

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

ORDER OF DETERMINATION

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN
AND TO THE WATERS OF PONY CANYON CREEK AND TRIBUTARIES,
LOCATED WITHIN THE UPPER REESE RIVER VALLEY HYDROGRAPHIC
BASIN (56), LANDER COUNTY, NEVADA.


JASON KING, P.E.
State Engineer

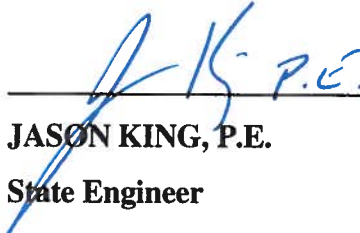
Dated this 17TH day
of July, 2017.



CERTIFICATION OF STATE ENGINEER

I, Jason King, P.E., State Engineer of the State of Nevada, duly appointed and qualified, having charge of the records and files of the Office of the State Engineer, do hereby certify that the following is a full, complete and true copy of the Order of Determination defining the relative rights *In the Matter of the Determination of the Relative Rights In and To the Waters of Pony Canyon Creek and Tributaries Located Within the Upper Reese River Valley Hydrographic Basin (56), Lander County, Nevada.* This Order of Determination was prepared and filed in the Office of the State Engineer on the 17TH day of July, 2017.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my seal of office at Carson City, Nevada, this 17TH day of July, 2017.



JASON KING, P.E.
State Engineer

ADJUDICATION

* * * * *

PONY CANYON CREEK AND TRIBUTARIES

LANDER COUNTY, NEVADA

* * * * *

Presented herewith is the Order of Determination defining the relative rights *In the Matter of the Determination of the Relative Rights In and To the Waters of Pony Canyon Creek and Tributaries Located Within the Upper Reese River Valley Hydrographic Basin (56), Lander County, Nevada.* This Order is prepared under the provisions of Chapter 533 of the Nevada Revised Statutes.



JASON KING, P.E.

State Engineer

Made, filed and caused to be entered of
record in the Office of the State Engineer
this 17TH day of JULY, 2017.

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I. GENERAL

On November 4, 1997, the Lander County Sewer and Water District Number 2 (Lander County) requested that the State Engineer determine the relative rights to all surface waters tributary to Pony Creek a.k.a. Pony Canyon Creek, Lander County, Nevada.

On December 10, 1997, the Sixth Judicial District Court of the State of Nevada in and for the County of Lander in the case of *Jay Gandolfo v. County of Lander and Lander County Sewer and Water District Number 2*, Case No. 7670, issued an Order Staying Proceeding and requiring the State Engineer to determine the relative rights in and to the waters of Pony Canyon Creek and its tributaries located in Lander County, Nevada.

On January 6, 1998, the State Engineer issued Notice of Order No. 1139, Initiating Proceedings to Determine Water Rights *In the Matter of the Determination of the Relative Rights in and to The Waters of Pony Canyon Creek and Tributaries, Lander County, Nevada*. The Order initiated proceedings to adjudicate prestatutory vested rights to waters in the described area according to Nevada Revised Statutes (NRS) §§ 533.090 through 533.320, inclusive. The Notice was published pursuant to NRS § 533.095(3) in the *Battle Mountain Bugle* located in Battle Mountain, Nevada. The *Battle Mountain Bugle* is a newspaper of general circulation within the boundary of the subject adjudication area.

On September 13, 2013, the State Engineer issued Notice of Order No. 1230, which was a reissuance of Order No. 1139, initiating the proceedings. The Notice was published pursuant to NRS § 533.095(3) in the *Battle Mountain Bugle* located in Battle Mountain, Nevada.

On October 18, 2013, the State Engineer issued Notice of Order No. 1231 for Taking Proofs of Appropriation for the Determination of the Relative Rights in and to all surface waters occurring within the confines of Pony Canyon Creek and tributaries (Marshall Canyon Creek) located within the Upper Reese River Valley, Lander County, State of Nevada, pursuant to NRS § 533.110. This Notice set forth the requirement that all those making claims to these waters were required to make proof of their claims between December 23, 2013, and February 28, 2014. A copy of the Notice of Order for Taking Proofs to Determine Water Rights was served by certified mail October 30, 2013, to persons identified as owning land within the subject area that could be potential claimants. The Notice was published in the *Battle Mountain Bugle* located in Battle Mountain, Nevada, pursuant to NRS § 533.110.

Field investigations of the Proofs of Appropriation (claims) were conducted by staff of the Office of the State Engineer on several dates between 2013 and 2014 for claims in Pony Canyon Creek and Marshall Canyon Creek drainage areas. The field investigators' observations and measurements were reduced to reports of field investigation and are within the Pony Canyon Creek Adjudication files in the Office of the State Engineer.

On July 27, 2015, pursuant to NRS § 533.140, the State Engineer issued the Abstract of Claims and the Preliminary Order of Determination. Also on this date, the Notice and Order Fixing and Setting Time and Place for Inspection of Claims was issued

stating the period of inspection would be from September 1, 2015, to September 30, 2015, (Saturdays, Sundays and legal holidays excepted) from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. (PST) of each day, in the Office of the State Engineer in Carson City, Nevada.

Objections to the Preliminary Order of Determination were filed by Lander County on September 29, 2015, and by William J. Gandolfo on September 30, 2015. Therese A. Ure, Esq., filed an Affidavit in Support of William J. Gandolfo's objections on September 30, 2015.

Ms. Ure filed a letter on behalf of Claimant William J. Gandolfo to preserve Gandolfo's standing in a hearing on October 15, 2015. A letter in response to Ms. Ure's above mentioned letter was filed by Ross E. de Lipkau, Esq., representing Lincoln County, on October 22, 2015.

