

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

IN THE MATTER OF TRANSFER)
APPLICATIONS:)
47809 et al. (Group 3))
47861 et al. (Group 4))
49116 et al. (Group 5))
51006 et al. (Group 6))
51383 et al. (Group 7))

INTERIM RULING

#4411

GENERAL

During the 1980's, many of the water right holders within the Newlands Reclamation Project ("Project") filed change applications ("transfer applications") with the Nevada State Engineer seeking permission to transfer the place of use of water rights within the Project. Applications 47809, 47822, 47830, 47840, 48422, 48423, 48424, 48465, 48466, 48467, 48468, 48470, 48471, 48647, 48665, 48666, 48667, 48668, 48669, 48672, 48673, 48767, 48825, 48827, 48828, 48865, 48866 (27 applications in total, hereinafter identified as "Group 3") were filed to change the place of use of water decreed under the Truckee and Carson River Decrees.¹ The transfer applications² represent requests to change the place of use of decreed water on irrigated lands within the Project under the provisions set forth in the Orr Ditch Decree and the Alpine Decree.³

With the exception of Applications 47822 and 47830, the Group 3 transfer applications were timely protested by the Pyramid Lake Paiute Tribe of Indians ("PLPT") on various grounds, including the following:

¹ Final Decree in United States v. Orr Water Ditch Co., et al., Equity A-3 (D.Nev. 1944), ("Orr Ditch Decree"); and Final Decree in United States v. Alpine Land & Reservoir Co., et al., Equity No. D-183 (D.Nev. 1980) ("Alpine Decree").

² State of Nevada Exhibits No. 11 and 12, public administrative hearing before the State Engineer, June 24, 1985.

³ Orr Ditch Decree, p. 88. Alpine Decree, pp. 161-162.

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

7. On information and belief, said application involves the transfer of alleged water rights that have been abandoned or forfeited. Such alleged water rights cannot and should not be transferred.⁴

The PLPT requested that the transfer applications be denied for these reasons, among others, identified in the Protests.

The United States Department of Interior petitioned the State Engineer to intervene as an unaligned party in interest with regard to the hearing on the Group 3.⁵ Intervention was granted on the grounds that there were federal interests in the proceedings that justified standing as a party in interest.⁶

A public administrative hearing in the matter of the Group 3 transfer applications was held before the State Engineer on June 24, 1985, in Fallon, Nevada. The applicants and protestants made evidentiary presentations and extensive testimony was received from experts and witnesses on behalf of the parties who had standing in the matter.⁷

On September 30, 1985, the State Engineer issued his ruling with regard to the Group 3 transfer applications, overruling the PLPT's protests and granting the transfer applications. Pursuant to Ruling No. 3241, the State Engineer concluded, using a project-

⁴ State's Exhibits 11 & 14, public administrative hearing before the State Engineer, June 24, 1985.

⁵ DOI Exhibit 1, public administrative hearing before the State Engineer, November 26-29, 1984.

⁶ State Engineer's Ruling No. 3241, dated September 30, 1985, official records in the Office of the State Engineer. See transcript of public administrative hearing before the State Engineer, November 26-29, 1984, Vol. I, pp. 6-15.

⁷ Transcript, public administrative hearing before the State Engineer, June 24, 1985.

wide analysis, that existing water rights vested in the name of the United States when Congress authorized Lahontan Dam in 1902; that the transferors had not forfeited or abandoned their water rights under Nevada law; that the statutory provisions for forfeiture or abandonment, initially enacted in 1913, did not apply because the United States' water rights had vested in 1902; and that under the common law of abandonment mere non-use, without substantial and conclusive evidence of intent to abandon, was not sufficient evidence of abandonment.

