

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

IN THE MATTER OF APPLICATIONS )  
49395, 49396, 49569, 49689, 49880, )  
49999, 51039, 51041, 51054, 51057, )  
51231, 51235, 51368, 51369, 51371, )  
51374, 51377, 51599, 51605, 51735, )  
51737, 52335, 52545, 52549, 52550, )  
52552, 52554, 52843, 53662, 53910 )

RULING ON REMAND

# 5005

GENERAL INTRODUCTION

I.

**FILING OF APPLICATIONS AND PROTESTS**

Applications 49395, 49396, 49569, 49689, 49880, 49999, 51039, 51041, 51054, 51057 51231, 51235, 51368, 51369, 51371, 51374, 51377, 51599, 51605, 51735, 51737, 52335, 52545, 52549, 52550, 52552, 52554, 52843, 53662, 53910<sup>1</sup> were filed to change the place of use of water decreed under the Truckee and Carson River Decrees, the decrees which adjudicated the waters of those rivers.<sup>2</sup> The applications represent requests to change the place of use of portions of the water rights decreed and contracted for use within the Newlands Reclamation Project ("Project").

<sup>1</sup> The protestant Pyramid Lake Paiute Tribe's original appeal to the Federal District Court included applications in what the State Engineer has identified as Group 1 consisting of 58 applications, Group 2 consisting of 44 applications, and Group 3 consisting of 27 applications (129 applications in total). In U.S. v. Alpine Land and Reservoir Co., 878 F.2d 1217, 1219 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that the Pyramid Lake Paiute Tribe was precluded on appeal from challenging the forfeiture or abandonment of water rights for 104 of the subject transfer applications because it failed to protest the transfers before the State Engineer on these grounds. Based on the court's ruling, the 27 applications in Group 3 became the "original 25" transfer applications after excluding Applications 47822 and 47830 which were not protested on those grounds. Group 4 consisting of 24 applications, Group 5 consisting of 52 applications, Group 6 consisting of 62 applications, and Group 7 consisting of 52 applications became known commonly by the courts and the parties as the "subsequent 190" transfer applications.

<sup>2</sup> Final Decree, U.S. v. Orr Water Ditch Co., In Equity A-3 (D.Nev. 1944) ("Orr Ditch Decree"); and Final Decree, U.S. v. Alpine Land and Reservoir Co., Civil No. D-183 (D.Nev. 1980) ("Alpine Decree").

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PLPT.

The State Engineer finds, that if he were to allege a decreed water right was not perfected, the State would have the burden of proving that lack of perfection. There is no reason to treat the private petitioner or protestant any differently. The State Engineer finds the protestant has the burden of proving lack of perfection. It is not the applicant's burden to prove perfection of an adjudicated and decreed water right certified by the TCID to be a valid water right available for transfer just because a protestant alleges a lack of perfection claim.

II.

**MORE DEFINITIVE STATEMENT**

Since it is impossible for the protestant to sustain all three of its protest claims of lack of perfection, forfeiture and abandonment as to each parcel, the State Engineer ordered the protestant to provide the applicants by May 21, 1996, a more definitive statement in which the protestant was to identify parcel by parcel whether it was ultimately pursuing a claim of lack of perfection, forfeiture or abandonment as to each parcel, and to provide its documentary evidence to support said claim(s). In response, the applicants agreed to supply the protestant with any evidence they had to refute the protestant's claims.

The protestant argues it can allege alternative theories as to means by which an applicant can lose their water rights and repeatedly tried to amend its protest claims from those stated in the more definitive statement during the administrative hearings. The State Engineer did not allow the addition of protest claims from those set forth in the more definitive statement on the belief that it was unfair to the applicants to allow claims to be added during the hearing process. These protest claims were first part of the proceedings held in 1985, 1986, 1988, 1989 and 1991. The protestant provided little evidence to support its claims of lack of perfection, forfeiture and abandonment at the early

administrative hearings and has had sufficient time since the remand order in 1995 to garner any additional evidence to support its contentions. The protestant was given another opportunity more than 10 years after it first presented its cases to produce the evidence or any additional evidence to support its claims. The State Engineer finds it was reasonable to require the protestant to refine its generalized/alternating theory claims and to not allow amendment of those claims at the last minute.

III.

**LANDS TO WHICH WATER RIGHTS ARE APPURTENANT**

Water rights on particular parcels of land within the Newlands Project are governed by underlying documents identified as agreements, contracts and certificates.<sup>39</sup> Certain applicants argue that the water right is appurtenant to the entire parcel of land described in a contract.<sup>40</sup>

Some of the "Agreements" submitted into evidence were grants by private persons of their pre-Project vested water rights to the United States in exchange for Project water rights for lands then presently under cultivation and irrigation.<sup>41</sup> Other "Agreements" described obtaining a water right for the **total irrigable** area of

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<sup>39</sup> Alpine II, 878 F.2d at 1221. Agreements, contracts and certificates relevant to particular applications will be identified in the section of this ruling that deals with that application.