The Notice of Hearing on Objections to the Preliminary Order of Determination was issued on January 12, 2016, with a an Order Denying the Motion to Vacate Hearing and Set Briefing Schedule issued on March 7, 2016. An Amended Order Denying the Motion to Vacate Hearing and Set Briefing Schedule was issued on March 23, 2016.

II. OBJECTIONS

A. Lander County

Lander County filed an objection to the Preliminary Order of Determination on September 29, 2015, regarding amended Proof of Appropriation V-05316 stating:

In particular, the only objection of Lander County, is directed to amended Proof of Appropriation 05316. The priority of such Proof of Appropriation should be 1871, at the very earliest, as is set forth herein and will be proven at time of Hearing, on Objections to Preliminary Order of Determination. Therefore, the only issue here involved is the priority granted of given to William J. Gandolfo (hereinafter "Mr. Gandolfo") by the State Engineer. No objections are filed against any other material contained within the PRELIMINARY ORDER OF DETERMINATION.

B. William J. Gandolfo

William J. Gandolfo filed an objection to the Preliminary Order of Determination on September 30, 2015, regarding his amended Proof of Appropriation V-05316 stating:

The Preliminary Order should be amended to increase Gandolfo's authorized animal numbers pursuant to historic use.

The Preliminary Order should be amended to increase Gandolfo's season of use and authorized year-round.

Clarification of the Mount Airy Grazing Allotment with the proposed amendment to describe the place of use. "Gandolfo holds the grazing lease for the Mount Airy Grazing Allotment administered by the United States Bureau of Land Management. The Gandolfo and Veach pastures, located within the Mount Airy Grazing Allotment, partially encompass the Pony Canyon Creek and Marshall Canyon Creek and grazing allotments, which are the focus of this adjudication."

After all parties were duly noticed by certified mail pursuant to NRS § 533.150 an administrative hearing on the objections was held on April 12-13, 2016. The State Engineer has reviewed the exhibits and testimony presented in the administrative hearing, and the final determination on the claims presented in the adjudication are presented herein.

III. WATER SOURCES AND FLOW PATTERNS

The sources of water that are the subject of this adjudication include the waters of Pony Canyon Creek, Marshall Canyon Creek and their tributaries and various spring sources within the drainage area (Figure 1). The area is located within portions of T.19N., R.43E., M.D.B.&M. and T.19N., R.44E., M.D.B.&M., all within Lander County, Nevada. The crest of the divide delineating the eastern limit of the Pony Canyon Creek and Marshall Canyon Creek drainage basin range is near 8,000 feet above mean sea level (2,440 meters) and the terminus of the Pony Canyon Creek drainage where it intersects the Reese River is approximately 5,650 feet above mean sea level (1,725 meters) in elevation. Springs are generally restricted to the drainages themselves in the adjudication area. Streams within the adjudication area generally flow in a westerly direction into the Reese River Valley. Typical of Nevada's mountain streams, runoff peaks in the spring and then recedes during the summer months until there is minimal to zero flow. Streamflow within the drainages is intermittent with the waters going subsurface for considerable distances then resurfacing as spring areas within the stream bed where the canyon becomes more restricted in width and the thickness of the alluvial streambed material thins. Pony Canyon Creek disappears into the alluvium between the creek's drain exit and the rodeo grounds below the Town of Austin and does not reappear for the rest of its extent to the Reese River except during periods of high runoff. Marshall Canyon Creek behaves in a similar manner and is for all practical purposes a dry wash below the 6,400 foot (1,950 meter) contour. Total annual discharge from the springs and streams appears to be heavily dependent on winter snowfall and varies from year to year.

Flow measurements of springs and streams recorded during field investigations by staff of the Office of the State Engineer along with historical reported data are shown in Table 1.