The PLPT appealed State Engineer's Ruling No. 3241 overruling the PLPT's protests and granting the transfer applications to the United States District Court and the Ninth Circuit Court of Appeals. In Alpine II⁸ the Court held, among other things, that:

Nevada water law applies in water rights disputes between the PLPT and Project landowners;

the finding of the State Engineer that the transfers did not threaten to prove detrimental to the public interest was supported by substantial evidence;

it was appropriate for the State Engineer to determine the issues of perfection, abandonment and forfeiture;

that an appropriator has no right to request the transfer of a water right that has not been put to beneficial use; and further;

remanded the case to the U.S. District Court to evaluate the merits of the State Engineer's ruling that Nevada's statutory forfeiture provisions were inapplicable to the transfer applications and his finding that there was no evidence of transferor landowners' intent to abandon their water rights.⁹

On remand, the U.S. District Court affirmed the State Engineer's approval of the transfer applications and the State Engineer's ruling as to the Group 3 transfer applications on the

⁸ United States v. Alpine Land & Reservoir Co., et al., 878 F.2d 1217 (9th Cir. 1989) ("Alpine II").

⁹ United States v. Alpine Land & Reservoir Co., et al., 878 F.2d 1217 (9th Cir. 1989).

issues of perfection, abandonment and forfeiture. The matter once again was appealed to the Ninth Circuit Court of Appeals.¹⁰ The Ninth Circuit Court of Appeals in Alpine III remanded the case to the United States District Court for a determination as to (1) whether the water rights appurtenant to the transferor properties at issue have been perfected; (2) whether the holders of the water rights sought to be transferred abandoned the water rights appurtenant to the transferor properties; and (3) whether the specific water rights sought to be transferred have been forfeited. In order to determine whether a water right may have been forfeited, the Court held that it first must be determined whether and when the right vested, and under which law the appropriation was initiated. "If the right vested before March 22, 1913, or if the appropriation of the right was initiated in accordance with the law in effect prior to that date, then it is not subject to possible forfeiture under NRS 533.060."¹¹

On or about October 4, 1995, the United States District Court issued an order remanding the transfer application cases to the Nevada State Engineer for his consideration of all the applications (including the original 25 applications which were the subject matter of the action on remand from the 9th Circuit Court of Appeals, the 190 applications for transfer of water rights which were approved by the State Engineer and not reviewed by the Court, and the approximately 105 subsequent pending applications) to make determinations on the issues of the PLPT's protest claims alleging lack of perfection, forfeiture and abandonment of the base water rights supporting the transfer applications. The U.S. District Court did not require that the State Engineer reopen the hearing,

¹⁰ United States v. Alpine Land & Reservoir Co., et al., 983 F.2d 1487 (9th Cir. 1993) ("Alpine III").

¹¹ U.S. v. Alpine Land & Reservoir Co., 983 F.2d at 1496.

but rather ordered that if the State Engineer decided additional evidence was required, he should provide the parties the opportunity to present such evidence.

On Monday, February 5, 1996, the State Engineer held a status conference regarding Group 3 (the original 25, now 19¹²) of the transfer applications in order to explore the procedure to be followed in hearing the cases on remand. At the status conference, the protestant PLPT filed a pre-hearing brief on a procedural issue relating to the law of abandonment. Representatives of Applicants in Groups 4 through 7 requested the opportunity to also address the procedural issue raised by the PLPT's pre-hearing brief, as well as other legal issues, so as not to be prejudiced when their applications came up for hearing. Pursuant to that request, the State Engineer granted all Applicants in Groups 3 through 7 the opportunity to file pre-hearing briefs with regard to legal issues related to perfection, forfeiture and abandonment.

Pre-hearing briefs were filed by the PLPT (joined in by the United States¹³), the Truckee-Carson Irrigation District ("TCID"), Larry Fritz, et al., Laura Schroeder on behalf of her clients, the Clifford Mately Family Trust, et al., Keck, Mahin & Cate attorneys for Approximately 140 Transfer Applicants in Groups 3 through 7, and John Achurra, et al. The pre-hearing briefs presented a multitude of legal issues, some of which the State Engineer finds pertain to matters which can be ruled on as a matter of law at this time.

¹² Some of the original applications have either been cancelled, withdrawn by the applicant, the protest withdrawn or otherwise resolved.

¹³ The State Engineer notes that the United States was granted intervention as an unaligned party, but now appears to have aligned itself with the PLPT.

