ORIGINAL

STATE OF NEVADA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

DIVISION OF WATER RESOURCES

BEFORE THE STATE ENGINEER, MICHAEL TURNIPSEED

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| In the Matter of Applications 62405, 62619, 62830, 62831, 62897 63005, 63006, 63008, 63009, 63025 63026, 63027, 63034, 63056, 63057 63060, 63061, 63073, 63097, 63098 63104, 63105, 63106, 63137, 63138 63209, 63220, 63243, 63244, 63253 63268, 63280, and 63283 | #4642 |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PUBLIC HEARING

VOLUME I

MONDAY, JUNE 15, 1998

CARSON CITY, NEVADA

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



EXHIBIT
tabbies
TCID 254

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no questions -- Mr. King?

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

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

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

(The hearing concluded at 4:55 p.m.)

STATE OF NEVADA, )
) ss.
CARSON CITY. )

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

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

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

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

Karen Yates

KAREN YATES, RPR
Nevada CCR No. 195