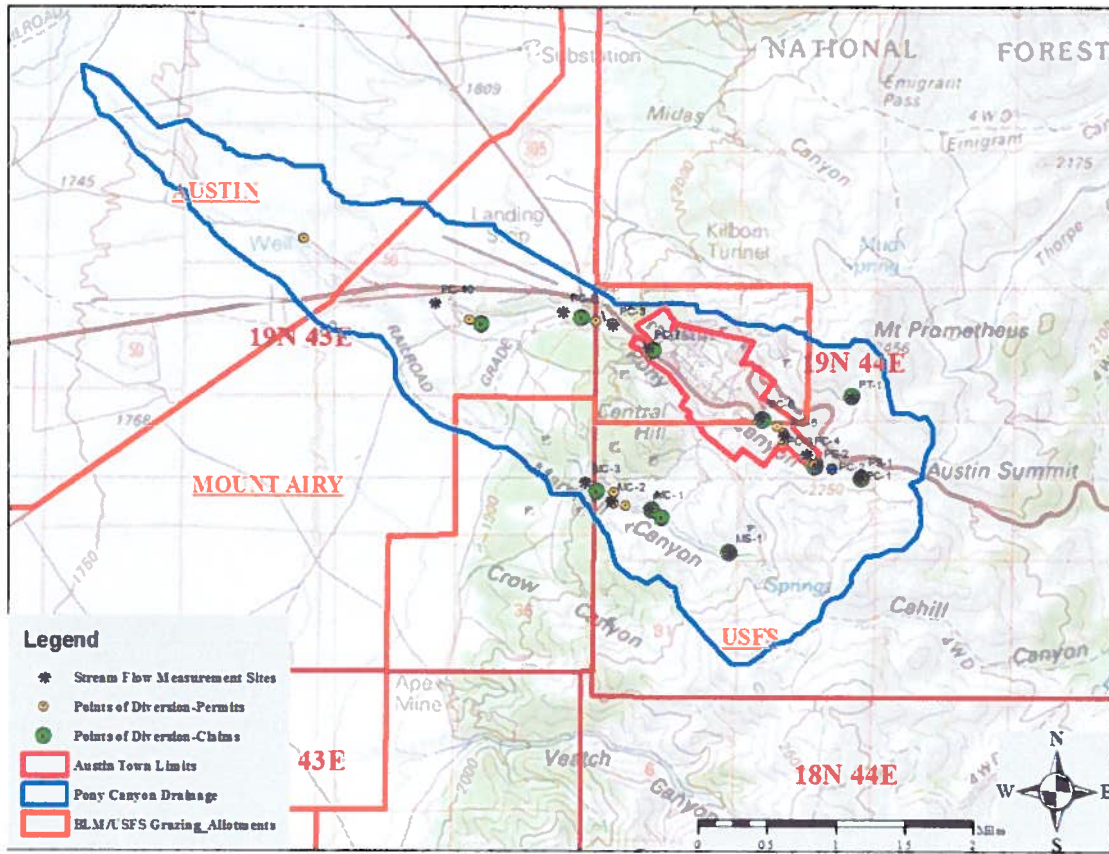


Figure 1: ADJUDICATION VICINITY MAP

NOTE: This map is intended solely for the purpose of illustrating the environs for this report. This map should not be relied upon as a legal description for any specific proof of appropriation or permit.

Table 1: Flow Measurements

Source	1997 [^]	1998 [^]	2003 [^]	2004 [^]	2005 [^]	2007 [^]	9/25/13	4/29/14	7/2/14	9/23/14
Pony Springs*	20.00	18.14	8.01	8.54	13.69	8.88	13.00	15.00	15.00	15.00
Marshall Springs*	15.00	18.15	1.90	2.17	8.53	4.51	N.R.	14.00	N.R.	N.R.
MC-1	--	--	--	--	--	--	1.79	9.90	31.92	2.21
MC-2	--	--	--	--	--	--	--	--	7.50	3.00
MC-3	--	--	--	--	--	--	Dry	Dry	Dry	Dry
MS-1	--	--	--	--	--	--	--	6.00	1.50	0.10
PC-1	--	--	--	--	--	--	Dry	1.00	<0.50	Dry
PC-2	--	--	--	--	--	--	--	12.00	4.25	3.00
PC-3	--	--	--	--	--	--	--	0.15	0.15	0.17
PC-4	--	--	--	--	--	--	--	7.00	1.00	Dry
PC-5	--	--	--	--	--	--	<0.50	10.00	1.50	Dry
PC-6	--	--	--	--	--	--	Dry	Dry	Dry	Dry
PC-7	--	--	--	--	--	--	10.00	10.00	5.92	5.92
PC-8	--	--	--	--	--	--	8.50	3.60	1.30	1.30
PC-9	--	--	--	--	--	--	Dry	Dry	Dry	Dry
PC-10	--	--	--	--	--	--	Dry	Dry	Dry	Dry
PS-1	--	--	--	--	--	--	N.M.	N.M.	N.M.	N.M.
PS-2	--	--	--	--	--	--	--	0.67	0.11	0.60
PT-1	--	--	--	--	--	--	--	Dry	Dry	Dry

All measurements are in gallons per minute. *Spring flow data from Lander County. [^]Average flow from quarterly data. N.R. is Not Reported. N.M. is Not Measured.

IV. LEGAL PRINCIPLES APPLICABLE TO THE DETERMINATION OF VESTED RIGHTS

Claims to prestatutory vested water rights on sources of water subject to this adjudication were established by filing proofs of appropriation in the Office of the State Engineer and submitting evidence to support the claimed date of priority, manner of use, place of use and the amount of water actually diverted and applied to beneficial use. Evidence is reviewed in conjunction with other records available to determine the limit and extent of prestatutory water rights claimed in this proceeding. In this Order of Determination, vested water rights to surface waters that are the subject of the adjudication refer to those rights that became fixed before statutory water rights provisions were first enacted on March 1, 1905.¹

¹ 1905 Nev. Stat. ch. 46 § 23 (repealed and reenacted by the 1913 Water Act).

Priority dates for irrigation are established as the year in which a water source was initially placed to beneficial use as documented by claimants;² or, the date on which the works of diversion commenced where such work or construction progressed with due and reasonable diligence to completion and beneficial use established, in which case, the date of appropriation shall relate back to the date when the work commenced. *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534 (1869); *Irwin v. Strait*, 18 Nev. 436, 4 P. 1215 (1884).

The limit and extent of water rights issued for all manners of use is limited to the quantity of water reasonably necessary for such use. The period of use for all manners of use is January 1 to December 31, unless otherwise specified.

A. Stock Watering

Claims filed for stock watering refer to differing numbers and types of animals from their earliest date of beneficial use to the present. The State Engineer recognizes that livestock are opportunistic and that the number and type of animals that utilize water from various sources varies depending on available feed in different parts of the range at different times of year and on management practices on the public lands. In this proceeding, stockwater duty is quantified based on the number and type of animals that historically used or are using these water sources. Duty is not a measure of water actually available on a perennial basis. Priority dates for stock water are established in this adjudication as the year in which a water source was initially placed to beneficial use as documented by claimants; or, the date on which the diversion of water was commenced and where such work or construction progressed with due and reasonable diligence to completion and beneficial use established. In *Steptoe Live Stock Co. v. Gulley et al.*, 53 Nev. 163, 295 P. 772 (1931) and *State v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988), the Nevada Supreme Court recognized that the absence of an actual diversion can still give rise to a valid stockwater right due to the ability of stock to water directly from a source.

