986, January 28, 1988, February 16, 22, 1989, and pre-hearing conference on November 7, 1990.

¹⁶ Orr Ditch Final Decree, p. 88.

¹⁷ Recently the Ninth Circuit Court of Appeals interpreted this controlling provision. The Court concluded that in the manner provided by law means that "not only state water law substance, therefore, but procedure as well, governs Orr Ditch water rights." United States v. Orr Water Ditch Co., 914 F.2d 1302, 1307-1308 (9th Cir. 1990).

Similarly, the Alpine Decree provides:¹⁸

Applications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer. Any person feeling himself aggrieved by any order or decision of the State Engineer on these matters may appeal that decision or order to this court. (Emphasis added)

The State Engineer finds that the change applications that are the subject matter herein are properly before him for consideration and decision.

II.

It is clear upon review of Alpine and Orr Ditch decrees that the State Engineer, in considering applications to change, is guided by whether the applications would "tend to impair the value of existing rights or be otherwise detrimental to the public welfare."¹⁹ The protestant contends that granting the applications at issue here would impair the value of the Pyramid Lake Tribe's rights because the Tribe is entitled to all of the unappropriated Truckee River water. The question of availability of unappropriated water is not at issue. In accordance with the position affirmed by the Ninth Circuit,²⁰ the applications seek only to change water already appropriated under determined rights. Therefore, the State Engineer finds that approval of these applications would not increase the consumptive use beyond the quantity for which there already exists a legal water right and there is no impairment to the value of any existing rights.

¹⁸ United States v. Alpine Land & Reservoir Co., 697 F.2d at 857-858. Alpine Final Decree, pp. 161-162.

¹⁹ United States v. Alpine Land & Reservoir Co., 697 F.2d at 858; NRS 533.370(3).

²⁰ United States v. Alpine Land & Reservoir Co., 697 F.2d at 857.

III.

The protestant documented the record with substantial evidence and testimony as to the precarious nature of the habitat of the Lahontan cutthroat trout and cui-ui sucker, classified respectively as threatened and endangered species in the lower reaches of the Truckee River.²¹ The record also reflects that man's activities in the lower reaches has resulted in additional impediments to the natural spawning habits of these species.²² The State Engineer recognizes and is sympathetic to public interest values closely tied to continued survival of the species, however, there is no evidence that the Newland's right set forth under the Orr Ditch Decree has ever been or would be exceeded if the change applications were approved. The Orr Ditch Decree is binding on all parties thereto and the Truckee-Carson Irrigation District is entitled to a diversion of Truckee River waters through the Truckee Canal, storage and comingling with the waters of the Carson River in Lahontan Reservoir for the irrigation of lands within the Newlands Project.²³ Upon careful review of the record, the State Engineer can find no evidence that approval of the change applications would constitute an injury to the existing rights of the protestant or any other existing rights set forth in the subject decrees. To the contrary, the record provides substantial evidence that the subject changes will not detrimentally affect or impair protestant's existing rights. The State Engineer has previously

21 Protestant's Exhibit No's. 6, 7 and transcript of public administrative hearing before the State Engineer, November 26 - 29, 1984, testimony of Chester Buchanan, Vol. II, pp. 101-208, and testimony of Alan Ruger, Vol. II, pp. 193-223.

22 Testimony of Chester Buchanan, Vol. II, pp. 136-139, transcript of public administrative hearing before the State Engineer, November 26 - 29, 1984.

23 Nevada vs. United States, 463 U.S. 110, 134-144 (1983).

ruled on this issue²⁴ and his decision was upheld by the Ninth Circuit Court of Appeals.²⁵ The protestant has not presented any additional evidence on this issue since the State Engineer's earlier rulings.

IV.

The protestant states "said applications involve the transfer of alleged water rights that were never perfected in accordance with federal and state law. Such alleged water rights cannot and should not be transferred." While that may be the rule in other western states, this is not the law in Nevada. Nevada law does not limit transferable water rights to perfected water rights. Neither case law nor statutes impose such a restriction on the transfer of water rights in Nevada. As a matter of long-standing policy, the State Engineer approves transfer applications of existing water rights, even when the right is not perfected.

