

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

IN THE MATTER OF APPLICATION 85166 )  
FILED TO APPROPRIATE OTHER SURFACE )  
WATER WITHIN THE CARSON DESERT )  
HYDROGRAPHIC BASIN (101), CHURCHILL )  
COUNTY, NEVADA. )

**RULING**

**#6337**

**GENERAL**

**I.**

Application 85166 was filed on May 12, 2015, by Stillwater Farms, Inc. to appropriate 25.0 cubic feet per second (cfs) of “other surface water” for wildlife purposes. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 8, T.19N., R.31E., M.D.B.&M. The proposed place of use is described as being located within Sections 15 and 16, NE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , S $\frac{1}{2}$  S $\frac{1}{2}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 17, E $\frac{1}{2}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 19, Sections 20 and 21, W $\frac{1}{2}$  of Section 22, NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 27, NE $\frac{1}{4}$ , W $\frac{1}{2}$  SE $\frac{1}{4}$ , W $\frac{1}{2}$  of Section 28, Section 29, E $\frac{1}{2}$ , E $\frac{1}{2}$  W $\frac{1}{2}$  of Section 30, NE $\frac{1}{4}$ , E $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 31, N $\frac{1}{2}$  of Section 32, N $\frac{1}{2}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 33, all in T.20N., R.31E., M.D.B.&M. Item 13, the remarks section of the application, indicates that the application is for “all the mismatched, tail, flood, and other excess water above prime delivery water that makes its way to the proposed point of diversion.”<sup>1</sup>

**II.**

Application 85166 was timely protested by Churchill County and the Truckee Carson Irrigation District (TCID) on essentially the same grounds as follows:<sup>1</sup>

1. The applicant seeks to appropriate “Other Surface Water” and no such definition exists in the statutes. In the miscellaneous remarks, the applicant states: “This application is for all the mismatched, tail, flood, and other excess water above prime delivery water that makes it to the proposed point of diversion”. The correct source of water is the Truckee and Carson Rivers which are “Newlands Project Waters” that are managed and delivered by TCID under contract with the United States. The application is deficient and should be rejected because it does not correctly identify the source of the water.

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<sup>1</sup> File No. 85166, official records in the Office of the State Engineer.

2. The Truckee and Carson River Newlands Project water sought to be appropriated is fully appropriated, is managed under contract with TCID for approved Project purposes and not available for further appropriation under state or federal law. The U.S. District Court has decreed that the water of the Carson River is fully appropriated under the Alpine Decree in 1980 and the State Engineer has found the Truckee River is also fully appropriated after granting any unappropriated water to the Pyramid Lake Paiute Tribe. Furthermore, in Ruling 6226, the State Engineer found that water, regardless of how it is characterized, at the proposed point of diversion was not available for further appropriation.
3. Under PL 101-618, the Secretary of Interior authorized a maintenance goal of 25,000 acres of wetlands habitat at the Stillwater National Wildlife Refuge and the State Engineer has consistently upheld this goal in rulings dating back to 1996. Furthermore, in May 2009 the TCID Board supported this position by approving a motion that 100% of the water appearing at the proposed point of diversion be routed to the Stillwater Refuge and be counted as deliveries towards existing water orders as a priority or spilled to the refuge and be counted toward the wetland's water supply. The board recognized that spills would count toward the water necessary to meet the 25,000 acre goal, and the USFWS acknowledged that spills could reduce the amount of water they needed to purchase in the future. Although TCID is not the owner of this water, as managers of the Newlands Project Truckee and Carson River waters, they are authorized to make operational and delivery management decisions within the Project. Approval of the application would reduce the ability to reach the 25,000 acre wetland goal and thus is not in the public interest.
4. Denying the application is in the public interest in that it will reduce the amount of agricultural rights USFWS will purchase which benefits the County as it reduces demand on the Agricultural sector that is the primary economic base for the County. Additionally, reduced prime water acquisitions helps maintain groundwater recharge associated with on-farm and delivery 'losses'. Counting this water as wetlands deliveries for the Stillwater Refuge in addition to reduced acquisitions will also improve Project delivery efficiencies mandated under OCAP [Operating Criteria and Procedures].
5. This application is identical in substance to applications 47786 and 79646, both of which were denied by the State Engineer under Ruling 6226 and that ruling was upheld on appeal to the U.S. District Court of Nevada.