B. Municipal

The duty for municipal use is quantified based on the diversion rate and total amount of water placed to beneficial use. The diversion rate and total amounts are determined by the number and types of entities (clientele) utilizing the water service.

The State Engineer recognizes that delivery of this water is limited by availability at the source, and in many years water at the source is not sufficient to meet demand and may need to be comingled and supplemented by water from other sources.

² The law of Nevada, in common with most other western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land, and such a right is appurtenant to the land on which it is used. *Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 159-161, 140 P. 720, 722 (1914).

V. BASIS OF CLAIMS

A. Irrigation Uses

Documentation to support proof of the continuous use of surface water for irrigation prior to March 1, 1905, was filed by two claimants. The two vested claims of water rights for irrigation in this adjudication are for waters in Pony Canyon Creek and Marshall Canyon Creek.

1. Claimant Austin Manhattan Consolidated Mining Company

The claimant on Marshall Canyon Creek (Austin Manhattan Consolidated Mining Company) state in their Claim of Vested Right V-00811 filed on May 14, 1910, that the area had been irrigated for the previous 25 years or more by S. L. Fuller, G. W. McHardy, M. J. Murphy, C. Mestratio and J. A. Miller who irrigated a small garden of potatoes, vegetables and grass with a combined area of between six and seven acres. The Austin Manhattan Consolidated Mining Company is no longer in existence and the place of use deccribed under the claim does not appear to have been in production for decades.

2. Claimant Town of Austin

The claimant on Pony Canyon Creek (Town of Austin) cite in their Claim of Vested Right V-05325, filed August 15, 1991, a deed from William Schwin dated August 16, 1894, which deeded the conduit from him to the Austin Cemetery Association to serve the cemeteries as the basis for their priority date of 1894. Schwin was involved in a lawsuit with the Austin Silver Mining Company in February 1894 concerning a diversion dispute upstream of Schwin's diversion on Pony Canyon Creek that served a placer mining operation that was leased and operated by George Leet.³ Transcripts of the lawsuit suggest that the pipeline was not in place to serve the cemetery at the time of the lawsuit, and that portion of Mr. Schwin's development of his property was still in the planning stage. Therefore, the pipeline was built and the cemetery irrigation system was brought into fruition sometime between February of 1894 and the sale of the conduit (pipeline) to the Austin Cemetery Association in August of 1894. The cemeteries are currently serviced by the Lander County Sewer and Water District Number 2 through the municipal water system and not from Pony Canyon Creek directly.

B. Stock Watering and Wildlife Uses

Proofs of Appropriation claiming the continuous use of surface water for stock watering purposes prior to March 1, 1905, were filed by three claimants. The basis of the claims for each of the three parties is discussed in this section. These claimants are those who originally filed the proofs of appropriation or are successors to past ranch operators with a long history of utilizing range and water resources.

³ *William Schwin v. Austin Silver Mining Company*, District Court of Nevada in and for Lander County, 1894.

1. Claimant United States Department of Agriculture-Forest Service (USFS)

The USFS filed claims on three sources in the Pony Canyon Creek and Marshall Canyon Creek drainages.

The USFS filed a Proof of Appropriation (V-03392) on Pony Canyon Spring in the Pony Canyon Creek drainage area for stock water with a priority date of 1863. The claim indicates that the “original user” watered during the first year of 1863, 1,000 head of cattle and 50 deer. The proof states that the nature of the claimant’s title to the land upon which the source of water and place of use are located is “reserved from public domain land for National Forest purposes on 3-1-1907, and remains so today.” The Proof of Appropriation indicates that the USFS has closed the area around this source to livestock grazing because it is within the Austin Town watershed, but indicates that approximately 100 deer currently utilize the source and approximately 100 cattle trail through the area each year.

The USFS filed a Proof of Appropriation on Marshall Canyon Creek (V-03474) for stock water with a priority date of 1863. The claim indicates that the “original user” watered during the first year of 1863, 600 head of cattle and 50 deer. The proof states that the nature of the claimant’s title to the land upon which the source of water and place of use are located is “reserved from public domain land for National Forest purposes on 2-20-1909, and remains so today.” The proof also states that approximately 450 cattle and 100 deer currently utilize the water from Marshall Canyon Creek from June through September and about 100 deer utilize the creek.

The USFS filed a Proof of Appropriation on Central Spring (V-03476) in the Marshall Canyon Creek drainage for stock water with a priority date of 1863. The claim indicates that the “original user” watered during the first year of 1863, 600 head of cattle and 50 deer. The proof states that the nature of the claimant’s title to the land upon which the source of water and place of use are located is “reserved from public domain land for National Forest purposes on 2-20-1909, and remains so today.” The proof also states that approximately 450 cattle currently utilize the water from Central Spring from June through September and about 100 deer utilize the spring.

2. Claimant Gandolfo

William J. Gandolfo claims a stockwater right on Pony Canyon Creek and Marshall Canyon Creek and their associated springs and tributaries with a priority date of 1855 to 1859, when Howard Egan and John Reese developed a cattle trail through the area in 1855 (exact numbers and locations from this activity are difficult to determine). J. H. Simpson, U.S. Army Corps of Topographical Engineers, directed 3 large wagon trains and “over 1000 cattle” owned by Russell, Majors and Waddell (a.k.a. Russel & Co.) through this area in 1859.⁴ Jacobsville is regarded as the first settlement in the area, which was established in 1859 and had several smaller ranches established in the vicinity along the Reese River

⁴ J. H. Simpson (Captain), *Report of Explorations Across the Great Basin of the Territory of Utah for a Direct Wagon-Route from Camp Floyd to Genoa in Carson Valley, in 1859*, Government Printing Office, Washington, D.C., 1876.

prior to that.⁵ The present day Gandolfo Ranch is south of this site. Portions of Pony Canyon Creek and Marshall Canyon Creek lie within the boundaries of the Mount Airy Allotment, of which, Gandolfo is the currently licensed operator. Other portions of these drainages lie within other grazing allotments managed by the United States Bureau of Land Management and United States Forest Service where Gandolfo is not the current licensed operator.

