

EXHIBIT

TMWA 4-3

**Nevada State Engineer Ruling 5760,
August 21, 2007**

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

IN THE MATTER OF APPLICATION)
70934 FILED TO CHANGE THE MANNER)
AND PLACE OF USE OF THE WATER OF)
THE TRUCKEE RIVER, TRACY)
SEGMENT HYDROGRAPHIC BASIN (83),)
STOREY COUNTY, NEVADA.)

RULING

5760

GENERAL

I.

Application 70934 was filed on March 10, 2004, by Washoe County, the City of Reno and the City of Sparks to change the place and manner of use of 6.875 cubic feet per second (cfs), not to exceed 1,636.45 acre-feet annually (afa), a portion of the waters heretofore decreed and set forth under Claim No. 3 of the *Orr Ditch Decree*¹ and Permit 47810, Certificate 13150.² The application proposes to change the manner of use from the decreed uses of irrigation, storage, power, municipal, domestic and other purposes to wildlife purposes in the Truckee River downstream from the point of diversion at Derby Dam to the Pyramid Lake inlet. The remarks section of the application notes that the Applicants have an agreement with the Truckee-Carson Irrigation District ("TCID") to pay the operation and maintenance fees associated with the water rights being changed.

By letter dated July 14, 2005, the Applicants withdrew 4.73 acres and 21.29 acre-feet from what it identified as Parcel K under Attachment A to the application, thereby reducing the amount requested to be changed under the application to 6.786 cfs, not to exceed 1,615.16 afa.³

II.

Application 70934 was timely protested by the City of Fallon and Churchill County on the following grounds as summarized:

¹ Final Decree, *United States v. Orr Water Ditch Co.*, Equity A-3 (D. Nev. 1944).

² Exhibit No. 1, public administrative hearing before the State Engineer, October 10, 2005. Hereinafter the transcript and exhibits from the hearing will be referred to solely by the transcript page number or the exhibit number.

³ Exhibit No. 2.

1. Granting the application would be a violation of the *Alpine Decree*⁴ and the *Orr Ditch Decree* and the Order and Judgment entered in the case of *Nevada v. U.S.*, 463 U.S. 110 (1983) on the grounds that the Newlands Project water rights are an integrated set of rights appropriated and decreed for the benefit of each in relation to all others. No owner of Newlands Project water rights may secede from the Newlands Project, which these Applicants propose to do, for the benefit of other segments of the Truckee River. Accordingly, the application is actually an attempt to unilaterally amend the *Orr Ditch Decree* and as such is unlawful.

2. The water rights proposed for transfer are subject to the *Orr Ditch Decree* for the use and benefit of the members of the Newlands Project to whom the United States owes a fiduciary trust responsibility. Water available under Claim No. 3 of the *Orr Ditch Decree* provides for an allocable share of the available water in any given irrigation year to all Project water users. Assuming arguendo that the place of use for the Newlands Project water rights could legally be transferred outside the Project, the application is defective and unlawful on its face because it fails to designate an appropriate point of diversion to transport Newlands Project water from the existing places of use within the Newlands Project to the proposed place of use without any transportation method or right of way for the necessary works of diversion.

3. The application cannot be granted unless the Applicants own or have the requisite legal right to place such water to beneficial use upon the proposed place of use. The Applicants have no ownership or other rights in the Truckee River or its bed downstream of Derby Dam; therefore, granting the application would violate Nevada law.

4. Granting the application would conflict with, injure and impair the existing permitted water rights owned by the City of Fallon, which supply its municipal water system upon which 8,500 residents rely for their drinking water, specifically, Permits 19859, 19860, 26168, 40869 and 55507.

⁴ *U.S. v. Alpine Land and Reservoir Co.*, Equity No. D-183 (D. Nev. 1980).

5. Granting the application would be detrimental to the City of Fallon as a Newlands Project water right owner, as well as detrimental to the public interest of the state of Nevada, because it would reduce water available to supply water rights for use upon appurtenant lands within the Newlands Project, which recharges the ground-water aquifer, consequently depleting the ground-water supply from which the City of Fallon appropriates water under its referenced water rights.

6. Granting the application would present a hazard and danger to the health, safety and welfare of the residents of the City of Fallon and the surrounding community because it would jeopardize the sole drinking water supply of the City's residents with said result being contrary to the public interest of the state of Nevada to enhance public municipal drinking water supplies. *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 918 P.2d 699 (1996). Granting the application would be detrimental to the public interest and conflict with existing rights by removing water resources from lands within aquifer recharge areas, which in turn would deplete ground water from which Churchill County's residents rely on to supply their domestic wells and which have a protectible interest under Nevada law. The application should not be granted without a condition on the transfer of mitigation of adverse effects on ground-water supplies.

7. Under the Reclamation Act of June 17, 1902, and the *Orr Ditch Decree*, Derby Dam and the Truckee Canal were established for the benefit of the residents within the Newlands Project for purposes and uses including the City of Fallon's municipal water utility for domestic and other purposes. Under § 209(a) of Public Law 101-618 (November 16, 1990) ("PL 101-618"), the Project is to be operated and maintained for the beneficial purposes including municipal water supply in Churchill County, which includes the City of Fallon. Granting the application will reduce ground-water recharge, will negatively affect water quality in violation of the *Orr Ditch Decree*, PL 101-618 and the City of Fallon's water rights, which supply its municipal water utility.