As previously found under State Engineer Ruling No. 6226, NRS § 533.364(4) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of Nevada. There is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on these matters should not be required. The Protestant requests that a Ruling be issued without a hearing based on the foregoing grounds denying the application pursuant to NRS § 533.371 (3-6).

### III.

Application 85166 was timely protested by the U.S. Bureau of Reclamation, Mid-Pacific Region, Lahontan Basin Area Office (BOR) on the following grounds:<sup>1</sup>

1. The application is for "all the mismatched, tail, flood, and other excess water above prime delivery water that makes its way to the proposed point of diversion". This implies the application is for water from the S-line Canal within the Newlands Project (Project). All water within the Project is already fully appropriated and is within the control of the Secretary of the Interior for approved Project purposes and is not available for further appropriation under state or federal law.
2. Under current Project operations, there is no water available at the proposed point of diversion. Whether characterized as prime water, operational spill, tail water, flood water, mismatched water, waste water, drain water, other surface water, excess water, or any other term, all water reaching the end of the S-Line Canal, where the proposed point of diversion is located, is either delivered to Project irrigators or to Stillwater National Wildlife Refuge for approved Project purposes.
3. This application appears to be a resubmission of Application Nos. 47786 and 79646, both of which attempted to appropriate water at the same proposed point of diversion in the same amount for the same proposed use. State Engineer Ruling #6226 appropriately denied both previous applications on the grounds that no water was available for appropriation. On appeal by Stillwater Farms, Inc. to the United States District Court of Nevada, Ruling #6226 was affirmed (UNITED STATES OF AMERICA V. ALPINE LAND AND RESERVOIR CO., et al., No. 3:73-cv-00211-LDG, In Equity D-183-LDG). Application No. 85166 should be denied on the same grounds.

### IV.

Application 85166 was timely protested by the United States Fish and Wildlife Service (USFWS) on the following grounds:<sup>1</sup>

1. The applicant does not have legal access to the proposed point of diversion. The proposed point of diversion is within Stillwater National Wildlife Refuge. Permission to access the proposed point of diversion for the purpose described by Application No. 85166 would not be granted if requested.
2. The application is for water from the S-line Canal within the Newlands Reclamation Project (Project). This water is already fully appropriated to the United States, is under the control of the Secretary of the Interior for approved Project purposes and is not available for further appropriation under state or federal law.

3. Under current project operations, there is no water available at the proposed point of diversion. Whether characterized as prime water, operational spill, tail water, flood water, mismatched water, waste water, drain water, other surface water, excess water, or any other term, all water reaching the end of the S-line Canal, where the proposed point of diversion is located, is either delivered to Project irrigators or to Stillwater National Wildlife Refuge for approved Project purposes.
4. This application appears to be a resubmission of Application Nos. 47786 and 79646, both of which attempted to appropriate water at the same proposed point of diversion in the same amount for the same proposed use. State Engineer Ruling #6226 appropriately denied both previous applications on the grounds that no water was available for appropriation. On appeal by Stillwater Farms, Inc. to the United States District Court of Nevada, Ruling #6226 was affirmed (UNITED STATES OF AMERICA V. ALPINE LAND AND RESERVOIR CO., et al., No. 3:73-cv-00183-LDG, In Equity D-183-LDG; Subfile No. 3:73-cv-00211-LDG, March 13, 2015). Application No. 85166 should be denied on the same grounds.

