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STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
BEFORE THE STATE ENGINEER, MICHAEL TURNIPSEED

-oOo-

In the Matter of Applications)
62405, 62619, 62830, 62831, 62897)
63005, 63006, 63008, 63009, 63025)
63026, 63027, 63034, 63056, 63057)
63060, 63061, 63073, 63097, 63098)
63104, 63105, 63106, 63137, 63138)
63209, 63220, 63243, 63244, 63253)
63268, 63280, and 63283)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
PUBLIC HEARING
VOLUME I
MONDAY, JUNE 15, 1998
CARSON CITY, NEVADA

Reported By: KAREN YATES, RPR
Nevada CCR No. 195

1 Previous to the hearing, we put the protests in
2 about eight different categories, realizing that the City of
3 Fallon protested certain applications and the County of
4 Churchill protested certain applications, and many of the
5 applications were protested by both.

6 The categories are: The water rights have been
7 abandoned; the water rights have been forfeited. Because
8 the water rights have been abandoned or forfeited, reviving
9 and granting the change applications would conflict with
10 existing rights. Because the water rights have been
11 abandoned or forfeited, reviving and granting the change
12 applications would per se be detrimental to the public
13 interest.

14 Because the water rights have been abandoned or
15 forfeited, reviving and granting the change applications
16 would be detrimental to the public interest because it would
17 reduce the water that recharges aquifers, thereby depleting
18 Churchill County's drinking water supply. Because the water
19 rights have been abandoned or forfeited, reviving and
20 granting the change applications would violate Public Law
21 101-618 and reduce rights decreed to TCID and water to
22 Pyramid Lake.

23 Because the water rights have been abandoned or
24 forfeited, reviving and granting the change applications
25 would violate the Endangered Species Act. If granted, the

1 change application would jeopardize many thousands of
2 Nevada's residents' drinking water supply.

3 Hopefully, I have addressed all of those in my
4 findings of fact, conclusions of law, and ruling.

5 Finding of fact one. I can find no evidence in
6 this record that the owners of these water rights past or
7 present intended to abandon, desert, forsake, or relinquish
8 these water rights. That standard is set out in Franktown
9 Creek Irrigation Company versus Marlette Lake Company and
10 the State Engineer, and other cases.

11 Quite the contrary. The evidence shows
12 reservation by deed, by quiet title action, by dedication,
13 that there was no intent to abandon these water rights.

14 Finding of fact two. I find nothing in the record
15 as to other union of acts or circumstances that would lead
16 the fact finder to find that these water rights had been
17 abandoned. The union of acts means more than just non-use.
18 That standard is set out in a Nevada case called Revert vs.
19 Ray.

20 Finding of fact three. I find nothing in the
21 record that would indicate that the approval of these change
22 applications would violate Public Law 101-618 or the
23 Endangered Species Act. Quite the contrary. More water
24 would go downstream by the conversion of agricultural rights
25 to municipal and industrial water rights

1 Finding of fact four. I find that those water
2 rights with a decreed priority date that precede 1913 are
3 not subject to forfeiture. That's directly in line with the
4 Alpine III case. The surface water rights vested or were
5 initiated in accordance with the law in effect prior to
6 1913, and were decreed as such. Those are all found in the
7 Orr Ditch decree.

8 Finding of fact five. I find that these water
9 rights are determined not to be abandoned and are available
10 to be transferred to a new point of diversion, place of use,
11 and/or manner of use as anticipated in the Orr Ditch decree,
12 special master's report, and Nevada water law. The cite to
13 the Orr Ditch decree is in the general provisions, page 88.
14 The NRS that covers those provisions are in 533.325 and
15 533.345.

16 Conclusions of law, number one. Nevada case law
17 discourages and abhors the taking of water rights away from
18 people. Therefore, the Supreme Court of Nevada has set the
19 standard of "clear and convincing evidence," which is
20 somewhere between substantial evidence and beyond a
21 reasonable doubt. In this case, protestants have failed to
22 carry that burden of showing by clear and convincing
23 evidence that these water rights have been abandoned.