8. Granting the application would violate federal reclamation law, 43 U.S.C. § 389, in several respects including, but not limited to: (i) the detrimental effect on existing water rights within the Newlands Project; and (ii) violation of the fiduciary, trust and contract obligations of the United States of America to all owners of Newlands Project water rights, specifically, the water transfer would conflict with and hinder the Secretary of the Interior's ability to reach efficiency required by Operating Criteria and Procedures ("OCAP").

9. Granting the application would adversely affect the cost of charges of water delivery and lessen the efficiency in the delivery of water to water-right owners served by the Newlands Project in violation of NRS § 533.370. Granting the application will effectively transfer water from the Newlands Project to instream flows outside the Project and will result in adverse impacts to other water-right owners in the Project by forcing them to absorb the loss of additional water to meet efficiency requirements.

10. PL 101-618 Section 209(c)(1) established criteria that an average of not less than 75% of actual diversion be delivered to satisfy water rights in the Newlands Project. The OCAP imposes requirements for Truckee Canal conveyance efficiency, which the proposed application would adversely affect, as well as impair the ability of the US and/or its agent, the TCID to achieve OCAP requirements. Granting the application would unlawfully affect the cost of water delivery to all other water-right owners within the Newlands Project, lessen TCID's efficiency in its delivery and use of water, and result in a decreased amount of water available to said Newlands Project water-right owners. Such results are against the public interest of the state of Nevada, and under NRS § 533.370, the State Engineer is required to disapprove an application if the proposed transfer may result in additional costs or losses.

11. Granting the application would violate the federal Safe Drinking Water Act as enforced by the State of Nevada through the Department of Environmental Protection and the Nevada Health Bureau because its depletion of ground-water quantity would have a corresponding negative effect on ground-water quality upon which the City of Fallon relies for its municipal water supply.

12. The application should not be granted for the full duty of 4.5 acre-feet per acre, but rather should only be granted for the decreed consumptive use amount of 2.99 acre-feet per acre because to grant the full duty would adversely affect return flows, ground-water recharge and wetlands, thus harming existing rights and be against the public interest of the state of Nevada.

13. Granting the application would be contrary to and violate federal law, 42 U.S.C. § 4300, the National Environmental Policy Act because it would implement major actions of the federal government without having prepared the required environmental analysis of the cumulative and synergistic effects of said actions to the human environment by either an Environmental Assessment or an Environmental Impact Statement.

14. Nevada Revised Statute § 533.368 requires hydrologic and environmental studies to determine the application's true consequences on existing water rights and Nevada's public interest.

15. The proposed change in use would violate Churchill County Code, Chapter 17.77 ("Dust Control Ordinance"), which requires that a person who transfers water rights off a parcel of land 5 acres or more, or who ceases to irrigate said parcel, to obtain a permit from Churchill County to mitigate fugitive dust. The changes proposed under this application in most instances are greater than 5 acres and the Applicants have taken no action under the Ordinance and it would be detrimental to the public interest to grant the application before the Applicants comply with the dust control ordinance and, due to the numerous problems that have been caused by fugitive dust, to grant the application without conditions of mitigation would be detrimental to the public interest.⁵

III.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the protested applications on October 10, 2005, at Carson City, Nevada, before representatives of the Office of the State Engineer.⁶

⁵ Exhibit Nos. 4 and 5.

⁶ Exhibit No. 7.

FINDINGS OF FACT

I.

Application 70934 was also timely protested by the TCID;⁷ however, the protest was withdrawn pursuant to a stipulation.⁸ The stipulation requires the Applicants to pay the operation and maintenance assessments levied by the TCID on the water rights requested for transfer under Application 70934 pursuant to and in accordance with the terms of that certain Water Rights Operations and Maintenance Assessment Agreement between the Local Governments and the TCID dated January 17, 2002. Among others provisions, the stipulation provides for the Applicants and the TCID to cooperate in good faith to cause the Bureau of Reclamation to recognize that the delivery of water should at worst only have a neutral effect on efficiency calculations under the OCAP.

The remaining Protestants alleged that the granting of the application would adversely affect the cost of charges of water delivery in violation of NRS § 533.370. The State Engineer finds due to the agreement for the payment of operations and maintenance assessments that granting the change application will not adversely affect the cost of water delivery to other water right owners served by the Newlands Project.

II.

The Protestants allege that granting the application would be a violation of the *Alpine* Decree and the *Orr Ditch* Decree and the Order and Judgment entered in the case of *Nevada v. U.S.*, 463 U.S. 110 (1983) on the grounds that the Newlands Project water rights are an integrated set of rights appropriated and decreed for the benefit of each in relation to all others and no owner of Newlands Project water rights may secede from the Newlands Project, which these Applicants propose to do, for the benefit of other segments of the Truckee River. Accordingly, the application is actually an attempt to unilaterally amend the *Orr Ditch* Decree and as such is unlawful. They argue that the Newlands Project framework is the 1902 Reclamation Act, which restricts service to the Project area, and that interrelated sections of the Reclamation Act require continued use of Reclamation water within projects and are evidence of Congress's intention that the projects and

⁷ Exhibit No. 6.

⁸ Exhibit No. 41.

their related water rights remain intact over time and that this transfer must be denied unless the Secretary of the Interior approves it.