## V.

The Applicant filed an Answer to the protests pursuant to NAC § 533.140, the content of which is discussed herein.<sup>1</sup>

## FINDINGS OF FACT

### I.

Nevada Revised Statute § 533.365(4) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of Nevada. The State Engineer finds that in the case of Application 85166, there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

### II.

The Applicant asserts that the protests of Churchill County, TCID and USFWS should be rejected as they are deficient for not complying with NRS § 533.365(2)(a) as they are not signed by the appropriate person. Additionally, the Applicant asserts that since the protests are not verified by affidavit of the Protestants, but rather their agent, they should be rejected. Nevada Revised Statute NRS § 533.365(2) provides that:

2. If the application is for a permit to change the place of diversion, manner of use or place of use of water already appropriated within the same basin, a protest filed against the granting of such an application by a government, governmental agency or political subdivision of a government must be verified by the affidavit of:

(a) Except as otherwise provided in paragraph (b), the director, administrator, chief, head or other person in charge of the government, governmental agency or political subdivision; or

(b) If the governmental agency or political subdivision is a division or other part of a department, the director or other person in charge of that department in this State, including, without limitation:

(1) The Regional Forester for the Intermountain Region, if the protest is filed by the United States Forest Service;

(2) The State Director of the Nevada State Office of the Bureau of Land Management, if the protest is filed by the Bureau of Land Management;

(3) The Regional Director of the Pacific Southwest Region, if the protest is filed by the United States Fish and Wildlife Service;

(4) The Regional Director of the Pacific West Region, if the protest is filed by the National Park Service;

(5) The Director of the State Department of Conservation and Natural Resources, if the protest is filed by any division of that Department; or

(6) The chair of the board of county commissioners, if the protest is filed by a county. (*Emphasis added.*)

The State Engineer finds Application 85166 is not a change application for water already appropriated in the same basin, but rather is a request for a new appropriation and this argument lacks merit.

### III.

Protestants assert that the Applicant seeks to appropriate "Other Surface Water" and no such definition exists in the statutes. In the miscellaneous remarks, the Applicant states: "This application is for all the mismatched, tail, flood, and other excess water above prime delivery water that makes its way to the proposed point of diversion." The Protestants assert that the correct source of water is the Truckee and Carson Rivers, which are "Newlands Project Waters" that are managed and delivered by the TCID under contract with the United States. The Protestants assert that this makes the application deficient and it should be rejected because it does not correctly identify the source of the water.

In its Answer to the Protests, the Applicant indicates that when the delivery of irrigation water occurs from the S-Line canal, excess water makes it to the end of the S-Line canal that consists of (1) "mismatched water," which it indicates is a term the TCID and farmers use for Project water that is placed in the delivery structure, but is not taken from the structure by the water right owners, (2) tail water, which Merriam-Webster defines as excess surface water draining especially from a field under cultivation, (3) run-off from water used on lands that may drain into the canal (which to the State Engineer sounds like the same thing as tail water), (4)

carriage water (the State Engineer notes no definition of carriage water was provided), flood and other waste water (the State Engineer notes that this kind of water was not described). The Applicant asserts that unless the excess water is diverted through one of the headgates at the end of the S-Line canal, the water backs up and challenges the integrity of the diversion structure. The Applicant alleges that historically, whenever this excess arrived at the diversion structure, it was diverted to Stillwater Farms through the same headgate, which is the point of diversion for the subject application.

The State Engineer finds that the term “other surface water” is a common term identifying sources of water in Nevada and over 950 applications and claims of pre-statutory vested water rights have been filed with the Office of the State Engineer identifying other surface water as the source. This category has been used to describe appropriations of seepage, tail water, small catchment basins and drainage water. There are over 250 water rights that currently exist in Nevada that identify the water source using this term.<sup>2</sup> However, the State Engineer also finds as addressed below, that two courts have held that while this water remains within the lands or works within the Project it is Project water, which is Truckee and Carson River water.

#### IV.

On September 14, 2015, the Applicant filed an Answer to Protests.<sup>1</sup> In essence, the Applicant argues that the State Engineer is responsible for administering the appropriation and management of the water it seeks to appropriate and, even in a federal reclamation project, water can only be used based on a state water right. The Applicant argues that Section 8 of the Reclamation Act, codified as 43 U.S.C. § 383, provides “[t]hat nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the law of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such law.” *Nevada v. U.S.*, 103 S.Ct. 2906, 2914 (1983).