<sup>40</sup> It should be noted that the State Engineer in this ruling uses the term "contract" to generically describe the various different kinds of documents that were introduced into evidence to demonstrate the dates water rights were obtained for the various parcels of land. It should also be noted that there have been different numbering systems utilized during the history of the Newlands Project to account for the water right contracts. Originally, the BOR was able to keep track of these contracts by the owner's name and later issued serial numbers to the contract owner's Homestead Entries. The State Engineer does not believe a serial number can be used to relate any contract to the date which the contract was obtained.

<sup>41</sup> Exhibit No. 27, public administrative hearing before the State Engineer, October 1996 through March 1997.

which was obtained by Cook in 1976.<sup>915</sup> The State Engineer finds that all the existing and proposed places of use were within a farm owned by the applicant at the time Application 53662 was filed, therefore, the transfers from Parcels 1, 2 and 3 are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>916</sup>

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claim of partial lack of perfection as to Parcel 2 or its claims of lack of perfection as to Parcels 1 and 3.

**III.**

**FORFEITURE AND ABANDONMENT**

The State Engineer concludes the water rights requested for transfer are intrafarm transfers not subject to the doctrines of forfeiture or abandonment pursuant to Judge McKibben's Order of September 3, 1998.

**RULING**

The protest to Application 53662 is hereby overruled and the State Engineer's decision granting Application 53662 is hereby affirmed.

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<sup>915</sup> Exhibit No. 1317, public administrative hearing before the State Engineer, April 12, 2000.

<sup>916</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**APPLICATION 53910**

**GENERAL**

**I.**

Application 53910 was filed on October 2, 1989, by Darrell E. & Beverly J. Thomas to change the place of use of 198.45 acre-feet annually, a portion of the decreed waters of the Truckee and Carson Rivers previously appropriated under the Serial Number 854, Claim No. 3 Orr Ditch Decree, and Alpine Decree.<sup>917</sup> The proposed point of diversion is described as being located at Lahontan Dam.

The existing places of use are described as:

**Parcel 1** - 24.00 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 31, T.20N., R.28E., M.D.B.&M.

**Parcel 2** - 19.00 acres NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Sec. 31, T.20N., R.28E., M.D.B.&M.<sup>918</sup>

**Parcel 3** - 1.10 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Sec. 31, T.20N., R.28E., M.D.B.&M.

The proposed places of use are described as 15.30 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  and 28.80 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , both in Section 31, T.20N., R.28E., M.D.B. & M.

**II.**

Application 53910 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,<sup>919</sup> and more specifically on the grounds as follows:<sup>920</sup>

**Parcel 1** - Lack of perfection, forfeiture, abandonment

**Parcel 2** - Lack of perfection, forfeiture, abandonment

**Parcel 3** - Lack of perfection, forfeiture, abandonment.

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<sup>917</sup> Exhibit No. 1485, public administrative hearing before the State Engineer, October 17, 2000.

<sup>918</sup> The State Engineer notes that the book record entered as Exhibit No. 1485 indicates that the existing place of use in Parcel 2 is the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 31, T.20N., R.28E., M.D.B.&M. However, upon review of the original application, it is clear that the existing place of use for Parcel 2 was identified as the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 31, T.20N., R.28E., M.D.B.&M.

<sup>919</sup> Exhibit No. 1486, public administrative hearing before the State Engineer, October 17, 2000.

<sup>920</sup> Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997.

**FINDINGS OF FACT**

**I.**

**CONTRACT DATES 53910**

Exhibit XXX from the 1991 administrative hearing contains contracts covering the existing place of uses under Application 53910.<sup>921</sup>

**Parcel 1** - Exhibit XXX contains a "Water-right Application for Lands in Private Ownership" under the name of E.R. Stuver and her husband dated September 10, 1919, covering the existing place of use. The State Engineer finds the contract date is September 10, 1919.

**Parcel 2** - Exhibit XXX contains a "Water-right Application for Lands in Private Ownership" under the name of G.F. and Ruth Engle dated October 21, 1919, covering the existing place of use. The State Engineer finds the contract date is October 21, 1919.

**Parcel 3** - Exhibit XXX contains a "Water-right Application for Lands in Private Ownership" under the name of C.B. and Millie Austin dated October 21, 1919, covering the existing place of use. The State Engineer finds the contract date is October 21, 1919.

**II.**

**PERFECTION**

**Parcel 1** - The contract date is September 10, 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>922</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as natural vegetation and a portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948, and in fact provided evidence that a water right was

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<sup>921</sup> Exhibit No. 1487, public administrative hearing before the State Engineer, October 17, 2000.

