

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

IN THE MATTER OF APPLICATIONS)
51045, 51051, 51052, 51058, 51060,))
51228, 51234, 51376, 51600, 51604,))
51606, 51608, 51733, 51734, 51736,))
51957, AND 52542.)

RULING ON REMAND

5047

GENERAL INTRODUCTION

I.

FILING OF APPLICATIONS AND PROTESTS

Applications 51045, 51051, 51052, 51058, 51060, 51228, 51234, 51376, 51600, 51604, 51606, 51608, 51733, 51734, 51736, 51957 and 52542¹ 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.² 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").

The applications (also identified herein as portions of the Groups 5, 6 and 7 transfer applications) were timely protested by the Pyramid Lake Paiute Tribe of Indians ("PLPT") on various grounds, including the following:

¹ 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.

² 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").

The State Engineer has repeatedly held that the PLPT would not be allowed to amend its contentions years into this matter; therefore, the contentions as originally asserted in the list of contentions filed upon remand will remain those pursuant to which the State Engineer will rule.

FINDINGS OF FACT

I.

CONTRACT DATES 51045

Parcels 1 and 2 - Exhibit LLL from the 1989 administrative hearing contains a "Water-right Application for Land in Private Ownership" dated August 17, 1918,¹²⁸ which covers the land identified as Parcels 1 and 2. The applicants also refer to this document as the relevant water rights contract.¹²⁹ The State Engineer finds the contract date is August 17, 1918.

Parcels 3 and 4 - Exhibit LLL from the 1989 administrative hearing contains an "Agreement" dated January 8, 1907,¹³⁰ which indicates that parts of the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 19, T.19N., R.27E., M.D.B.&M area covered by pre-Project vested water rights exchanged for Project water rights. A second document, a "Certificate for Filing Water Right Application"¹³¹ dated December 31, 1907, indicates that in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 19 31 acres of vested water rights existed and 3 acres of new water rights were added under the December 31, 1907, certificate. The PLPT indicates in its Table 1 that the December 31, 1907, certificate

¹²⁸ Official records in the office of the State Engineer.

¹²⁹ Applicants' Petition for Certification as Intrafarm Transfer, filed September 29, 2000, official records in the office of the State Engineer.

¹³⁰ See also, Applicants' Petition for Certification as Intrafarm Transfer, Attachment B, filed September 29, 2000, official records in the office of the State Engineer.

¹³¹ See also, Applicants' Petition for Certification as Intrafarm Transfer, Attachment C, filed September 29, 2000, official records in the office of the State Engineer.

By letter dated February 25, 1994 and revised March 23, 1994, the applicant withdrew 1.7 acres from the Parcel 4 request for transfer and 2.0 acres from the Parcel 6 request for transfer.¹²⁵

II.

Application 51045 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,¹²⁶ and more specifically on the grounds as follows:¹²⁷

- Parcel 1** - Lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, abandonment
- Parcel 4** - Lack of perfection, abandonment
- Parcel 5** - Lack of perfection, abandonment
- Parcel 6** - Lack of perfection, abandonment
- Parcel 7** - Lack of perfection, abandonment
- Parcel 8** - Partial lack of perfection, partial abandonment.

Pursuant to the filing of the PLPT's evidence in this matter on March 8, 2001, which post-dates the filing of the applicant's evidence, the Tribe attempted to amend its contentions to the following:

- Parcel 1** - Lack of perfection, forfeiture, abandonment
- Parcel 2** - Lack of perfection, forfeiture, abandonment
- Parcel 3** - Lack of perfection, abandonment
- Parcel 4** - Lack of perfection, abandonment
- Parcel 5** - Lack of perfection, abandonment
- Parcel 6** - Lack of perfection, abandonment
- Parcel 7** - Partial lack of perfection, abandonment
- Parcel 8** - Partial lack of perfection, abandonment.

¹²⁵ File No. 51045, official records in the office of the State Engineer.

¹²⁶ File No. 51045, official records in the office of the State Engineer.