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<sup>2</sup> See, e.g., Permit 25491, which indicates that “The applicant is at the end of the ditch and all waters which are not diverted under previous permits comes to his point of diversion and will be either diverted to his use or runs into Artesia Lake.” The permit was issued to appropriate “waste water” the permit terms indicate that it was issued subject to its availability and carries with it no provisions or guarantee for the availability of such water; *and see also*, Permit 71133, which appropriated nuisance water.

Application 85166 is nearly an identical refiling of denied Application 47786, which was filed by Stillwater Farms, Inc. and denied by the State Engineer; however, here, instead of identifying the source of water as “drain water,” the Applicant now calls it “mismatched, tail, flood, and other excess water above prime delivery water” that makes its way to the proposed point of diversion. The Applicant appealed the denial of Application 47786 to both the Federal District Court and the Tenth Judicial District Court of the State of Nevada in and for the County of Churchill.

The Federal District Court addressed the Applicant’s argument that the court lacked jurisdiction over the water sought for appropriation and held that “this court has jurisdiction because Stillwater contests the State Engineer’s determination that water still within the irrigation works operated by the TCID for the benefit of appropriators within the Newlands Project is not drain water.”<sup>3</sup> The Court held that “until the water *escapes* from the lands or works of those who lawfully appropriated and diverted the water from its source of supply, the water is unavailable for the appropriation.”<sup>4</sup> The court went on to state:

Stillwater does not cite to any authority establishing or even suggesting that ‘excess water’ or ‘mismatched water’ becomes available for appropriation while it still remains on the land or in the works of those who originally appropriated the water. Rather, the Nevada Supreme Court’s decision in *Gallio* establishes the contrary: no right can be obtained to such water while it remains under the control of the lawful appropriator. Regardless of whether the water Stillwater sought to appropriate is labeled as ‘mismatched’ at the proposed point of diversion, the water remained in the works and control of TCID and was not available for appropriation as drain water.<sup>5</sup>

The Tenth Judicial District Court held that water that remained in the S-Line Canal can be called for at any time during the irrigation season by a permit holder and is not waste water subject to appropriation. *Stillwater Farms, Inc. v. King*, Case No. 38904, Order Affirming State Engineer’s Ruling No. 6226 (10th Judicial District Court Nev., September 10, 2015).

The State Engineer finds that two Nevada courts have already ruled and held that the water is unavailable for appropriation.

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<sup>3</sup> *U.S. v. Alpine, Re: Nevada State Engineer Ruling No. 6226*, No. 3:73-cv-00211-LDG (D. Nev. March 13, 2015) (emphasis original).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

V.

The Applicant asserts that the water sought to be appropriated is under the control of the Secretary of the Interior is in contravention of the cooperative federalism exemplified in Section 8 of the Reclamation Act and the deference to state water law by Congress. It argues that while the TCID, under its contract with BOR, can enforce federal regulations related to how water is delivered through the Project facilities, neither it nor the USFWS has the authority to determine how water should be appropriated, which is the exclusive jurisdiction of the State Engineer. It also argues, citing to *Nevada v. U.S.*, 463, U.S. 110 (1983), for the proposition that neither the Federal Government nor the TCID as their agent has the authority to reallocate water between users in the Project and the State Engineer should reject the Protestants' claims that they have the right to decide that water should be released to the USFWS for use in the Stillwater National Wildlife Refuge.

The water rights for the Newlands Reclamation Project (Project) were established pursuant to two separate proceedings. The "United States initiated what became known as the *Orr Ditch*<sup>6</sup> litigation in an attempt to settle the competing claims to the waters of the Truckee River."<sup>7</sup> "The United States initiated a separate litigation to adjudicate claims to the waters of the Carson River, which concluded with the entry of the final decree in 1980."<sup>8</sup> The governing decrees resulting from these proceedings deal with the Newlands Reclamation Project as a whole and decreed pre-statutory vested water rights in the name of the United States for use in the Project. "For the Newlands Project the applicable Nevada law was the state water law as it existed in 1902."<sup>9</sup> The rights of particular properties to receive Project water are based on contracts and certificates issued by either the Secretary of the Interior (BOR) or the TCID. The water rights for the entire Project were appropriated pursuant to the common law of the State that predated the application process that now is State law.