The pre-hearing briefs raised the following issues, among others:

1. Is the PLPT through its protest to the transfer applications attempting to modify, relitigate or collaterally attack the Orr Ditch Decree and Alpine Decree, and should the protest bases of lack of perfection, forfeiture or abandonment be barred by the doctrine of *res judicata*?
2. Does the State Engineer have the authority to entertain these challenges?
3. Should the transfer applications have been filed at all?
4. Did the Nevada legislature's clarification of NRS 533.324 after the entry of Alpine II affect these cases?
5. Should the State Engineer apply a rule that a rebuttable presumption of abandonment is created when there is evidence of prolonged nonuse of a water right submitted by the protestant, thereby shifting the burden of going forward to the applicant?

On or about July 22, 1996, the following motions were filed with the State Engineer:

1. Motion for Summary Judgment on behalf of Ann Gerdamann, Application 48467;
2. Motion for Summary Judgment on behalf of Rambling River Ranches, Application 48865;
3. Response to PLPT's Failure to Serve More Definitive Statement and Motion to Dismiss Protest or in the Alternative for Summary Judgment on behalf of Larry Fritz, Application 48468;
4. Response to PLPT's Failure to Serve More Definitive Statement and Motion to Dismiss Protest or in the Alternative for Summary Judgment on behalf of Gaylord Blue, Application 48668;
5. Response to PLPT's Failure to Serve More Definitive Statement and Motion to Dismiss Protest or in the Alternative for Summary Judgment on behalf of Roger Mills, Application 47840;

6. Response to PLPT's Failure to Serve More Definitive Statement and Motion to Dismiss Protest or in the Alternative for Summary Judgment on behalf of Larry Mathews¹⁴, Application 47840;
7. Request for Summary Ruling on Protest by PLPT as to Application Nos. 47809, 48424, 48465, 48466, 48647, 48669, 48672, 48673 and 48828 for Failure to Comply with Nevada State Engineer's Orders for Presenting Evidence and Analysis in Support of Protest, Insufficiency of Materials Submitted by Stetson Engineers Inc. and Failure to Provide Any Analysis as to the Relevancy of Those Materials As They Relate to the Legal Issues of Perfection, Abandonment and Forfeiture.

FINDINGS OF FACT

I.

As to the above-referenced motions, applicants have requested the State Engineer apply NRCP 56(b) or in the alternative FRCP 56(b) and grant the applicants summary judgment. The State Engineer finds that neither the Nevada Rules of Civil Procedure or the Federal Rules of Civil Procedure govern administrative hearings or matters before the State Engineer. Those rules are applicable to actions before the district courts.

The State Engineer finds he does not prejudge the evidence before the actual administrative hearing and he will not prejudge the value of the PLPT's evidence before the administrative hearings on the individual applications at issue here. It has always been the State Engineer's policy to allow the protestant to present its evidence and he will give it the weight it warrants. The U.S. District Court instructed the State Engineer to review the protest bases individually and he intends to conduct a full and fair

¹⁴ Nothing in the records of the State Engineer shows a valid assignment of this water right to Larry Mathews.

hearing as to each protest claim regarding lack of perfection, abandonment and forfeiture for each application that is not settled through negotiations.

The protest issues as to lack of perfection, forfeiture and abandonment have been lingering for more than 11 years. If the State Engineer were to grant the motions for summary judgment at this time it is his belief that the litigation would just continue and it is in the interest of all concerned to try to obtain final resolution of these issues. Therefore, it is in everyone's interest to get any remaining evidence on the record whereby the State Engineer can weigh the evidence and issue a final ruling.

However, the State Engineer finds the definitive statement and evidence supplied by the PLPT to the transfer applicants does not comply with the intent of the order for a more definitive statement and does not appear to specifically address the PLPT's protest claim of lack of perfection. The evidence itself indicates that many of these change applications involve pre-Project vested water rights, and the State Engineer questions the validity of maintaining the lack of perfection claim as to those vested water rights.

II.