Even though perfection of water rights is not necessary for transfers, substantial evidence provides that the subject water rights were in fact perfected. Perfection of a water right for agricultural purposes requires that the water must be beneficially used by actual application on the land. The applicants submitted copies of the original contracts²⁶ between the United States of America and the project farmers which established the right to project water. The historic practice of the Bureau of Reclamation and its predecessor was to require

²⁴ State Engineer's Ruling No. 3147, In the Matter of Applications 47797 et al., dated May 15, 1985, State Engineer's Ruling No. 3191, In the Matter of Applications 47801 et al., Dated May 16, 1985, and State Engineer's Ruling No. 3241, In the Matter of Applications 47809 et al., dated September 30, 1985, official records in the office of the State Engineer.

²⁵ United States v. Alpine Land & Reservoir Co., 878 F.2d at 1224.

²⁶ Applicant's Exhibit No. RRR, public administrative hearing before the State Engineer, April 9, 1991.

project farmers to put the land into production, then make application to the federal government for a water right.²⁷ The issuance of these contracts is evidence that a perfected water right exists.

The protestant attempted to show that some of the lands of the existing places of use were never irrigated. Citing maps from the early 1920's and aerial photographs taken in 1948, 1949, 1977 and 1984,²⁸ the protestant asserted that portions of these lands are covered by roads, ditches, buildings, etc., and therefore, the protestant contends that the lands could not have been irrigated. However, these maps and photographs do not provide a continuous record of land use and no evidence was submitted to invalidate the government contracts. Therefore, the State Engineer finds that the original contracts between the United States and the project farmers are valid and each of these contracts establishes a perfected water right to project water.

V.

The amount of water allowed to be transferred shall be limited to the duty of the existing place of use or the proposed place of use, whichever is lesser. The contested bench land/bottom land designations have yet to be decided. The State Engineer reserves the right to amend any permit to conform to the final bench land/bottom land determination.

VI.

The protests to all of the applications at issue here, included a claim that the existing water rights have been abandoned or forfeited.²⁹ The existing Truckee-Carson Irrigation

²⁷ Testimony of Applicant's witness Doris Morin, pp. 133-135, transcript of the public administrative hearing before the State Engineer, April 9, 1991.

²⁸ Protestant's Exhibit No's. 191, 192 and 193, and testimony of protestant's witness Ali Shahroody, p. 43, transcript of public administrative hearing before the State Engineer, April 9, 1991.

²⁹ State of Nevada Exhibit No. 72, public administrative hearing before the State Engineer, April 9, 1991.

District water rights were vested in the name of the United States when Congress authorized the Newlands Project in 1902. Both the Alpine Decree and Orr Ditch Decree recognize the Truckee-Carson Irrigation District rights as having a priority of 1902 and Alpine specifically recognized existing uses as late as 1980 and that these rights did exist in their entirety.³⁰

The Nevada Supreme Court, in Manse Springs,³¹ provides authoritative guidance on the fundamental distinctions between abandonment and statutory forfeiture as well as establishing precedent for criteria to be considered in making findings on loss of water rights. The court held that abandonment is a voluntary matter, the relinquishment of a water right by the owner with the intention of forsaking and deserting it. Forfeiture, on the other hand, is the involuntary or forced loss of a water right caused by failure of the holder to utilize the resource for the time fixed by statute. The court further held that the statutory forfeiture procedure did not apply to water rights vested prior to the enactment of the 1913 water law.

Both the relinquishment of possession and the intent are essential to a finding of abandonment and are well defined and set forth in Nevada law.^{31, 32} The State Engineer finds no disparity or confusion in definition. Mere non-use of the water to which an appropriator is entitled under valid rights without substantial evidence of intent to abandon and relinquish possession, is not sufficient for a finding of abandonment.

³⁰ Orr Ditch and Alpine decrees, supra, Nevada v. United States, 463 U.S. 110 (1983).

³¹ In re waters of Manse Spring and Its Tributaries, 60 Nev. 280, 286-287, 288-289, 290, 108 P.2d 311 (1940).