Section 5 of the Reclamation Act provides:

That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of

<sup>6</sup> *United States v. Orr Ditch Co.*, Equity No. A-3 (D. Nev. 1944).

<sup>7</sup> *U.S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1220 (9th Cir. 1989).

<sup>8</sup> *Ibid.*

<sup>9</sup> *U.S. v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877, 885 (D. Nev. 1980).

water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act. (*Emphasis added.*)

The water rights for the Project were decreed by the Nevada Federal District Courts applying State common law that existed at the time. However, the Reclamation Act itself recognizes the system for allocating new appropriations of water decreed to the United States for use by Newlands Project farmers (entryman) of Project water is through contracts or water right applications filed with the BOR or the contracted operator of the Project, the TCID. “It is undisputed that the primary purpose of the Government in bringing the *Orr Ditch* suit in 1913 was to secure water rights for the irrigation of the land that would be contained in the Newlands Project, and that the Government was acting under the aegis of the Reclamation Act of 1902 in bringing that action.”<sup>10</sup>

This system of farmers applying to use the Project water has been recognized in the *Alpine* Decree, case law, as well as the Reclamation Act. The *Alpine* Decree provides that “[t]he United States is entitled to divert and store the entire flow of the Carson River as it reaches the Lahontan Dam for distribution to the individual farmers on the Project who own the water rights appurtenant to their lands and for generating power.”<sup>11</sup>

The Applicant’s argument that neither the Federal Government nor the TCID, as its agent, has the authority to reallocate water between users in the Project takes the decision in *Nevada v. U.S.* out of context. The case of *Nevada v. U.S.* arose out of an action in which the United States tried to reopen the adjudication of the waters of the Truckee River asserting a claim to additional water for the Pyramid Lake Indian Reservation. The issue was whether the United States government could partially undo the 1944 *Orr Ditch* Decree, which would have

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<sup>10</sup> *Nevada v. U.S.*, 103 S.Ct. 2906, 2914 (1983).

<sup>11</sup> Final Decree in *United States v. Alpine Land & Reservoir Co.*, Civil No. D-183 BRT (D. Nev. 1980), Rights of the United States of America at 151.

taken water and property rights from some water right holders and given it to the Pyramid Lake Indian Tribe. The case specially references that individual water users contracted with the United States for the use of Project water, but central to the decision was the property right of the farmers upon obtaining those contracts for the use of Project water and placing the water to beneficial use.<sup>12</sup> The holding was that once the lands were acquired by settlers in the Project, the Government's ownership of the water rights was at most nominal because the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which the water rights became appurtenant upon the application of Project water to the land.<sup>13</sup> It in no way implies that the Government, or the TCID as its agent, cannot contract to users within the Project for use of Project water. "The water rights on the Newlands Project covered by approved water rights applications and contracts are appurtenant to the land irrigated and owned by the individual land owners in the Project."<sup>14</sup>

The State Engineer finds that State water law did govern the initial appropriation of water for the Newlands Project. However, the State Engineer also finds that in the Project, the initial right to use Project water by an individual is obtained through contract/application process through the BOR or its agent the TCID. In *Ide v. United States*, 263 U.S. 497 (1924), the United States Supreme Court held that there could be no appropriation of seepage water because, although the federal government passed water rights with the project land patents, it did not give up all incidents of control, and so could collect and redistribute seepage water as against the land owners with Wyoming patents and no original project water rights. "This holding is merely a slightly different way of stating what was said in *Fox*, that the government diverts, stores and distributes water but the project farmers with government patents, not the government itself, have title to the water right."<sup>15</sup> However, it is noted that change applications are processed through the Nevada State Engineer pursuant to *Alpine Decree*.<sup>16</sup>

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<sup>12</sup> *Nevada v. U.S.*, 103 S.Ct. at 2916-2917.