Claim No. 3 of the *Orr Ditch* Decree confirms a water right for the irrigation of lands on the Newlands Project, for storage in Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the Project and for domestic and other purposes. In the *Orr Ditch* Decree, the Federal District Court established the parameters of the water right under Claim No. 3, i.e., water use within the Newlands Project for various purposes, and identified the United States as the owner of the water right. However, since that time, the *Alpine* Court has held that the water rights on the Newlands Project covered by approved water rights applications and contracts are appurtenant to the land irrigated and are owned by the individual land owners in the Project. While the United States may have title to the irrigation works, as to the appurtenant water rights it maintains only a lien holders interest to secure repayment of the project construction costs.⁹ Additionally, the Ninth Circuit Court of Appeals has held that state law governs the validity of transfers of water rights within the Newlands Project and that this is simply an application of the 1902 Reclamation Act, which expressly disclaimed any intention of displacing state water law.¹⁰

While the Reclamation Act was the basis for the creation of the Newlands Project, Section 8 of the 1902 Reclamation Act itself provides that nothing in the Act is to be construed as affecting or interfering with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation.¹¹ It has been held that an important unifying factor in the long working relationship between the United States and the several arid western states in the area of reclamation projects is the purposeful and continued deference to state water law by Congress and the only area where state law may not control is where it conflicts with explicit congressional directives in the Reclamation Act.¹² Nevada Revised Statute § 533.325 provides for the filing of change applications. While the Protestants argue that the water right originally granted for the Project has to stay as part of the Project, they have not demonstrated any specific language in the *Orr Ditch* Decree, the *Alpine* Decree or the Reclamation Act that so restricts the water rights and

⁹ *U.S. v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879 (D. Nev. 1980).

¹⁰ *U.S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1223 (9th Cir. 1989).

¹¹ 43 U.S.C. § 383.

¹² *U.S. v. Alpine Land & Reservoir Co.*, 503 F. Supp. at 880.

they have not demonstrated any specific conflict with an explicit congressional directive in the Reclamation Act.

Both the *Orr Ditch* Decree and the *Alpine* Decree provide for the filing of change applications on decreed water rights. The *Orr Ditch* Decree provides that “[p]ersons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the water to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of others persons whose rights are fixed by this decree.” The *Alpine* Decree provides that “[a]pplications for changes in the place of diversion, place of use or manner of use as to Nevada shall be directed to the State Engineer” and “[c]hanges in manner of use applications from use for irrigation to any other use and changes in place of use applications shall be allowed only for the net consumptive use of the water right as determined by this Decree.”¹³ The decrees themselves provide for the filing of change applications.

There is no specific support found for the Protestants argument that the Nevada Irrigation District Act also requires the water rights to stay within the Project or irrigation district. The Nevada Irrigation District Act found NRS 539.233 indicates that water acquired by an irrigation district can be used outside the boundaries of the district. There is nothing in the Nevada Irrigation District Act that specifically indicates that water owned by an individual must stay within the irrigation district or that the individual must have the consent of either the irrigation district or the United States to dispose of their water.

Title II of Public Law 101-618, the “Truckee-Carson Pyramid Lake Water Rights Settlement Act” (the “Settlement Act”) makes it clear that the purposes of the Newlands Project are not only those identified in the *Orr Ditch* Decree, but have since the time of the decree been expanded to additional uses. The Project is authorized to be operated and maintained for the purposes of fish and wildlife, including threatened and endangered species, municipal and industrial water supply in Lyon and Churchill Counties, recreation, water quality, and any other purposes recognized as beneficial uses under Nevada law.¹⁴ Pursuant to Section 209(a) of the Settlement

¹³ *Alpine* Decree at 161-162.

¹⁴ P.L. 101-618 § 209(a)(1).

Act, Congress expressly authorized use of the Newlands Project for contemporary purposes, including any purpose recognized as a beneficial use under Nevada water law. The additional uses of the Newlands Project water made pursuant to this section are to be accomplished by transfers made in accordance with Nevada water law. Nowhere in this section of P.L. 101-618 does it indicate that water can only be used within the boundaries of the Newlands Project. Rather, the logical interpretation is that by this law Congress appears to have completely changed the purposes of the Newlands Project, but that does not demonstrate a violation of the relevant decrees.

The State Engineer finds state water law governs the appropriation and use of water in the Newlands Project. The State Engineer finds that NRS § 533.325, the *Orr Ditch Decree* and the *Alpine Decree* provide for the filing of change applications. The State Engineer finds that NRS § 533.023 provides that water may be used for wildlife purposes, which includes use of water for fisheries and their related habitats. The State Engineer finds no evidence was provided or any argument made that supports that granting the change applications will violate the *Orr Ditch Decree*, the *Alpine Decree* or the Order and Judgment entered in the case of *Nevada v. U.S.* The State Engineer finds the courts have held that while the United States originally acquired the water right for the Newlands Project, the U.S. passed title to those water rights to the Project farmers.¹⁵ The State Engineer finds the courts have held that the water rights in the Project are owned by the property owners who contracted with the United States for use of the water and those rights may be changed subject to Nevada water law. The State Engineer finds no evidence showed that transfer applications require approval of the Secretary of the Interior. The State Engineer finds that PL 101-618 apparently altered the purposes for which the Newlands Project may be used. The State Engineer finds no evidence was provided that identified a specific restriction found within the Reclamation Act, the *Orr Ditch Decree*, the *Alpine Decree* or PL 101-618 that those uses must be within the Newlands Project. The State Engineer finds there is no evidence that the TCID, as the agent of the U.S. Bureau of Reclamation, alleges that Claim No. 3 water cannot be used outside the Newlands Project. The State Engineer finds the U.S. Bureau of Reclamation did not file a protest to the proposed change or complain that Claim No. 3 water cannot be used outside the Project.