3. Claimant Mock

Karen Mock claims a stock water and/or wildlife right on a spring in Marshall Canyon (V-01513) with the place of use within the S. C. Baker patented mining claim (MS#100). Documentation provided with the claim consisted of the deed from which Karen O. Saylor (now Karen O. Mock), who purchased the claim from Elvera Ostberg in 1995. No location of the point of diversion, priority date, diversion rate or number of animals was stated in the proof or mentioned in the supporting documents.

C. Quasi-Municipal and Municipal

A Proof of Appropriation for quasi-municipal and municipal purposes prior to March 1, 1905, was filed by one claimant. The basis of the claim is discussed in this section. The claimant in this proceeding is the original claimant.

1. Claimant Lander County Sewer and Water District Number 2

The Lander County Sewer and Water District Number 2 claims a municipal water right (V-07314) on Pony Canyon Creek and tributaries, which also includes springs, seeps and mine openings that emit water in the Pony Canyon Creek drainage area. The District claims a priority date of 1863, which is the year that the Town of Austin was established.

D. Mining and Milling

1. Claimant Austin Manhattan Consolidated Mining Company

The Austin Manhattan Consolidated Mining Company claims a mining and milling water right (V-00785) on a tunnel and dam that fed a pipeline that supplied water to the "old Manhattan Mill," which was above Austin on Pony Canyon Creek. This water development and the mill it served were constructed approximately 30 years prior to the date of the claim application. The claim was filed in 1910, which would yield a priority date of 1880. No diversion rate is stated in the claim. The Austin Manhattan Consolidated Mining Company is no longer in existence and the point of diversion and place of use described under the claim does not appear to have been in production for nearly a century.

VI. FINDINGS OF THE STATE ENGINEER

The following list of claims of prestatutory vested water rights, and permitted and certificated water rights, are for surface water sources within the area encompassed by this

⁵ Nevada Historic Preservation Office, Carson City, Nevada.

adjudication proceeding. These claims and appropriations were established pursuant to Chapters 533 and 534 of the Nevada Revised Statutes. The limit and extent of all claims and of all permitted and certificated water rights within the adjudication area are described in detail in the Table of Relative Rights of Appropriators located in Appendix A.

A. Proofs Determined to be Valid or Partially Valid

Proof of Appropriation V-05316 was filed on July 8, 1991, by Willaim J. Gandolfo for 0.2 cubic feet per second (cfs) of the waters of Pony Canyon Creek for stock watering purposes at a point located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, T.19N., R.43E., M.D.B.&M. with a priority date of prior to 1900. The claim states that 150 cattle, 100 horses and 4,000 sheep historically utilized the source year round, but current permitted stock numbers were 400 cattle (1991). An amended Proof of Appropriation V-05316 was filed on April 8, 2014, along with a place of use map and documentary evidence to substantiate the claim. The amended proof claims 0.2 cfs of the waters from Pony Canyon Creek and Marshall Canyon Creek along their entire reach, from their headwaters to their juncture with the Reese River with a priority date of 1855-1859. The amended claim states that 1,250 cattle and 50 horses initially utilized the source with variable numbers of livestock utilizing the source thereafter. The period of use is listed as occurring between January 1st and December 31 of the year.

1. Priority date.

An objection was filed against the preliminary findings of the State Engineer by Lander County to the priority date of 1859, which it believes should be 1871 at the earliest. Lander County argues that casual use of the waters by traveling stockmen does not establish a right to the water, but rather, Gandolfo must connect himself in interest to the predecessors back to the claimed priority date.⁶ Gandolfo responded during the hearing that the claimed priority date of 1855 to 1859 could be shown by the public lands being used for cattle grazing during that time; or additionally, that the graziers were predecessors in interest to Gandolfo.

Recently, the Nevada Supreme Court in *Rand Properties, et al. v. Daniel Fillippini, et al.*, 2016 WL 1619306 (April 21, 2016) (unpublished) reaffirmed that in Nevada, stockwater rights on public domains are passed by chain of title. (Citing *Steptoe Live Stock v. Gulley*, 53 Nev. 163, 169-176, 295 P.2d 772, 773-776 (1931)); therefore, Gandolfo must connect himself to his predecessors in interest to support the claimed priority date.

Jacobsville was the site of the Gandolfo family's first ranch when the Jacobs family arrived in the area and established a possessory claim in 1859.⁷ The possessory claim was surveyed in 1863, and the portion of Gandolfo's ranch in Jacobsville corresponds with the 1863 surveyed lands and Gandolfo had demonstrated a connection in interest to the Jacobs

⁶ Exhibit 55, public administrative hearing on the objections to the Preliminary Order of Determination before the State Engineer, April 12-13, 2016. Hereinafter, the hearing exhibits and transcript will be referred to solely by the exhibit number or transcript page.