Applicants argue that NRS 533.365(1) provides that any interested person may file, within the appropriate time frame, a written protest against the granting of an application, setting forth with "reasonable certainty" the grounds of such protest, which shall be verified by the affidavit of the Protestant, his agent or attorney, and that the PLPT's protest failed to conform to those requirements.

Applicants argue that the definition of "reasonable certainty" means that the protest claim is "more probable than not". The State Engineer finds that reasonable certainty as set forth in NRS

533.365(1) means to identify the specific components of the protest¹⁵, i.e., lack of perfection, forfeiture, abandonment, and that the PLPT in its original protests sufficiently identified the bases of its protest claims.

III.

Applicant Rambling River Ranches argues that it is entitled to summary judgment as the PLPT agreed by stipulation not to protest or appeal Application 48865. The PLPT disagrees with this interpretation. The State Engineer finds that the applicant did not cite to any specific statement by the PLPT agreeing not to protest or appeal Application 48865.

IV.

Certain applicants argue that Stetson Engineering, Inc. ("Stetson") should be precluded from supplying evidence to support the PLPT's protest claims on the basis that the firm or its agents are not certified by the State of Nevada as water right surveyors. The applicants continue that there is no evidence to indicate that Stetson is authorized to act on behalf of the PLPT or that the documents provided by Stetson constitute the complete evidentiary showing by the PLPT. The State Engineer must agree with the PLPT in that these assertions are not meritorious.

Stetson is not filing water right applications on behalf of the PLPT; but rather is acting as the PLPT's consultant with regard to its protest claims. The State Engineer finds that a consultant or expert witness is not required to be a certified water right surveyor in the State of Nevada if that consultant is not filing documents which are required to be filed by a licensed water right

¹⁵ Reasonable is defined as fair, suitable under the circumstances, and certain is defined as fixed, settled, proved to be true, of a specific but unspecified character, quantity or degree. BLACK'S LAW DICTIONARY 1138 (5th ed 1979); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 222 (9th ed 1987).

surveyor.¹⁶ The State Engineer further finds that if Stetson was acting without the PLPT's authority, it could be assumed that the PLPT would be the one raising the objection, not the water right applicants.

V.

Certain applicants ask the State Engineer to dismiss the PLPT's protest claims pursuant to NRCP 41(b) for failure to comply with the State Engineer's procedural order regarding a more definitive statement. The State Engineer finds that while the more definitive statement was not of the quality the State Engineer had hoped, and while the State Engineer agrees it lacks the specificity the State Engineer desired, particularly as to the claim of lack of perfection, the PLPT appears to have provided what can only be assumed to be its best evidence as to its protest claims, and the State Engineer will weigh the quality of that evidence during the administrative hearing process.

CONCLUSIONS OF LAW

I.

RES JUDICATA.

The argument is presented that the PLPT by way of its protests to the transfer applications is seeking to modify the Orr Ditch Decree to its benefit; and thus, is relitigating its claim to the waters of the Truckee River and should be barred from doing so by the doctrine of *res judicata*. A similar argument was presented with regard to the Carson River and the Alpine Decree. The State Engineer concludes that the PLPT's claims of lack of perfection, forfeiture and abandonment are questions of State law within the State Engineer's purview under Nevada law and as ordered by the

¹⁶ The State Engineer makes no determination as to whether the laws governing professional engineers in Nevada have been complied with by Stetson.

U.S. District Court.¹⁷ The U.S. District Court did not hold that these issues are precluded from being heard by the doctrine of *res judicata*. The State Engineer concludes the PLPT is not barred by the doctrine of *res judicata* from asserting its protest claims of lack of perfection, forfeiture or abandonment.

II.

STATE ENGINEER AUTHORITY TO ENTERTAIN THESE CHALLENGES

In the pre-hearing brief filed by Larry Fritz, et al. and John Achurra, et al., it is argued that the PLPT cannot destroy a decreed water right through a protest to a change application, and that the State Engineer should "reject the suggestion" of the Alpine II Court that the State Engineer may adjudicate issues of abandonment, forfeiture and perfection in a change application protest proceeding and instead should refer the PLPT to the appropriate state or federal court for the relief it seeks. The applicants also argue that Nevada law forbids divestiture of real property by the method attempted by the PLPT in its Protests.