¹⁵ *U.S. v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 881 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983).

III.

Protestants allege that Section 209(c)(1) of PL 101-618 established criteria that an average of not less than 75% of actual diversion be delivered to satisfy water rights in the Newlands Project. They allege that OCAP imposes requirements for Truckee Canal conveyance efficiency, which the proposed application would adversely affect, as well as impair the ability of the US and/or its agent, the TCID to achieve OCAP requirements. They also allege that granting the application would unlawfully affect the cost of water delivery to all other water rights owners within the Newlands Project, lessen the TCID's efficiency in its delivery and use of water, and result in a decreased amount of water available to said Newlands Project water right owners, and such results are against the public interest of the state of Nevada, and under NRS § 533.370, the State Engineer is required to disapprove an application if the proposed transfer may result in additional costs or losses.

Nevada Revised Statute § 533.370(1)(b) provides that the State Engineer shall approve an application if the proposed change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water. The stipulation between the Applicants and the TCID referenced above provides for the payment of assessments in accordance with the terms of that certain Water Rights Operations and Maintenance Assessment Agreement between the Local Governments and the TCID dated January 17, 2002. Testimony and evidence also indicates that operations and maintenance assessments will continue to be paid;¹⁶ therefore, the State Engineer finds no evidence supports the allegation that granting the change application will affect the cost of water delivery to other water right owners within the Newlands Project.

The Applicants and the TCID agreed to cooperate in good faith to cause the Bureau of Reclamation to recognize that the delivery of water should at worst only have a neutral effect on efficiency calculations under the OCAP. The Applicants argue that since the lands were taken out of irrigation and are not going to be irrigated in the future, it is not the change being requested that might reduce the efficiency, but rather it was the cessation of irrigation, which occurred prior to filing of the change application, that might have the effect of reducing efficiency.

¹⁶ Exhibit No. 33, pp. 20-23; Exhibit No. 33C.

The State Engineer finds he is granting the application based on the agreement to cooperate in good faith to cause the Bureau of Reclamation to recognize that the delivery of water should at worst only have a neutral effect on efficiency calculations under the OCAP, and that without said neutral effect or mitigation of any effect that may be caused he would be required to deny the application by law.

IV.

As to the issue of fugitive dust and Churchill County's Dust Control Ordinance, in the Intermediate Order dated September 13, 2005,¹⁷ the State Engineer noted that in State Engineer's Ruling No. 5078, dated September 26, 2001, the State Engineer found that whether a piece of land presents dust issues after irrigation ceases or water is removed is not within the purview of his review as to whether a change application should be granted. Other agencies are designated as having the responsibility for air quality issues in Nevada.

The State Engineer finds more and more arguments are being raised under the guise that the use of water as proposed under an application would threaten to prove detrimental to the public interest, and as such, under NRS § 533.370(5) the application should be denied. The State Engineer believes this statutory provision was never intended for analysis of all the issues currently being alleged as to why applications should be denied. The State Engineer finds the Nevada Supreme Court's and the Ninth Circuit Court of Appeals' interpretation of the intent of this provision is that it needs to be read in the context of Nevada's water law and water policy statutes, which does not include Churchill County's Dust Control Ordinance. In *Churchill County v. Ricci*, the Court held that "the State Engineer's authority was limited to considerations identified in Nevada's water policy statutes. [Citation omitted.] The court in *Pyramid Lake* noted that the State Engineer could not include a consideration of factors identified in water allocation statutes from other states, or directives in Nevada statutes requiring other state administrative agencies to conduct a comparative economic analysis of water delivery alternatives, in a public interest analysis."¹⁸ The State Engineer finds it is Churchill County that is responsible for enforcing Churchill County's Dust Control Ordinance and not the State Engineer.

¹⁷ Exhibit No. 19.

¹⁸ 341 F.3d 1172, 1183 (9th Cir. 2003).

V.

Protestant City of Fallon argues, assuming *arguendo* that the place of use of the Newlands Project water rights could legally be transferred outside the Project, the application is defective and unlawful on its face because it fails to designate an appropriate point of diversion to transport Newlands Project water from the existing places of use within the Newlands Project to the proposed place of use without any transportation method or right of way for the necessary works of diversion. The water law does not require an applicant show the means of diverting water from the original place of use to the new place of use, but rather a means of diverting water from the source to the new place of use. If an applicant has a water right on a stream and diverts it into his diversion ditch, but wants to move the point of diversion further upstream, he does not have to show a transportation system that takes it from the original point of diversion to the new point of diversion upstream. The State Engineer finds this protest allegation lacks merit.

VI.

Protestants allege that granting the application would violate federal reclamation law, 43 U.S.C. § 389, in several respects including, but not limited to: (i) the detrimental effect on existing water rights within the Newlands Project; and (ii) violation of the fiduciary, trust and contract obligations of the United States of America to all owners of Newlands Project water rights, specifically, the water transfer would conflict with and hinder the Secretary of the Interior's ability to reach the efficiency required by the Operating Criteria and Procedures ("OCAP").