<sup>13</sup> *Id.* at 2916.

<sup>14</sup> *U.S. v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877, 879 (D. Nev. 1980).

<sup>15</sup> *Id.* at 880. *Ickes v. Fox*, 300 U.S. 82 (1937).

<sup>16</sup> Final Decree in *United States v. Alpine Land & Reservoir Co.*, Civil No. D-183 BRT (D. Nev. 1980), Administrative Provisions VII, at 161, "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."

## VI.

When the State Engineer was acting on the previous applications filed by Stillwater Farms for drain water, he required the Applicant and protestants to those applications to file reports that would bring together all the information explaining the filing of applications for drain water, agreements related to drain water in the Stillwater and Carson Lake area, to explain why additional drain water should be appropriated and to provide any other information that would assist in understanding the use of drain water in the Newlands Project.

The TCID informed the State Engineer that in 1948, the USFWS entered into an agreement (Tripartite Agreement) with the TCID and the Nevada State Board of Fish and Game Commissioners (NBFG) where the TCID agreed to granting the NBFG and the USFWS the right to develop certain lands and administer those lands for a wildlife refuge (Stillwater Wildlife Management Area).<sup>17</sup> The TCID agreed to allow the use of all the waste water not utilized by the TCID in the operation of the Newlands Project for the Stillwater Wildlife Management Area. The Tripartite Agreement expired in November 1998.

In the 1950s, the USFWS and NBFG filed applications with the Nevada State Engineer to appropriate drain water for use in the Stillwater Wildlife Refuge.<sup>18</sup> These applications were protested by the TCID and sat for many years without resolution along with similar applications that had been filed by the TCID for drain water. Thereafter, on September 8, 1987, the TCID, the State of Nevada Department of Wildlife<sup>19</sup> and the USFWS executed the *Stillwater Return Flow Water Right Agreement*.<sup>20</sup> This agreement was in furtherance of the 1948 Tripartite Agreement. The *Return Flow Agreement* acknowledged the water right applications filed by the USFWS (Applications 13345-13351) were made for the protection of the heavy investment made in the Stillwater Wildlife Management Area and were not meant to interfere with the primary use of water by the TCID in the operation of the Newlands Project.<sup>21</sup> Pursuant to the Agreement, the

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<sup>17</sup> See, Report in File No. 47786, official records in the Office of the State Engineer.

<sup>18</sup> See generally, Water right Applications 13345 through 13351, official records in the Office of the State Engineer.

<sup>19</sup> The Nevada Department of Wildlife was formerly called the Nevada State Board of Fish and Game Commissioners, as discussed in the preceding paragraphs.

<sup>20</sup> See, File No. 13345, Official records of the Office of the State Engineer.

<sup>21</sup> See, Item 7 under water right Application 13345, official records in the Office of the State Engineer.

parties agreed to the State Engineer's issuance of permits to the USFWS for drain water.<sup>22</sup> All surplus flows in the Project, are by agreement, for the benefit of the Stillwater Wildlife Management Area.

The State Engineer finds that this application represents a new appropriation of water within the Newlands Reclamation Project, which both the BOR, as the owner of the Project, and the TCID, as manager of the Project have protested. It is not a change application presented to the State Engineer, which the decree courts have given the State Engineer jurisdiction over. It is not water that has been discharged from the canal system that delivers water to the project landowners. Rather, it is water that remains in the Project. Although the Applicant now describes it differently as a source of water, it does not change the right of the BOR/TCID to manage water within the Project. These findings of the State Engineer are supported by the Federal District Court and the Tenth Judicial District Court, as both courts have already ruled that while the Project water remains in the Project, it is not available for appropriation by Stillwater Farms.