⁷ Transcript Vol. I, pp. 51, 161, 170, 183; Exhibit 36, pp. 8-9.

family back to 1859 through a series of tax records, deeds and land patents.⁸ Gandolfo is also successor to a second ranch, known as the Reese River Ranch, approximately seven miles south of the Jacobsville property, which dates back at least to 1872 when the patent was issued from the United States to the State of Nevada.⁹ The Gandolfo family historically utilized both ranches as part of its ranching operation.¹⁰ As discussed below, the evidence showed that cattle were owned by Gandolfo's predecessors, establishing a vested stockwater right.

2. The measure and limit of the right.

The objection filed by William J. Gandolfo concerned increasing the authorized animal numbers pursuant to historic use, increasing the season of use to year-round and clarifying the description of the Mount Airy Grazing Allotment with respect to the place of use. Some discussion of historical livestock grazing is provided as a backdrop to the State Engineer's determination.

Historically, the federal government tacitly allowed and encouraged all persons to use the open range as a public common. *Buford v. Houtz*, 133 U.S. 320, 10 S.Ct. 305, 33 L.Ed. 618 (1890). Because graziers were not restricted to grazing allotments, as they are today, 19th century stock operators ranged over hundreds of miles and used water sources opportunistically and for a short period of time and different graziers used the same sources of water. The laws governing grazing on public lands have evolved significantly from the late 19th century to present day. At the time the claimants of vested stockwater rights appropriated water for stock in the late 19th century or early 20th century, there were no laws governing grazing on public lands. *Buford, supra*. In 1925, Nevada passed the Stockwater Act to bring about some regulation of grazing on public lands. NRS § 533.485, *et seq.* In 1934, the Taylor Grazing Act was passed, pre-empting the Stockwater Act to the extent it conflicted with the Taylor Grazing Act. *Ansolabehere v. Laborde*, 73 Nev. 93, 310 P.2d 842 (1957).

Under the Taylor Grazing Act, a grazier had to prove he was established in the area in order to have an adjudicated grazing right under the Act, which Gandolfo's family did.¹¹ Gandolfo currently holds a 10-year grazing permit from BLM, which authorizes him to graze 340 cattle.¹² However, he can also obtain temporary non-renewable permits (TNR) for additional cattle based upon BLM requirements.¹³ Pursuant to TNR permits, Gandolfo has run up 1,280 cattle.¹⁴ Gandolfo also has 50 horses on his private land, which his family previously held a horse permit for from BLM for use on public land.¹⁵

Although limited, there is evidence suggesting the Jacobs family owned livestock at the Jacobsville settlement from the telegraph from J.W. Jacobs to Governor Nye in

⁸ Exhibits 37, 40 and 102.

⁹ Exhibit 93; Transcript Vol. I, pp. 18-19.

¹⁰ Transcript Vol. I, pp. 186-187.

¹¹ Transcript Vol. I, p. 40.

¹² Transcript Vol. I, p. 43.

¹³ Transcript Vol. I, p. 44.

¹⁴ Transcript Vol. I, p. 49.

¹⁵ Transcript Vol. I, pp. 54-55.

1862.¹⁶ The telegraph reflects that Jacobs owned cattle, which had been stolen by the Pi-Ute Indians, and Jacobs requested the assistance of 50 men to retrieve the cattle. The telegram suggests two things to the State Engineer: first, that the value or quantity of stolen cattle was significant enough for Mr. Jacobs to directly request assistance of 50 men from the governor; and second, the telegraph states that the Indians had to be “chastised” now, otherwise the next time they would “clean out the entire herd,” suggesting some number of cattle constituting a herd was still left in Jacobs’ possession. Although the precise number of cattle is not determinable prior to 1905, NRS § 533.492 permits the use of grazing permit information as one piece of evidence in quantifying rights to stockwater. *And see also*, NRS § 533.490(2).

Gandolfo holds the grazing lease for the Mount Airy Grazing Allotment administered by the United States Bureau of Land Management.¹⁷ The Gandolfo and Veach pastures, located within the Mount Airy Grazing Allotment, partially encompass the Pony Canyon Creek and Marshall Canyon Creek grazing allotments, which are the focus of this adjudication. Because of the dynamic nature of the number of animals permitted under the grazing leases and their period of use based on forage availability, the State Engineer has determined that the maximum number of animals allowed to be watered under this claim would be 1,250 cattle and 50 horses year round with a maximum diversion rate of 0.041 cfs¹⁸ when the water is available with a priority date of 1859. When Gandolfo is in priority, the law requires that Gandolfo take no more than can be beneficially used without waste. NRS § 533.045.¹⁹ Stated otherwise, if Gandolfo is not issued any TNR permits from BLM, he is only authorized to divert as much water as reasonably necessary to water the number of livestock under the 10-year grazing permit, and anything more is available for use by junior right holders. *Id.*; NRS § 533.035.²⁰

In the case that the number of animals utilizing the place of use exceeds the number determined above, statutory applications to appropriate additional waters will need to be filed with the Office of the State Engineer. This right does not provide for ingress or egress onto public, private or corporate lands that the water right holder does not control or is otherwise not permitted to enter.

¹⁶ Exhibit 39.

¹⁷ Exhibit 27.

¹⁸ Consumptive use for cattle and horses is 20 gallons per day per animal (0.00003125 cfs/head/annum) 1,250 cattle and 50 horses equilibrates to 0.040625 cfs/year.

¹⁹ Although this provision was codified through the 1913 Water Act, it was originally recognized in 1899 during the vesting period of pre-statutory rights. *See, e.g.*, Cutting, Compiled Laws of Nevada 1861-1900 § 356.