43 U.S.C. § 389 provides that:

The Secretary is authorized, in connection with the construction or operation and maintenance of any project, (a) to purchase or condemn suitable lands or interests in lands for relocation of highways, roadways, railroads, telegraph, telephone, or electric transmission lines, or any other properties whatsoever, the relocation of which in the judgment of the Secretary is necessitated by said construction or operation and maintenance, and to perform any or all work involved in said relocations on said lands or interests in land, other lands or interests in lands owned and held by the United States in connection with the construction or operation and maintenance of said project, or properties not owned by the United States; (b) enter into contracts with the owners of said properties whereby they undertake to acquire any or all property needed for said relocation, or to perform any or all work involved in said relocations; and (c) for the purpose of effecting completely said relocations, to convey or exchange Government properties acquired or improved under (a)

above, with or without improvements, or other properties owned and held by the United States in connection with the construction or operation and maintenance of said project, or to grant perpetual easements therein or thereover. Grants or conveyances hereunder shall be by instruments executed by the Secretary without regard to provisions of law governing the patenting of public lands.

The Secretary is further authorized, for the purpose of orderly and economical construction or operation and maintenance of any project, to enter into such contracts for exchange or replacement of water, water rights, or electric energy or for the adjustment of water rights, as in his judgment are necessary and in the interests of the United States and the project.

The State Engineer finds 43 U.S.C. § 389 in no way supports the allegation of Protestants that granting the change application would violate this provision of the United States Code. The State Engineer finds this section of the United States Code does not even address the existing water rights in the Project in the context argued by Protestants or address any fiduciary, trust or contract obligation of the Secretary of the Interior to Newlands Project water right holders or address the Secretary of the Interior's obligation under OCAP. The State Engineer finds this protest allegation as formulated lacks merit. The State Engineer finds that questions regarding the nature and extent of the United States' fiduciary, trust and contract obligations to the Newlands Project water right holders is not within jurisdictional issues delegated to him for review under Nevada water law.

VII.

Protestants allege that granting the application would violate the federal Safe Drinking Water Act as enforced by the State of Nevada through the Department of Environmental Protection and the Nevada Health Bureau because the depletion of ground-water quantity would have a corresponding negative effect on ground-water quality upon which the City of Fallon relies for its municipal water supply. The State Engineer finds no evidence was provided in support of this protest claim and dismisses the protest claim.

VIII.

The heart of the Protestant's argument is found in several of its protest allegations, which is that as water rights on the Newlands Project are converted from irrigation to other uses, such as municipal use in local towns, instream use in the Truckee River for wildlife purposes or use to irrigate wetlands for wildlife that naturally existed before the Project was built, there will be less water recharging the aquifers from which the City or others appropriate water. Therefore, granting

the applications will impair its existing rights and threaten to prove detrimental to the public interest. Protestant City of Fallon alleges that granting the change application will conflict with, injure and impair its existing permitted ground-water rights, specifically Permits 19859, 19860, 26168, 40869 and 55507. However, the Protestant did not provide any specific evidence to demonstrate how the changes proposed under this application would impair those rights.

The State Engineer has previously found that he can not force a farmer to continue to irrigate lands with a surface-water source in order to provide continued ground-water recharge or to protect the water quantity or quality of a junior ground-water user or any ground-water user. The City of Fallon argues that it does not assert that the water rights must continue to be used at their existing places of use, but rather NRS § 533.370 precludes the transfer if it conflicts with the City's existing water rights, whether surface or ground water, junior or senior or threatens to prove detrimental to the public interest. The Protestants' arguments center around an analysis that requires unnatural conditions to continue because they hold water rights that they believe depend on the secondary recharge from irrigation or leakage from canals and ditches and that by allowing the water rights to be moved from the existing place of use it will impair their water rights or threaten to prove detrimental to the public interest.

If a person merely ceased to irrigate and let the water right lapse, the effect would be the same, but it is the change application process through which the Protestants are trying to express their dissatisfaction with P.L. 101-618 and the other changes taking place within the Newlands Project. In effect, the Protestants are arguing, that as junior ground-water right holders who have come to rely on the unnatural recharge the Project created, that any change from that artificial recharge will impact its existing rights and threaten to prove detrimental to the public interest.

The State Engineer, in Order No. 1116, recognized the fact that the recharge experienced from surface-water irrigation was declining in the Carson Desert Hydrographic Basin and thereby restricted further ground-water development in the area.¹⁹ Ground-water development was restricted based on the fact that application of surface water for irrigation was disappearing, but the order did not nor could it order the use of surface water for irrigation to continue. Since the turn of the 20th century and creation of the Newlands Reclamation Project, it is true that surface-water

¹⁹ State Engineer's Order No. 1116, dated August 22, 1995, official records in the Office of the State Engineer.

irrigation in the Newlands Project has changed the depth to water over large areas of the valley floor and has increased the amount of water that recharges the ground-water aquifers from that which occurs naturally. The water brought into the Newlands Project from the Truckee River is not native to the Carson Desert Hydrographic Basin. The water under consideration in this application is water that the Applicants are requesting to be changed back for use in its river of origin.