<sup>922</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

perfected on 7.06 acres of the 24.00 acres comprising Parcel 1.<sup>923</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II, which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

**Parcel 2** - The contract date is October 21, 1919, and provided that within the E $\frac{1}{2}$  SW $\frac{1}{4}$  of said Section 31 there were 80 acres of irrigable land in 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>924</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was natural vegetation and a portion irrigated. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948, and in fact provided evidence that a water right was perfected on 6.95 acres of the 19.00 acres comprising Parcel 2.<sup>925</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II, which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right

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<sup>923</sup> Exhibit No. 1492, public administrative hearing before the State Engineer, October 17, 2000.

<sup>924</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>925</sup> Exhibit No. 1492, public administrative hearing before the State Engineer, October 17, 2000.

was perfected.

**Parcel 3** - The contract date is October 21, 1919, and provided that within the W½ SE¼ of said Section 31 there were 80 acres of irrigable land in 1919. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>926</sup> which indicates from aerial photographs that in 1948 the land use on this parcel was described as a road and natural vegetation. The protestant did not provide any evidence other than a 1948 photograph as its evidence that a water right was not perfected on this parcel between 1919 and 1948, and in fact provided evidence that a water right was perfected on 0.60 of an acre of the 1.10 acres comprising Parcel 3.<sup>927</sup> The State Engineer finds that a 1948 photograph is not sufficient evidence to prove that a water right was never perfected on this parcel between 1919 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel. The State Engineer specifically adopts and incorporates General Conclusion of Law II, which held that for lands which have a water right contract dated pre-1927 at some point in time prior to the date of the contract the water right was perfected.

### III.

#### FORFEITURE

The Federal District Court in its Order of Remand of September 3, 1998, relevant to transfer applications from Group 3, held that if the evidence showed that any of the applications were solely intrafarm transfers the State Engineer was to certify that finding to the Federal District Court, and held that the water rights would not be subject to the doctrine of forfeiture.

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<sup>926</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>927</sup> Exhibit No. 1492, public administrative hearing before the State Engineer, October 17, 2000.



**Parcels 1 and 2** - The contract date for Parcel 1 is September 10, 1919, and for Parcel 2 is October 21, 1919; therefore, the water rights are subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>928</sup> which indicates from aerial photographs that in 1948 the land use for both parcels was described as natural vegetation and a portion irrigated. In 1962, 1973, 1974, 1975, 1977, 1980, 1984 and 1989 the land uses were described as natural vegetation and bare land.

A witness for the applicant, a former owner of the farm, was brought forth to testify as to previous irrigation practices, but the testimony was very difficult to follow and understand. The witness described that the S½ of the SW¼ of said Section 31 had 44 acres of water rights used each year during the 1950's to grow melons and alfalfa.<sup>929</sup> The witness indicated that he purchased the farm in the early 1960's, leveled the S½ SW¼ of said Section 31 and fenced the N½ SW¼, which is that area which encompasses Parcels 1 and 2, and that tail water was allowed to run off the S½ into the N½ SW¼ of said Section 31.<sup>930</sup> The witness indicated that the N½ SW¼ of said Section 31 was used as a pasture for cattle from 1965 through 1982. The witness further indicated that the water came off the field in the S½ SW¼ of said Section 31 and flowed between Parcels 1 and 2 until ultimately finding its way to a low point where it ponded.<sup>931</sup>

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<sup>928</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>929</sup> Transcript, pp. 6204-6205, public administrative hearing before the State Engineer, October 17, 2000.

<sup>930</sup> Transcript, pp. 6204-6207, public administrative hearing before the State Engineer, October 17, 2000.

<sup>931</sup> Transcript, pp. 6204-6211, public administrative hearing before the State Engineer, October 17, 2000.

The State Engineer finds there is not clear and convincing evidence of non-use of the water rights on Parcels 1 and 2.

**Parcel 3** - The contract date for Parcel 3 is October 21, 1919; therefore, the water right is subject to the forfeiture provision of NRS § 533.060. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"<sup>932</sup> which indicates from aerial photographs that in 1948, 1962, 1973, 1974, 1975, 1977, and 1980 the land use on this parcel was described as a road and natural vegetation. In 1984, 1985, 1988 and 1989 the land use was described as a road, on-farm supply ditch and a portion irrigated. During the course of testimony, it became clear that the applicant believes the area from which water rights were requested to be stripped on the east side of Parcel 3 is not even his property, and that the road which he believed he was requesting to move water off of may not be part of the applicants' land.<sup>933</sup> The State Engineer finds there is sufficient evidence to draw into doubt whether the applicant owns the existing place of use from which he is requesting to transfer water; therefore, the State Engineer cannot allow the transfer of water from Parcel 3.