²⁰ There was testimony during the hearing concerning the futile call doctrine and evidence concerning the flow and reach of water sources in this adjudication. The State Engineer agrees with Gandolfo that the doctrine is one of regulation, and that the rights must be determined before a futile call can be made. *See, Union Mill & Mining Co. v. Dangberg*, 81 F. 73 (C.C.D. Nev. 1897) (“It would be unjust and inequitable to compel the farmers in the valley to allow the water to run down to the mills when the quantity of water was wholly insufficient, to enable the complainant to run its mills with water power. There must be a beneficial use before any protection can be invoked. No provisions should be contained in the decree which would result in depriving one party of the use of the water when the other party could make no beneficial use of it. This would amount to a destruction, instead of a protection, of the rights of the parties.”).

Proof of Appropriation V-07314 was filed by Lander County Water and Sewer District No. 2 on December 5, 1995, claiming a vested right on Pony Canyon Creek and its tributaries for municipal use in the Lander County Water and Sewer District service area (in and around the town of Austin, Nevada). A priority date of 1863 was claimed. An amended Proof of Appropriation was filed on February 26, 2014, which changed the place of use by increasing the size of the service area from approximately 560 acres to approximately 1,760 acres and stated a diversion rate of approximately 0.5 cfs. Evidence provided by the claimant supports a priority date of 1863 and a diversion rate of approximately 0.5 cfs. However, Sanborn insurance maps of the town of Austin from 1886 to 1907²¹ suggest a service area as being less than 50 acres. Since the service area as outlined in the original filing dated December 5, 1995, was 560 acres, there is not any evidence to suggest that the service area was this large nor is there sufficient evidence to support the service area being 1,760 acres as outlined in the amended Proof filed on February 26, 2014. The State Engineer has determined that the evidence supports a diversion rate of 0.5 cfs with a priority date of 1863 with a service area of approximately 50 acres.

B. Rejected Proofs of Appropriation

Proofs of Appropriation V-02472, V-03392 and V-03476 were filed by the United States Department of Agriculture-Forest Service (USFS). These Proofs of Appropriation were rejected in the Preliminary Order of Determination with no objections filed.

Proof of Appropriation V-10513 was filed by Karen Mock on February 27, 2014, for stock water from a spring in Marshall Canyon. The State Engineer rejected this Proof of Appropriation in the Preliminary Order of Determination with no objection filed.

C. Abandoned Proofs of Appropriation

Proof of Appropriation V-00785 filed by the Austin Manhattan Consolidated Mining Company, **Proof of Appropriation V-00811** filed by the Austin Manhattan Consolidated Mining Company and **Proof of Appropriation V-05325** filed by the Town of Austin were declared abandoned in the Preliminary Order of Determination with no objections filed.

D. Permitted and Certificated Water Rights

There are many permitted and certificated water rights for surface water sources within the area encompassed by this adjudication proceeding. These appropriations were acquired pursuant to Chapter 533 of the Nevada Revised Statutes. These permits and certificates are not part of this adjudication and are provided solely for background information only. The limit and extent of these existing permitted and certificated water rights are described in detail in Appendix B.

²¹ The Sanborn Map Company, New York, New York.

VII. CHANGES TO WATER RIGHTS DETERMINED IN THIS PROCEEDING

All water rights established under this adjudication shall be appurtenant to the place of use designated herein. NRS § 533.040. Any water user desiring to change the point of diversion, manner of use or place of use of the water rights established herein must make application to the State Engineer for permission to make a change pursuant to NRS §§ 533.325 and 533.345.

Existing permitted and certificated rights that are superceded by vested claims are subject to being declared void upon finalization of the decree if the State Engineer determines the permit or certificate is redundant to a decreed water right.

VIII. AVAILABLE WATERS

The State Engineer determines that the streams and springs named herein are fully appropriated under the claims of vested rights determined to be valid in this proceeding and/or under existing permits and certificates issued by the State Engineer. For all other sources of surface water within the area subject to this adjudication, there is no surplus water in an average year for any additional consumptive uses.

**APPENDIX A: TABLE OF RELATIVE RIGHTS DETERMINED TO
BE VALID**

PROOF NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC-FT/ACRE	TOTAL AC-FT.
V-05316	WILLIAM J. GANDOLFO	PONY CANYON CREEK AND TRIBUTARIES AND ASSOCIATED SPRING SOURCES	SW¼NW¼, SEC. 9, T.19N., R.43E., M.D.B.&M. (TERMINUS OF STREAM AT REESE RIVER)	JANUARY 1 TO DECEMBER 31	STOCKWATER 1859	0.041		29.12
PLACE OF USE 40 ACRE DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	<p>WATER NECESSARY FOR THE NEEDS OF 1250 CATTLE AND 50 HORSES YEAR ROUND WHEN THE WATER IS AVAILABLE. ACTUAL CALCULATED DIVERSION RATE IS 0.040625 CFS.</p> <p>PLACE OF USE IS THE REACHES OF THE STREAM WITHIN THE MOUNT AIRY ALLOTMENT.</p>			
PORTION OF	23	T.19N.	R.43E.					
PORTION OF	24	T.19N.	R.43E.					
PORTION OF	25	T.19N.	R.43E.					
PORTION OF	26	T.19N.	R.43E.					
PORTION OF	19	T.19N.	R.44E.					
PORTION OF	20	T.19N.	R.44E.					