The State Engineer recognizes that the effect of changes in water use on local ground-water supplies is not known and is a major public concern.²⁰ The State Engineer finds he cannot force a person to continue to irrigate with surface water and he will not restrict a change in use of a senior surface-water right in order to provide ground-water recharge. A farmer is not required to continue farming because someone else drilled a ground-water well which depends on the farmer applying water to his land. The State Engineer recognizes that ground-water recharge experienced from surface-water irrigation is declining in the Carson Desert Hydrographic Basin and that ground-water development has been restricted in the area due to the fact that the application of surface water is disappearing, but the surface water users are not going to be restricted in what they can do because others hold ground-water rights that were granted in times when there was much greater surface water irrigation that recharged the ground-water basin. It is the ground-water users that need to be planning for the acquisition of additional water rights to recharge the ground-water basin if they believe such is required.

IX.

The Protestants alleged that approval of the application would be contrary to and violate federal law, 42 U.S.C. § 4300, the National Environmental Policy Act (NEPA) because it would implement major actions of the federal government without having prepared the required environmental analysis of the cumulative and synergistic effects of said actions to the human environment by either an Environmental Assessment or an Environmental Impact Statement. The Protestants have argued that they are not asking the State Engineer to address violations of NEPA, but rather that if there is a violation of NEPA, such a violation would threaten to prove detrimental to the public interest, which is a statutory criteria the State Engineer addresses under NRS §

²⁰ See, D. Maurer, A. Johnson and A. Welch, *Hydrogeology and Potential Effects of Changes in Water Use, Carson Desert Agricultural Area, Churchill County, Nevada*, United States Geological Survey, Open-File Report 93-463, p.

533.370(5) and dismisses the protest claim.

The State Engineer has repeatedly addressed this argument as raised by these Protestants. The State Engineer finds he is not the person who is to address violations of NEPA, and that in order to determine the question as framed by the Protestants he would have to determine if there is a violation of NEPA. Additionally, in a previous ruling where this argument has already been addressed, the Ninth Circuit Court of Appeals held that “[w]ith respect to the County and the City’s claim that a cumulative study is essential to avoid any potential detrimental impacts to the public interest, [that] none of the policy considerations identified in *Pyramid Lake* encompasses the need for a comprehensive assessment of the potential effects of future water transfer applications.”²¹ The Court found that neither Nevada water law or water policy statements addressed the need for cumulative studies before the State Engineer approves a transfer application.

The State Engineer finds the forum for addressing this issue is not the State Engineer and he will not turn the water appropriation process into a forum for addressing whether the United States has violated NEPA and does not accept the Protestant’s argument that attempts to weave NEPA into Nevada’s public interest criterion. The jurisdiction for the State Engineer is provided for under Nevada water law. Additionally, the State Engineer finds the Protestant provided no evidence on this protest issue.

X.

Protestants argue that NRS § 533.368 requires hydrologic and environmental studies to determine the application’s true consequences on existing water rights and Nevada’s public interest. The State Engineer is aware that the ground-water recharge experienced from surface-water irrigation is declining in the Carson Desert Hydrographic Basin and further ground-water development in the area is restricted. Nevada Revised Statute § 533.368 provides the State Engineer with the discretion to determine whether a hydrological study, an environmental study or other study is needed before he makes a determination on an application. There have already been numerous studies conducted in regard to the ground water in the Lahontan Valley and with respect to the changes within the Newlands Project and surrounding areas. The Ninth Circuit Court of

44 (1994).

²¹ *Churchill County v. Ricci*, 341 F.3d 1172, 1183 (9th Cir. 2003).

Appeals in *Churchill County v. Ricci* held that “the determination of whether to require a study – be it cumulative, hydrological, environmental, or any other form – is left to the sound discretion of the State Engineer.”²²

The State Engineer finds studies have been prepared noting there will be changes to the amount of water recharging the ground-water basin as the surface-water rights are transferred to other uses. The State Engineer finds he does not need to order a study to act on the application before him or to know that as surface-water use is eliminated from the area recharge to the ground water will change and exercises his discretion not to require these Applicants perform a cumulative impact study to address all the changes going on within the Newlands Project, Churchill County and the City of Fallon. This does not preclude the Protestants from conducting their own study to address cumulative impacts or to address changes to the area; however, the State Engineer does not need to order such a study to address this application.

XI.

Testimony and evidence indicated the source of ground-water recharge for domestic and permitted wells on Swingle Bench is primarily from losses in the delivery system and deep percolation from flood irrigation and that there has been a downward trend in water levels with the abandonment of irrigation starting in 1998.²³ Testimony and evidence was also provided as to the well drilling activity (either deepening wells or replacement wells) on the Swingle Bench since 1999 and the opinion was made that it seemed to coincide with either the abandonment of ditches or laterals or the removal of water from irrigated fields.²⁴

Looking at Exhibit No. 24N, which is a diagram showing laterals that have been abandoned and related well drilling activity, starting with APN 007-141-017 it shows the replacement of a domestic well, but the well is in the middle of irrigated fields and there is no abandoned lateral nearby. As to APN 007-141-025, the exhibit shows it to be a new well and it appears this was a larger former field that has been parceled. As to APN 007-141-030, there was a domestic well abandoned and replaced. While it is difficult to tell if this field was formerly irrigated, it looks like it was the homeowner himself who sold off his water as the house is on the edge of the field where

²² 341 F.3d 1172, 1184 (2003).