## VII.

Protestants assert that under Public Law 101-618, the Secretary of Interior authorized the maintenance goal of 25,000 acres of wetlands habitat at the Stillwater National Wildlife Refuge and the State Engineer has consistently upheld this goal in rulings dating back to 1996. They further assert that in May 2009, the TCID Board supported this position by approving a motion that 100% of the water appearing at the proposed point of diversion be routed to the Stillwater Refuge and be counted as deliveries towards existing water orders as a priority or spilled to the refuge and be counted toward the wetland's water supply. The Applicant asserts that the State Engineer should reject the Protestants' claims that they have the right to decide that water should be released to the USFWS for use in the Stillwater National Wildlife Refuge. The Applicant asserts that even though this water was historically released to Stillwater Farms, the USFWS asked that the excess water be released instead to Stillwater Wildlife Refuge through the USFWS headgate, and that TCID granted this request even though neither the USFWS nor TCID have a valid right to appropriate the water. The Applicant asserts that this water is not counted against the USFWS existing water right deliveries; therefore, the water must be considered

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<sup>22</sup> See, e.g., File No. 13345 (permit term stating "the issuance of this permit is issued specifically subject to the agreement dated September 8, 1987, between the [TCID], Nevada Department of Wildlife and United States Fish and Wildlife Service.").

unappropriated. The Applicant asserts that the State Engineer must resolve this dispute because the TCID and the USFWS are intruding on the State Engineer's jurisdiction as the sole authority for the appropriation of water in Nevada.

Public Law 101-618 § 206(a) provided that in order to sustain, on a long-term average, approximately 25,000 acres of primary wetland habitat within the Lahontan Valley wetlands, the Secretary of the Interior was authorized and directed, in conjunction with the State of Nevada and *such other parties as may provide water* and water rights for the purposes of the section, *to acquire by purchase or other means water* and water rights, with or without the lands to which such rights are appurtenant, and to transfer, hold, and exercise such water and water rights. Thus, the State Engineer notes that the language of § 206(a) appears broad enough to support the operational decision of TCID to deliver excess Project water to USFWS in support of the wetlands water supply as an approved project purpose.<sup>23</sup>

As the TCID's 2009 board minutes reflect, and the State Engineer agrees, at the point the TCID determines whether to release the water to the USFWS as an existing delivery, or to spill the water to the USFWS as an operational and management decision in support of maintaining wetland habitat, the water is still within TCID's structures and is therefore under the control of the TCID. Therefore, for the same reasons discussed above, the State Engineer finds that the water is not available for appropriation.

### CONCLUSIONS OF LAW

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>24</sup>

#### II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:<sup>25</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;

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<sup>23</sup> See also § 206(a)(3)(A) (authorizing the Secretary to use Federal diversion structures to deliver water to the wetlands); and see § 206(b)(4) (authorizing the Secretary to mitigate adverse conditions from Project drain water, but noting the section does not prohibit the use of wetlands for drainage purposes).

<sup>24</sup> NRS Chapter 533.

<sup>25</sup> NRS § 533.370(2).

- C. the proposed use or change conflicts with protectable 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.**

The State Engineer concludes that the Applicant's argument that the protests of Churchill County, TCID and the USFWS should be rejected as deficient for not complying with NRS § 533.365(2)(a), is without merit.

**IV.**

The State Engineer concludes there is no water available for appropriation at the proposed point of diversion and two courts have already ruled so.

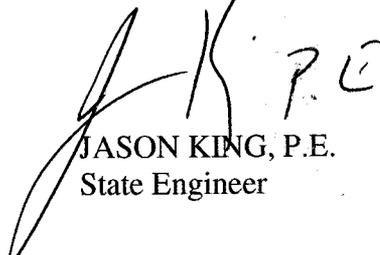
**V.**

The State Engineer concludes that while the water decreed for use in the Newlands Reclamation Project remains within the Project, the management, control and delivery of water is not within the jurisdiction of the State Engineer. Change applications from those initial decreed rights; however, are within the State Engineer's jurisdiction.

**RULING**

Application 85166 is hereby denied on the grounds that no water is available for appropriation. No ruling is made on the remaining protest grounds.

Respectfully submitted,

  
JASON KING, P.E.  
State Engineer

Dated this 5th day of  
February, 2016.