24 Now, as to the forfeiture of a portion of
25 Application 63026 and 63619, all those water rights or

1 parcels with a priority date post-1913 are subject to
2 forfeiture, directly in line with the Alpine III decision in
3 the Ninth Circuit.

4 Did I misstate the application? The applications
5 that have portions that are subject to forfeiture are 63026
6 and 62619.

7 Evidence shows that 1.6 acres in Claim 139 as
8 being irrigated as late as 1992. Therefore, if there ever
9 was a forfeiture, it has been cured, based on the Eureka
10 decision. All other claims on 63026 or 62619 which have a
11 post-1913 priority date show no use for a substantial period
12 of time. Therefore, those portions have been forfeited as
13 per Alpine III. To interpret otherwise would be a
14 collateral attack on the decree.

15 Protestants brought up the fact that beneficial
16 use is the standard in Nevada. Beneficial use is the
17 standard in almost all of the western states, but I have to
18 weigh beneficial use versus taking a real private property
19 right. The Nevada Supreme Court has said it abhors such
20 action.

21 I conclude that the conversion of ag rights to M &
22 I rights was anticipated in Public Law 101-618. The Sierra
23 Pacific Power Company resource plan and Nevada legislature
24 have also anticipated the conversion of agricultural rights
25 to municipal rights in the Truckee Meadows to sustain

1 growth. Therefore, approval of these change applications
2 would not threaten or prove detrimental to the public
3 interest.

4 As to the shifting of the burden of showing intent
5 or lack thereof, in the Town of Eureka versus the State
6 Engineer, the Supreme Court was clear in that the person
7 claiming forfeiture has the burden. I see no reason why the
8 burden on abandonment would be otherwise. It is not the law
9 in Nevada until the legislature speaks to that issue.

10 I conclude that these water rights are valid water
11 rights and can be changed from ag to municipal without
12 interfering with existing water rights, as shown in the
13 Burns exhibit.

14 Now, for the ruling. Protests to all applications
15 are hereby overruled, except for the protest based on
16 forfeiture in Application 62619 and 63026. The 30
17 applications which are based entirely on pre-1913 water
18 rights are approved in their entirety, subject to the
19 payment of the statutory fees and ownership verification.

20 Application 62619 and 63026 are approved except
21 those portions based on Truckee River Claims 105, 118, and
22 55, subject again to payment of the statutory fees and
23 ownership verification.

24 Any question on the ruling? I also want to thank
25 you for your attention and your professionalism in this

1 hearing. We had actually set aside three weeks for the
2 hearing and finished it in three days.

3 If there are no questions -- Mr. King?

4 MR. KING: Simply, the ruling then will be reduced
5 to a written ruling or just orally --

6 THE STATE ENGINEER: Orally and a copy of the
7 transcript. The appeal period will begin running today
8 under 533.450.

9 Any other questions about the ruling? The hearing
10 is closed.

11 (The hearing concluded at 4:55 p.m.)
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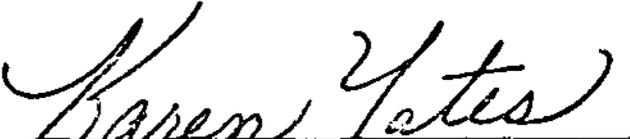
STATE OF NEVADA,)
) ss.
CARSON CITY.)

I, KAREN YATES, a Certified Court Reporter in and for the State of Nevada, do hereby certify:

That I was present at a meeting of the Nevada Department of Conservation and Natural Resources, Division of Water Resources, 123 West Nye Lane, Carson City, Nevada, on June 15, 16, and 17, 1998, and took verbatim stenotype notes of the proceedings had upon the hearing in the matter of Change Applications 62405, et cetera, and thereafter transcribed them into typewriting as herein appears,

That the foregoing transcript, consisting of pages 1 through 479, is a full, true and correct transcription of my stenotype notes of said hearing.

DATED at Carson City, Nevada, this 29th day of June, 1998.


KAREN YATES, RFR
Nevada CCR No. 195