²³ Exhibit Nos. 26, 26C, 26J, 26K.

the former lateral ended. Therefore, it was the farmer who caused this impact to his own well. As to APNs 007-141-070 and 007-141-033, these areas look as if they were never irrigated; therefore, the fact that new domestic wells were drilled does not appear to have been caused by the cessation of irrigation and is irrelevant. From the exhibit it appears to show that perhaps the area is subject to recent parceling and development. As to APN 007-111-013, where a domestic well was deepened and replaced, the abandoned laterals that surround the formerly irrigated area in which the house sits show that if there was an impact by the cessation of irrigation, the farmer caused it himself. As to APNs 007-111-039, 007-111-042, 007-111-037 and 007-111-038, where new domestic wells were drilled there is an abandoned lateral that goes along the edges of these parcels, but these parcels also look as if the land owners themselves or the former land owner stopped the irrigation on those parcels. As to APN 007-191-040, where a new domestic well was drilled, all the fields around the parcel are irrigated and there are no abandoned laterals close by; thus, the drilling of a new domestic well is not likely related to cessation of irrigation. As to APN 007-111-019, a new domestic well was drilled, but the photograph does not even appear to show a house there, so it truly is a new well. As to APN 007-191-002, the photograph is not sufficient to draw any conclusions. As to APN 007-191-036, and the drilling of a new domestic well, the parcel is not close to any laterals or irrigated land and looks more like a new parcel upon which a house does not exist. As to APN 007-111-024 there are no abandoned fields or laterals nearby; therefore, the deepening of the well does not appear to be related to cessation of irrigation.

The State Engineer finds this evidence does not support a finding that the well drilling activity is related to the cessation of irrigation and as found above, a surface-water irrigator will not be forced to continue irrigating or applying water to recharge a ground-water basin.

XII.

The Protestants assert that the application should not be granted for the full duty of 4.5 acre-feet per acre, but rather should only be granted for the decreed consumptive use amount of 2.99 acre-feet per acre because to grant the full duty would adversely affect return flows, ground-water recharge and wetlands, thus harming existing rights and be against the public interest of the state of Nevada.

²⁴ Transcript, pp. 36-37; Exhibit Nos. 24N, 26I.

Testimony was presented that other change applications that have been filed for wildlife use on the main stem of the Truckee River have been limited to the consumptive use to prevent a conflict between the wildlife use and downstream water rights that had previously been able to divert the return flows that resulted from the prior agricultural use.²⁵ Specifically, the witness testified that Permits 67182, 67183, 67525, 67526, 71113 and 71669 that were obtained by the local governments for wildlife use on the main stem of the Truckee River, which had an original place of use within the Truckee River Hydrographic Basin, have had a consumptive use limitation imposed on them as a permit condition. "In these instances, the permit condition prevents a conflict between this wildlife use and downstream water rights that would have previously been able to divert the return flows that resulted from the prior agricultural use of the water."²⁶ However, the witness testified that as to Application 70934, the return flow from the prior irrigation was not used to supply other Newlands Project water users and that the existing places of use are not situated in areas where there is a formal drain system that has been developed to divert and convey water to downstream surface-water users nor did the water make its way back to the Truckee River.²⁷ The return flow did not make its way back to the Truckee River from the prior agricultural use, but rather the water was physically exported from the Truckee River basin with no physical mechanism for surface water return flows back to the Truckee River.²⁸ The Applicants' witness testified that if a consumptive limitation were placed on the water requested for transfer, the unpermitted portion of the water right would revert to the source of supply, the Truckee River, as unappropriated water and would not be available for ground-water recharge or other Newlands Project water users.

While the *Alpine* Decree provides that applications for changes in the manner of use from irrigation to any other use and changes in place of use shall be allowed only for the net consumptive use of the water right as determined by the Decree, the *Orr Ditch* Decree does not specifically provide for a consumptive use limitation. The *Orr Ditch* Decree provides that water right holders are entitled to file changes in the manner provided by law so far as they may do so without injury to the rights of other persons whose rights are fixed by the decree.

²⁵ Exhibit No. 33, pp. 25-26.

²⁶ Exhibit No. 33, p. 26.

²⁷ Exhibit No. 33, p. 27.

²⁸ Exhibit No. 33, p. 28.

Testimony and evidence was provided that indicated the water supply for the Mahala wetlands is a result of deep percolation of the agricultural fields and conveyance losses through the ditch system, and that ground water flows off the Swingle Bench in an easterly, northeasterly direction from the bench to the Mahala Slough area. The evidence presented indicated that the direction of ground-water flow is off the bench to the wetland area and then it flows back to the northwest and the water flows out of Mahala Slough through channels and enters Massie Slough and that these wetlands have been drying up since water has been removed from the Swingle Bench.²⁹ Additional testimony indicated that the Mahala/Massie wetlands are considered to be very important wetlands, but that late in the 1990s the bird breeding population plummeted and that Mahala wetlands are all but eliminated today and there is a significant reduction in the Massie wetlands. This witness was of the opinion that most of the wetlands in the Lahontan Valley are a byproduct of the Newlands Project and they make up for the wetlands that were destroyed in other parts of the Carson and Truckee River systems as a result of water used to create the Project.³⁰

The conflict presented here is between the creation of wetlands from the unnatural conditions of irrigation with water imported from another hydrographic basin that becomes drain and waste water, or returning the water to its natural source, the Truckee River, for instream wildlife use. The State Engineer does not believe it threatens to prove detrimental to the public interest to return water to its natural source for wildlife use instead of maintaining the importation of water to a non-native hydrographic basin for the maintenance of artificially created wetlands.