In Alpine II the court held that "[w]hile it may not be incumbent upon the State Engineer to adjudicate such issues as perfection or forfeiture in a transfer proceeding, it is perfectly valid for him to do so under both Nevada law and the Final Decree."¹⁸ After Alpine III, the United States District Court remanded the transfer cases to the State Engineer and he was ordered to make determinations as to perfection, forfeiture and abandonment. The State Engineer concludes that he is the proper person to hear these issues, and the court has held it is within

¹⁷ Order of October 4, 1995, U.S. District Court, District of Nevada remanding the transfer application cases to the Nevada State Engineer for determinations on the issues of the PLPT's protest claims alleging lack of perfection, forfeiture and abandonment of the base water rights supporting the transfer applications.

¹⁸ U.S. v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1227 (9th Cir. 1989).

the State Engineer's authority to consider these issues, and has ordered him to do so. The State Engineer will not "just reject" an order of a federal district court.

Larry Fritz, et al. and John Achurra, et al. also argue that Nevada law forbids the divestiture of real property by the method being used by PLPT, and that the only method available to the PLPT is pursuant to NRS 30.010 through NRS 30.120 (Declaratory Judgment) and NRS 40.010 through NRS 40.030 (Actions to Determine Conflicting Claims to Real Property). Nevada water law substance and procedure govern Orr Ditch Decree water rights.¹⁹ Nevada substantive water law provides for the loss of water rights by abandonment or forfeiture.²⁰

Historically, the State Engineer has considered issues of forfeiture or abandonment within the context of protest proceedings and concludes it is proper for him to do so with regard to the PLPT's protests to the transfer applications. While water rights are regarded as real property in Nevada, those rights are also of a limited nature and may be lost through nonuse.²¹ As the water laws of Nevada are administered by the State Engineer, and it is within his authority to make determinations of lack of perfection, forfeiture and abandonment, the State Engineer concludes that Larry Fritz, et al. and John Achurra, et al. are mistaken in their statement that the only method available to the PLPT is found in Chapters 30 and 40 of the Nevada Revised Statutes. The State Engineer in the first instance has the power to determine his own jurisdiction and the Court has remanded these transfer applications to him.²² The State Engineer concludes he has the authority to

¹⁹ U.S. v. Orr Water Ditch Co., 914 F.2d 1302, 1307-1308 (9th Cir. 1990).

²⁰ NRS 533.060.

²¹ NRS 533.060.

²² U.S. v. Orr Water Ditch Co., 914 F.2d 1302, 1310-1311 (9th Cir. 1990).

entertain the PLPT's challenges based on lack of perfection, forfeiture and abandonment.

By citation to Pitt v. Scrugham, 44 Nev. 418 (1921), applicants allege that enunciated Nevada decisional law precludes the States Engineer from exercising judicial powers in "contests" involving vested water rights. It is argued that judicial authority of this nature was not constitutionally delegable to the State Engineer in an administrative proceeding.

The Pitt case addressed several specific sections of the 1913 water law relative to the comprehensive adjudication of water rights on a particular source. The relevant section is the precursor to the present NRS 533.145 - Objections to preliminary order of determination; form and content of objection. The original 1913 statute provided that:

Sec. 29. Should any person claiming any interest in the stream system involved in the determination of relative rights to the use of water, whether claiming under vested title or under permit from the state engineer, desire to contest any of the statements and proof of claims filed with the state engineer by any claimant to the waters of such stream system, as herein provided, he shall, within twenty days ... in writing notify the state engineer, stating with reasonable certainty the grounds of the proposed contest ...²³

In Pitt v. Scrugham, the Nevada Supreme Court held Section 29 to be "unconstitutional, because they [the sections] attempt to give judicial powers to the state engineer to hear and determine contests involving not relative but vested rights, which the statute itself expressly inhibits."²⁴ After the Pitt case the statute was amended to provide:

²³ Act of March 22, 1913, ch. 140, §29, 1913, Nev. Stat. 200.