³² Valcalda v. Silver Peak Mines, 86 F. 90, 95 (9th Cir. 1898); Revert v. Ray, 95 Nev. 783, 786 P.2d 262 (1979); Franktown v. Marlette 77 Nev. 348, 354, 364 P.2d 1069 (1961).

The owners of the water rights on the transferor lands paid the annual assessments charged for water-righted acreage.³³ According to the Secretary-Treasurer of the Truckee-Carson Irrigation District,³⁴ no project farmer has ever indicated an intent to abandon a water right. Based on this record of evidence, the State Engineer finds that there was neither intent to abandon nor intent to forsake the water right.

VII.

The protestant feels that these applications cannot be approved because they involve the change "from lands that are not impracticable to irrigate and therefore such alleged water rights are not eligible for transfer to other lands." However, the protestant does not present any legal basis for this assertion. There are no provisions in the Nevada water law that limit the eligibility for changing the place of use based on the practicability or impracticability to irrigate the existing place of use. Rather, NRS 533.370 (3) sets out the criteria for the State Engineer to consider in change applications. In addition, the Ninth Circuit Court of Appeals affirmed the fact that the State Engineer is not precluded by statute from granting a change application where it is not impracticable to use the water at the present site.³⁵ Therefore, the State Engineer finds these applications cannot be denied on the basis of the practicability or impracticability to irrigate the existing place of use.

³³ Testimony of Applicant's witness Doris Morin pp. 169-170, transcript of public administrative hearing before the State Engineer, April 9, 1991. See also pp. 71-72, transcript of public administrative hearing before the State Engineer, November 26-29, 1984.

³⁴ Testimony of Applicant's witness Doris Morin p. 75, transcript of public administrative hearing before the State Engineer, November 26-29, 1984.

³⁵ United States v. Alpine Land & Reservoir Co., 878 F.2d at 1227.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action.³⁶

II.

The Orr Ditch Decree and the Alpine Decree set forth the procedure and authority in the matter of applications to change the point of diversion, manner, purpose or place of use of decreed waters of the Carson and Truckee Rivers.

III.

The record of evidence is substantial as to the historical uses of the water under the subject applications to change.

IV.

There is no evidence that the approval of the applications to change in this matter will effect or impair the value of other existing rights set forth under the subject decrees.

V.

There is no evidence that the approval of the applications to change in this matter will be detrimental to the public interest or welfare.

VI.

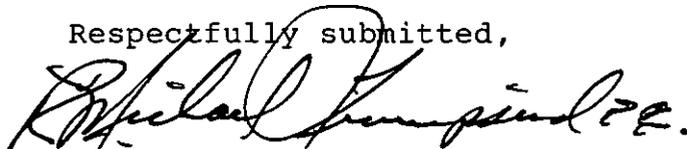
The record in this proceeding and in the previous administrative hearings held before the State Engineer provides substantial evidence that the water rights proposed to be changed have not been abandoned.

³⁶ NRS 533.325, Orr Ditch Decree, p. 88, and Alpine Decree pp. 161-162.

RULING

The protests to the granting of Applications to Change 51383, 51603, 51608, 51733, 51735, 51736, 51737, 51738, 51953, 51954, 51955, 51956, 51957, 51958, 51959, 51960, 51961, 51997, 52021, 52252, 52335, 52361, 52542, 52543, 52544, 52545, 52546, 52547, 52548, 52549, 52550, 52551, 52552, 52553, 52554, 52555, 52570, 52668, 52669, 52670, 52843, 53659, 53661, 53662, 53910, 54152, 54594, 54595, 54596, 54714, 54715 and 54882 are herewith overruled and Applications 51383, 51603, 51608, 51733, 51735, 51736, 51737, 51738, 51953, 51954, 51955, 51956, 51957, 51958, 51959, 51960, 51961, 51997, 52021, 52252, 52335, 52361, 52542, 52543, 52544, 52545, 52546, 52547, 52548, 52549, 52550, 52551, 52552, 52553, 52554, 52555, 52570, 52668, 52669, 52670, 52843, 53659, 53661, 53662, 53910, 54152, 54594, 54595, 54596, 54714, 54715 and 54882 will be approved subject to existing rights on the source and subject to water duties affirmed or modified by the Federal Water Master or by the United States District Court.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 30th day of
January, 1992.