¹²⁷ Exhibit No. 479, public administrative hearing before the State Engineer, October 7, 1997, official records in the office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴¹⁴

II.

PERFECTION

The State Engineer concludes that the protestant did not prove its claim of lack of perfection.

III.

FORFEITURE AND ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrines of forfeiture and abandonment pursuant to Judge McKibben's Order of September 3, 1998.

RULING

The protest to Application 51957 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed.

⁴¹⁴ NRS chapter 533 and Order of Remand from Federal District Court.

APPLICATION 52542

GENERAL

I.

Application 52542 was filed on September 23, 1988, by William E. & Laura M. Shepard⁴¹⁵ to change the place of use of 58.83 acre-feet annually, a portion of the waters of the Truckee and Carson Rivers previously appropriated under Serial Number 282, Claim No. 3, Orr Ditch Decree, and Alpine Decree. The proposed point of diversion is described as being located at Lahontan Dam. The existing place of use is described as:

Parcel 1 - 4.60 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, T.18N., R.29E., M.D.B.&M.

Parcel 2 - 12.21 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, T.18N., R.29E., M.D.B.&M.

The proposed places of use are described as being 9.34 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 0.41 of an acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, and 7.06 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, all within Section 29, T.18N., R.29E., M.D.B.&M.

II.

Application 52542 was protested by the PLPT on the grounds described in the General Introduction I of this ruling,⁴¹⁶ and more specifically on the grounds as follows:⁴¹⁷

Parcel 1 - Partial lack of perfection, abandonment

Parcel 2 - Partial lack of perfection, partial abandonment.

FINDINGS OF FACT

I.

CONTRACT DATES 52542

Parcels 1 and 2 - Exhibit XXX from the 1991 administrative hearing contains an "Agreement" dated April 29, 1907, in the name of Howard B. Pratt and Sadie Pratt, Charles A. Brown, Howard

⁴¹⁵ File No. 52542, official records in the office of the State Engineer.

⁴¹⁶ File No. 52542, official records in the office of the State Engineer.

⁴¹⁷ Exhibit No. 259, public administrative hearing before the State Engineer, April 15, 1997, official records in the office of the State Engineer.

Davidson, William R. Lee and Sylvia Ann Lee⁴¹⁸, which covers the S $\frac{1}{2}$ NE $\frac{1}{4}$ and the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 19, T.18N., R.29E., M.D.B.& M., the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, T.18N., R.29E., M.D.B.&M., and provides the water rights are based on pre-Project vested water rights. Exhibit XXX also contains another "Certificate of Filing Water Right Application" dated December 31, 1907, in the name of William E. Frazier, which covers the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19 (18 acres vested water rights, 22 acres new water rights), the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19 (3 acres vested water rights, 37 acres new water rights), the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20 (6 acres vested water rights, 34 acres new water rights), the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20 (15 acres vested water rights, 25 acres new water rights), and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20 (18 acres vested water rights, 22 acres new water rights), all within T.18N., R.29E., M.D.B.&M. Exhibit XXX also contains a "Certificate of Filing Water Right Application" dated December 24, 1909, in the name of William E. Frazier, which covers the N $\frac{1}{2}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 19, and the S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 20, all within T.18N., R.29E., M.D.B.&M., which indicates on those lands there were 150 acres of vested water rights within the 290 irrigable acres described.

The applicants provided evidence of an "Agreement" dated May 8, 1903, in the name of W.R. Lee and D.A. Lee which provides for the exchange of pre-Project vested water rights for 250 acres of Project water rights in parts of Sections 19 and 20, T.18N., R.29E., M.D.B.&M. Nothing in this record provides any further detail as to the location of those water rights.

The State Engineer specifically adopts and incorporates General Finding of Fact VI and finds the three documents found in Exhibit XXX are the contract documents that will be used to

⁴¹⁸ Official records in the office of the State Engineer.

determine a contract date and finds those three documents are close enough in time that they can be related back to each other. The State Engineer finds the contract date is April 29, 1907.