²⁴ Pitt v. Scrugham, 44 Nev. at 428.

Sec. 29. Any person claiming any interest in the stream-system involved in the determination of relative rights and to the use of water, whether claiming under vested title or under permit from the state engineer, may object to any finding, part, or portion of the preliminary order of determination made by the state engineer, by filing objections with the state engineer within thirty days

The State Engineer concludes that by these proceedings the State Engineer is not making any determination that property should be taken from one person and given to another, he is not trying, determining or establishing conflicting claims to vested rights to water. The State Engineer concludes he has statutory jurisdiction to entertain protests²⁶ to the water right applications, and there is a right of appeal in the courts from any decision he makes with regard to a protested water right application.²⁷

III.

SHOULD THE TRANSFER APPLICATIONS HAVE BEEN FILED AT ALL?

Several different applicants argue the transfer applications should not have been filed in the first place. These arguments allege that the applicants now realize that the directives and instructions delivered by the Bureau of Reclamation through its agent TCID to initiate the transfers were grounded on specious legal assumptions and may not be in accord with the intention or purpose of NRS 533.345; that the change applications had to be filed under threat that without them delivery of water would be withheld; that the contracts by which Project landowners have acquired rights to use of water described only forty acre/quarter sections in which the water right could be used and do not described the exact location of acreage to be irrigated thereby authorizing irrigation anywhere within the forty acre parcel; that the water can be moved anywhere within the forty acre parcel during

²⁵ Act of March 16, 1921, ch. 106, §29, 1921, Nev. Stat. 173.

²⁶ NRS 533.365.

²⁷ NRS 533.450.

the development of the land and water prior to proof of beneficial use making the transfer unnecessary; and that the applications were erroneously submitted at the request of TCID to correct their delivery records.

The State Engineer concludes that he will not judge whether or not the applications should have been filed nor will he declare them to be moot or dismiss said applications. If the applicants believe they were filed in error they are free to withdraw their applications. The State Engineer concludes he will act on the applications that are before him.

IV.

DID THE NEVADA LEGISLATURE'S CLARIFICATION OF NRS 533.324 AFTER THE COURT'S ALPINE II ORDER AFFECT THIS CASE?

At the time of Alpine II NRS 533.325 permitted any person to apply to the State Engineer to change the point of diversion, place or manner of use of "water already appropriated". The PLPT contended that this section only authorized the transfer of water rights which had been perfected, i.e., placed to beneficial use, in accord with the approach adopted by the supreme courts of Wyoming, Idaho, and Colorado.²⁸ The Court in Alpine II accepted the Tribe's argument that the law of Nevada requires that the only transferable water right is one that has been appropriated to a beneficial use, i.e., perfected.²⁹

Some of the applicants have noted that the District Court gave specific instructions to the State Engineer to apply the Alpine II and Alpine III decisions when deciding the transfer cases on remand; that the decisions in Alpine III are the law in this circuit and need to be applied or the case will simply continue on the treadmill of litigation. However, the State Engineer cannot

²⁸ U.S. v. Alpine Land & Reservoir Co., 878 F.2d at 1226.

²⁹ U.S. v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1493 (9th Cir. 1992).

ignore the fact that the Nevada Legislature has clarified Nevada law which establishes that the court was in error as to its interpretation of Nevada law.

There is a doctrine in law called the "law of the case" which, as generally used, designates a principle which provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals, as long as the facts are substantially the same.³⁰ The "law of the case" is a procedural rule generally followed, not because the court is without power to reconsider a former determination, but because the orderly process of judicial procedure requires an end to the litigation.³¹

Some courts have held that the doctrine of the law of the case is one of policy only and will be disregarded when compelling circumstances call for a redetermination of the determination of the point of law on prior appeal, and this is particularly true where an intervening or contemporaneous change in the law has occurred overruling former decisions.³² The doctrine will not be applied where it will result in an unjust decision,³³ nor does it apply until final judgment embracing all issues of the case is entered.³⁴ The doctrine of the "law of the case" is a matter of

³⁰ Office of the State Engineer, Div. of Water Resources v. Curtis Park Manor Water Users Ass'n., 101 Nev. 30, 32, 692 P.2d 495 (1985).