#### IV.

##### ABANDONMENT

The State Engineer in his Interim Ruling No. 4411 and in General Finding of Fact I found that the protestant has the burden of proving its case of abandonment by clear and convincing acts of abandonment and intent to abandon, i.e., intent to forsake and desert the water right.<sup>934</sup> "Abandonment, requiring a union of acts

<sup>932</sup> Exhibit No. 1490, public administrative hearing before the State Engineer, October 17, 2000.

<sup>933</sup> Transcript, pp. 6216-6219, 6225-6235, public administrative hearing before the State Engineer, October 17, 2000.

<sup>934</sup> State Engineer's Interim Ruling No. 4411, dated August 30, 1996. Citing to Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

and intent is a question of fact to be determined from all the surrounding circumstances."<sup>935</sup> Non-use for a period of time may inferentially be some evidence of intent to abandon,<sup>936</sup> however, abandonment will not be presumed, but rather must be clearly and convincingly established by the evidence.

The Federal District Court in its Order of September 3, 1998, relevant to transfer applications from Group 3, held that if there is a substantial period of non-use of the water, the State Engineer finds the land has been covered by an improvement inconsistent with irrigation, and the applicant has not made a sufficient showing of lack of intent to abandon, the water right will be deemed abandoned, unless it is an intrafarm transfer. However, the Federal District Court also held that if there is solely a finding of non-use on any parcel, combined with a finding of payment of taxes or assessments, the PLPT has failed to prove abandonment by clear and convincing evidence.

**Parcels 1 and 2** - The State Engineer has already found that there is not clear and convincing evidence of non-use of the water rights on Parcels 1 and 2.

**Parcel 3** - The State Engineer has already found there is sufficient evidence to draw into doubt whether the applicant owns the existing place of use from which he is requesting to transfer water; therefore, the State Engineer cannot allow the transfer of water from Parcel 3.

#### **CONCLUSIONS OF LAW**

##### **I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>937</sup>

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<sup>935</sup> Revert v. Ray, 95 Nev. 782, 786 (1979).

<sup>936</sup> Franktown Creek Irrigation Co., Inc. v. Marlette Lake Company and the State Engineer of the State of Nevada, 77 Nev. 348, 354 (1961).

<sup>937</sup> NRS chapter 533 and Order of Remand from Federal District Court.

**II.**

**PERFECTION**

The State Engineer concludes the protestant did not prove its claims of lack of perfection as to Parcels 1, 2 or 3.

**III.**

**FORFEITURE**

The State Engineer concludes as to Parcels 1 and 2 since there is not clear and convincing evidence of non-use of the water rights the protestant's forfeiture claim is not supported. The State Engineer concludes as to Parcel 3 that without sufficient proof that the applicants are requesting a transfer of water from land they own and there is no proof of ownership of the water right they are requesting to transfer, the transfer cannot be allowed.

**IV.**

**ABANDONMENT**

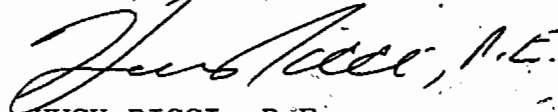
The State Engineer concludes as to Parcels 1 and 2 since there is not clear and convincing evidence of non-use of the water rights the protestant's abandonment claim is not supported. The State Engineer concludes as to Parcel 3 that without sufficient proof that the applicants are requesting a transfer of water from land they own and there is no proof of ownership of the water right they are requesting to transfer, the transfer cannot be allowed.

**RULING**

The protest to Application 53910 is hereby overruled. The State Engineer's decision granting Application 53910 as to Parcels 1 and 2 is hereby affirmed; however, the State Engineer's decision as to Parcel 3 is reversed and no transfer of water rights will be allowed from Parcel 3 due to the ownership issue. Therefore the permit granted under Application 53910 is amended to allow the transfer of water rights appurtenant to 43 acres of land totaling 193.50 acre-feet to be perfected at the proposed place of use.

The applicant is hereby ordered to file with the State Engineer within 90 days a map, which designates which portion of the proposed place of use is excluded as to the water rights that were not allowed to be changed off Parcel 3.

Respectfully submitted as to  
Applications 49395, 49396, 49569,  
49689, 49880, 49999, 51039, 51041,  
51054, 51057, 51231, 51235, 51368,  
51369, 51371, 51374, 51377, 51599,  
51605, 51735, 51737, 52335, 52545,  
52549, 52550, 52552, 52554, 52843,  
53662, 53910,

  
HUGH RICCI, P.E.  
State Engineer

HR/SJT/hf  
Dated this 9<sup>th</sup> day of  
March, 2001.