II.

PERFECTION

Parcel 1 - The contract date is April 29, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴¹⁹ which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975 and 1977 the land use on this parcel was described as a drain ditch, delivery ditch (L1-8-1 lateral), road and portion irrigated. In 1980, 1984, 1985, 1986, 1987 and 1988 the land use was described as a drain ditch, delivery ditch (L1-8-1 lateral) and road. The PLPT provided evidence that from 1948 through 1977 a 0.37 of an acre portion of the 4.60 acres proposed for transfer was irrigated.⁴²⁰

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 1907 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel, and proved perfection on a portion of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. 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.

⁴¹⁹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴²⁰ Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

Parcel 2 - The contract date is April 29, 1907. The PLPT provided evidence in Table 2 - "Land Use Descriptions for Existing Place(s) of Use"⁴²¹ which indicates from aerial photographs that in 1948, 1962, 1972, 1973, 1974, 1975, 1977, 1980 and 1984 the land use on this parcel was described as a drain ditch, road and portion irrigated. In 1985, 1986 and 1987 the land use was described as a drain ditch, road, portion irrigated, farm yard and farm structures. In 1988 the land use was described as a drain ditch, farm yard and farm structures. The PLPT provided evidence that from 1980 through 1984 8.46 acres of the 12.21 acres proposed for transfer were irrigated.⁴²²

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 1907 and 1948; therefore, the protestant did not prove its claim of lack of perfection on this parcel, and proved perfection on a portion of the parcel. The State Engineer specifically adopts and incorporates General Finding of Fact VIII that pre-Project vested water rights were perfected as a matter of fact and law. 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.

ABANDONMENT

The Federal District Court in its Order 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

⁴²¹ PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

⁴²² Map Irrigated Portions of Existing Place(s) of Use, PLPT package of evidence filed on March 8, 2001, official records in the office of the State Engineer.

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 doctrines of forfeiture or abandonment.

Parcel 1 and 2 - The evidence as to the land use descriptions are all adequately described in the section on perfection; therefore, for the sake of brevity, the State Engineer will not repeat them in this section. As to Parcel 1, the State Engineer finds no water was placed to beneficial use on the entire Parcel 1 for the 8 year period from 1980 through 1988. As to Parcel 2, the State Engineer finds that most of the parcel was irrigated through 1984, some unquantified amount of Parcel 2 was irrigated from 1985 through 1988, it is only the year of the filing of the application that the protestant's evidence shows the entire parcel was not irrigated. The State Engineer finds there is not clear and convincing evidence as to non-use on any specific portion of the parcel for the statutory forfeiture period.

The applicants provided evidence showing that the existing and proposed places of use are within the farm unit owned by the applicants' family in total since 1988.⁴²³ The State Engineer further finds that evidence was provided showing that the transfers from these parcels are intrafarm transfers not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴²⁴

⁴²³ Applicants' Petition for Certification as Intrafarm Transfer for Application 52542 filed on September 29, 2000, official records in the office of the State Engineer.

⁴²⁴ NRS Chapter 533 and Order of Remand from Federal District Court.

II.

PERFECTION

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

III.

ABANDONMENT

The State Engineer concludes that this is an intrafarm transfer not subject to the doctrine of abandonment pursuant to Judge McKibben's Order of September 3, 1998, and that the protestant did not prove non-use for the statutory period on any specifically identifiable portion of Parcel 2; therefore, did not prove non-use by clear and convincing evidence for the statutory forfeiture period.

RULING

The protest to Application 52542 is hereby overruled and the State Engineer's decision granting the transfer of water rights is hereby re-affirmed.

Respectfully submitted as to
Applications 51045, 51051, 51052,
51058, 51060, 51228, 51234, 51376,
51600, 51604, 51606, 51608, 51733,
51734, 51736, 51957, and 52542,


HUGH RICCI, P.E.
State Engineer

HR/SJT/hf

Dated this 9th day of
August, 2001.