³¹ State v. Maxwell, 508 P.2d 96, 100, 19 Az.App. 431 (1973).

³² Ryan v. Mike-Ron Corp., 63 Cal.Rptr. 601, 605-606 (1967). Law of the case may be relaxed and the matter reconsidered when the law has been changed in the appellate phase of the same case and might affect nonfinal mixed factual and legal adjudication. Sisler v. Gannett Co., Inc., 536 A.2d 299 (N.J.Super.A.D. 1987).

³³ People v. Medina, 492 P.2d 686, 691, 99 Cal.Rptr. 630 (1972); see also Pigeon Point Ranch, Inc. v. Perot, 379 P.2d 321, 28 Cal.Rptr. 865 (1963).

³⁴ R.L.K. and Co. v. State Tax Commission, 438 P.2d 985 (1968).

judicial policy, not law, and merely expresses a practice of the courts to generally refuse to reopen what has been decided, it is not a limit to their power³⁵ and, it will not be applied at the expense of justice.³⁶

The State Engineer, while sympathetic to the continual treadmill of litigation these cases have been on, cannot just ignore the Court's misinterpretation of Nevada law, particularly in light of the confusion that could result in the years to come for other citizens of the state. In 1993 the Nevada Legislature clarified Nevada's definition of "water already appropriated" by providing that "water already appropriated" includes water for whose appropriation the state engineer has issued a permit but which has not been applied to the intended use before an application to change is made.³⁷

The Revisor's Note to NRS 533.324 notes that the legislature declared that it had examined the past and present practice of the state engineer with respect to the approval or denial of applications to change the place of diversion, manner of use or place of use of water and found that those applications have been approved or denied in the same manner as applications involving water applied to the intended beneficial use before the application for change had been made. The legislature declared that its intent by the act was to clarify the operation of the statute thereby promoting stability and consistency in the administration of Nevada water law. The State Engineer concludes that law of the supreme courts of Wyoming, Idaho, and Colorado is not the law of Nevada and

³⁵ Luedtke v. Nabors Alaska Drilling, Inc., 834 P.2d 1220 (1992).

³⁶ Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II, 860 P.2d 1328, 176 Az. 275 (Az.App. Div. 1 1993).

³⁷ NRS 533.324.

the State Engineer believes it is his obligation to follow the law of Nevada which allows for the permitting of a change application on a water right that has not yet been perfected.

V.

Rebuttable Presumption of Abandonment is Not Nevada Law

The PLPT argued that the State Engineer should apply a rule that a presumption of abandonment is created when there is evidence of prolonged nonuse of a water right. The PLPT continues that once it submits evidence of a substantial period of nonuse of a water right the burden shifts to the transfer applicant to present evidence justifying the nonuse, showing that the nonuse of the water right resulted from circumstances beyond the water right users control, and failure to do so would result in a finding of abandonment.

The PLPT, citing to case law of Colorado, New Mexico, Montana, California and Wyoming, argues this rule of rebuttable presumption is well established in the western states, there is no reason the common law of abandonment should be different in Nevada than in other western states, and the Nevada Supreme Court's relatively sparse discussions of abandonment suggest a general desire to accept the doctrine as it has been developed in other states. Applicants argued in response that the burden of proving "intent to abandon" is on the party who asserts it, and that a showing of a prolonged period of nonuse of a water right does not shift the burden of going forward to the water right holder to introduce evidence to rebut the presumption.