PROOF NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC-FT/ACRE	TOTAL AC-FT.
V-07314	LANDER COUNTY SEWER & WATER DISTRICT # 2	PONY CANYON CREEK AND TRIBUTARIES	SW¼NE¼, SEC. 29, T.19N., R.44E., M.D.B.&M. OR AT A POINT FROM WHICH THE NE¼ CORNER OF SAID SEC. 29 BEARS N10°45'W, A DISTANCE OF 1,680.0 FEET SE¼SE¼, SEC. 30, T.19N., R.44E., M.D.B.&M. OR AT A POINT FROM WHICH THE NE CORNER OF SAID SEC. 30 BEARS N3°57'E, A DISTANCE OF 4,968.0 FEET SE¼NE¼, SEC. 24, T.19N., R.43E., M.D.B.&M. OR AT A POINT FROM WHICH THE E¼ CORNER OF SAID SEC. 24 BEARS S47°29'01"E, A DISTANCE OF 674.73 FEET	JANUARY 1 TO DECEMBER 31	MUNICIPAL 1863	0.07		50.68
PLACE OF USE 40 ACRE DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	<p>PLACE OF USE IS THE HISTORICAL TOWN LIMITS OF AUSTIN.</p>			
PORTIONS OF	19	19N	43E					
		APPROX. 50 ACRES TOTAL						

APPENDIX B: TABLE OF PERMITTED AND CERTIFICATED RIGHTS

PERMIT NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC.-FT./ACRE	TOTAL AC.-FT.
10956 CERT NO. 2813	ILR FISHER AND W.L. PETERSEN	PONY CANYON	SW $\frac{1}{4}$ NW $\frac{1}{4}$, SEC. 19, T.19N., R.44E., M.D.B.&M. OR AT A POINT FROM WHICH THE NW CORNER OF SAID SECTION 19 BEARS N0°23'E. 1,530 FEET	JANUARY 1 TO DECEMBER 31	MINING AND MILLING MAY 15, 1943	1		723,997
PLACE OF USE 40 ACRES DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	MILLING FACILITIES AND MINING AREA HAVE BEEN RECLAIMED AND NO LONGER IN EXISTENCE			
SW	NW	24	T.19N.	R.43E.				

PERMIT NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC.-FT./ACRE	TOTAL AC.-FT.
11999 CERT NO. 3631	MOLLY MAGEE	MARSIAL CANYON CREEK	NW $\frac{1}{4}$ SW $\frac{1}{4}$, SEC. 30, T.19N., R.44E., M.D.B.&M. OR AT A POINT FROM WHICH THE W $\frac{1}{4}$ CORNER OF SAID SEC. 30 BEARS N55°35'W, 885 FEET.	JANUARY 1 TO DECEMBER 31	MINING AND MILLING SEPTEMBER 3, 1947	1		723,966
PLACE OF USE 40 ACRES DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	ACRE FEET/ ANNUM IS CALCULATED FROM THE DIVERSION RATE. MILL SITE IS IN RUINS AND NO LONGER FUNCTIONAL.			
NW	SW	30	T.19N.	R.44E.				

PERMIT NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC.-FT./ACRE	TOTAL AC.-FT.
14643 CERT NO. 4564	BIG CREEK MINING AND MILLING CO.	CLIFTON TUNNEL	SW $\frac{1}{4}$ NW $\frac{1}{4}$, SEC. 19, T.19N., R.44E., M.D.B.&M.	JANUARY 1 TO DECEMBER 31	MINING AND MILLING NOVEMBER 28, 1952	0.25		180,992
PLACE OF USE 40 ACRES DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	ACRE FEET/ ANNUM IS CALCULATED FROM THE DIVERSION RATE. MILL SITE IS IN RUINS AND NO LONGER FUNCTIONAL.			
NW	NW	19	T.19N.	R.44E.				

PERMIT NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC.-FT./ACRE	TOTAL AC.-FT.
20157 CERT NO. 5883	LANDER COUNTY SEWER & WATER DISTRICT #2	UNNAMED, OTHER SURFACE WATER	SW ¹ NE ⁴ , SEC. 29, T.19N., R.44E., M.D.B.&M. OR AT A POINT FROM WHICH THE N ¹ CORNER OF SAID SECTION 29 BEARS N10°45'W., A DISTANCE OF 1,680.0 FEET	JANUARY 1 TO DECEMBER 31	MUNICIPAL, NOVEMBER 17, 1961	0.5		361.98
PLACE OF USE 40 ACRE DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	PLACE OF USE IS THE TOWN OF AUSTIN WATER DISTRIBUTION SYSTEM.			
SW	NE	19	T.19N.	R.44E.				
SE	NW	19	T.19N.	R.44E.				
NW	SE	19	T.19N.	R.44E.				
NE	SW	19	T.19N.	R.44E.				

PERMIT NO.	CLAIMANT	SOURCE	POINT(S) OF DIVERSION	YEARLY PERIOD OF USE	PURPOSE & PRIORITY	FLOW CFS	DUTY AC.-FT./ACRE	TOTAL AC.-FT.
20158 CERT NO. 5884	LANDER COUNTY SEWER & WATER DISTRICT #2	MARSHALL CANYON & TRIBUTARIES	SE ⁴ SE ⁴ , SEC. 30, T.19N., R.44E., M.D.B.&M. OR AT A POINT FROM WHICH THE NE CORNER OF SAID SECTION 30 BEARS N3°57'E, A DISTANCE OF 4,965.0 FEET.	JANUARY 1 TO DECEMBER 31	MUNICIPAL, NOVEMBER 17, 1961	0.5		361.975
PLACE OF USE 40 ACRE DESCRIPTION		ACRES PER SECTION	REMARKS					
QTR-QTR	QTR	SECTION	TOWN-SHIP	RANGE	PLACE OF USE IS THE TOWN OF AUSTIN WATER DISTRIBUTION SYSTEM.			
SW	NE	19	T.19N.	R.44E.				
SW	NW	19	T.19N.	R.44E.				
NW	SE	19	T.19N.	R.44E.				
NE	SW	19	T.19N.	R.44E.				