The State Engineer concludes Nevada does not shift the burden of going forward to the applicants upon the protestant's showing of an extended period of nonuse. "The state, having a right to designate the method of appropriation, may also provide how long water may be permitted to run idly by and not be beneficially used."³⁸ Rights acquired before 1913 can only be lost in

³⁸ In Re Waters of Manse Spring, 60 Nev. 280, 287 (1940).

accordance with the law in existence before the enactment of NRS 533.060, namely intentional abandonment.³⁹

The Nevada Supreme Court in Manse Spring asked the specific question of whether a pre-1913 water right could be impaired by providing a different method for its loss than had theretofore existed.⁴⁰ Prior to 1913 in the case of abandonment, the intent of the water user was controlling.⁴¹ "To substitute and enlarge upon that by saying that the water user shall lose the water by failure to use it for a period of five years, irrespective of the intent, certainly takes away much of the stability and security of the right to the continued use of such water."⁴² Applying a rebuttable presumption standard would further undercut the stability and security of pre-1913 vested water rights.

The State Engineer has previously held the burden of proof is upon whoever seeks the declaration, be it the State Engineer, a private party, a protestant, or an applicant, to establish by conclusive and substantial evidence that the act of abandonment has occurred.⁴³ The State Engineer will not shift the burden to the transfer applicant to present evidence justifying the nonuse upon a mere showing by the PLPT of a substantial period of nonuse of a water right. Furthermore, since the Nevada Supreme Court's 1992 ruling in the Town of Eureka⁴⁴ wherein the Court held that because "the law disfavors a forfeiture, the State bears the burden of

³⁹ Id. at 289.

⁴⁰ Id. at 290.

⁴¹ Id. at 290.

⁴² Id. at 290.

⁴³ State Engineer Supplemental Ruling on Remand No. 2804, dated April 15, 1983, official records of the Office of the State Engineer (In the Matter of Harootunian applications, Eagle Valley, Nevada)

⁴⁴ Town of Eureka v. State Engineer, 108 Nev. 163, 862 P.2d 948 (1992).

proving by clear and convincing evidence, a statutory period of non-use"⁴⁵ the State Engineer concludes there is no reason proof of abandonment should be held to any standard lower than clear and convincing evidence.

In Nevada, no rebuttable presumption of abandonment is created by evidence of the prolonged nonuse of a water right.⁴⁶ The State Engineer concludes the PLPT brought these protests, it is the "plaintiff" in these cases, and bears the burden of proving its case as to abandonment by clear and convincing evidence of acts of abandonment and intent to abandon, intent to forsake and desert the water right.⁴⁷ "Abandonment, requiring a union of acts and intent, is a question of fact to be determined from all the surrounding circumstances."⁴⁸ Nonuse for a period of time may inferentially be some evidence of intent to abandon;⁴⁹ however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence. If the legislature wishes to establish a rebuttable presumption regarding abandonment it may do so, but to date it has not so chosen.

⁴⁵ Id. at 826 P.2d 952.

⁴⁶ The United States District Court in Alpine III noted that "[t]he Tribe, relying on authority from other western states, argues that a substantial period of nonuse creates a rebuttable presumption of abandonment. Though the longer the period of nonuse, the greater the likelihood of abandonment, we find no support for a rebuttable presumption under Nevada law." U.S. v Alpine Land & Reservoir Co., 983 F.2d 1487, 1494 n. 8 (9th Cir. 1992).

⁴⁷ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

⁴⁸ Revert v. Ray, 95 Nev. 782, 786 (1979).

⁴⁹ Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

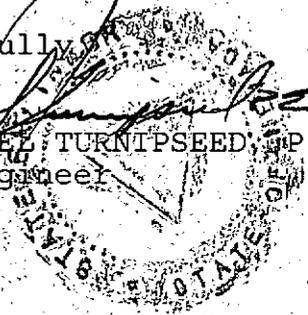
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RULING

The Motions for Summary Ruling, Summary Judgment and Dismissal are hereby denied. The PLPT bears the burden of proving its case as to abandonment by clear and convincing evidence of acts of abandonment and intent to abandon.

Respectfully,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/SJT/ab

Dated this 30th day of
August, 1996.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Interim Ruling Number 4411 was deposited in the U.S. Mail, first class, postage prepaid, on this 30th day of August, 1996, addressed to the following:

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