The State Engineer finds there is no evidence there are downstream surface-water users that rely on return flow from the existing places of use under this application to support their water rights and grants the permit for the full duty.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³¹

²⁹ Transcript, pp. 37-42; Exhibit No. 26, pp.8-10.

³⁰ Exhibit No. 29, Transcript, pp.49-56.

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters where:³²

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes approval of the application will not violate the *Orr Ditch* Decree or Nevada water law. The State Engineer concludes the *Alpine* Court has said that the water rights in the Newlands Project held by individual owners are the property rights of those owners and may be changed as authorized under Nevada water law. The State Engineer finds the *Orr Ditch* Decree specifically provides for changes in water rights and does not restrict use of those water rights to use within the Newlands Project in perpetuity.

IV.

The State Engineer concludes that under NRS § 533.370(5) the legislature intended that the question of whether the use of the water under an application or change application threatens to prove detrimental to the public interest was to be analyzed in reference to provisions of Nevada's water law and water policy and is not intended to take into consideration all the parameters Protestants are attempting to bring into consideration here. The State Engineer concludes that this analysis does not include consideration of such issues as Churchill County's Dust Control Ordinance or the National Environmental Policy Act since the enforcement of those provisions of law are delegated to other agencies of government.

³¹ NRS chapter 533.

³² NRS 533.370(5).

V.

Protestants argue that the application cannot be granted unless the Applicants own or have the requisite legal rights to place such water to beneficial use upon the proposed place of use. Therefore, since the Applicants have no ownership or other rights in the Truckee River or its bed downstream of Derby Dam, granting the application would violate Nevada law. The City of Fallon expands this protest issue in its closing arguments to allege that such instream uses are reserved to the State of Nevada and in limited circumstances to agencies of the Federal Government where they control lands with *in situ* waters. Protestants argue that if any applicant could apply for instream or *in situ* water use it would be directly contrary to the public interest of the state of Nevada, which recognizes the usufructory nature of water rights and requires active beneficial use. Otherwise the water right would be forfeited or abandoned.

Nevada Revised Statute § 533.023 provides for the beneficial use of water for “wildlife purposes” that includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats. This change application is for instream wildlife use and the Nevada legislature has determined this is a beneficial use of Nevada’s waters. “[W]hen ‘wildlife, including fish’ and . . . ‘recreation’ were added to the purposes for appropriation, the concept of *in situ* appropriation of water was introduced – it appearing to us that these purposes could be enjoyed without diversion.”³³

Nothing contained in the legislative history or Nevada water law leads to the conclusion that an instream water right can only be held by the State of Nevada. In fact, State Engineers have previously granted instream water rights to these Applicants. If the Nevada Legislature intended wildlife water rights to only be held in the name of the State of Nevada, the State Engineer believes it would have explicitly stated so by statute as has been done by other states. By not including such language it must be inferred that the legislature intended that persons other than the State of Nevada can apply for instream wildlife water rights.

³³ *Nevada v. Morros*, 104 Nev. 709, 715, 766 P.2d 263 (1988).

In *Nevada v. Morros*,³⁴ the Nevada Supreme Court was addressing applications that had been filed by agencies of the Federal Government including an application for *in situ* water use and held that Nevada water law recognizes and permits such an appropriation without a diversion for a public recreation purpose. The Court found that wildlife watering is encompassed in the definition of recreation and that Nevada law recognizes the recreational value of wildlife. However, that case noted that in managing the federal grazing lands, the United States was acting in its proprietary capacity and that although the United States did not own the livestock or wildlife, it owned the land on which the water was to be put to beneficial use. In this case, the Protestant argues that the Applicants do not have any ownership or other rights in the Truckee River or its bed downstream of Derby Dam; therefore, granting the application would violate Nevada law, but they do not point to the law that would be violated. The issue of requisite ownership or access goes to the ability to place the water to beneficial use.

The State of Nevada under the equal footing doctrine acquired title to the bed and banks of the Truckee River.³⁵ In 1993, Pursuant to Assembly Bill 618, the State of Nevada permanently relinquished any right, title and other interest that the State may have in the bed and banks of the Truckee River that lie within the boundaries of the Pyramid Lake Indian Reservation. The transfer application is being pursued in furtherance of the Truckee River Water Quality Settlement Agreement dated October 10, 1996. The State of Nevada through its Attorney General and the Nevada Division of Environmental Protection, the United States and the Pyramid Lake Paiute Tribe were all parties to this agreement.³⁶ Neither the State of Nevada, the United States as Trustee for the Pyramid Lake Paiute Tribe or the Pyramid Lake Paiute Tribe have protested the transfer application. The Settlement Agreement could be interpreted as those parties' acquiescence in the use of those lands for placing these waters to beneficial use. Putting water back into its natural source for wildlife uses is a beneficial use under Nevada water law.

³⁴ *Id.* at 715.

³⁵ *Pollard's Lessee v. Hagen*, 44 U.S (3 How.) 212 (1845).

³⁶ Exhibit No. 27D.

The State Engineer concludes that wildlife use is a beneficial use of water under Nevada's water law and Nevada water law does not indicate that only the State of Nevada may hold a permit for use of water for wildlife and the legislative history does not support such an argument. The State Engineer concludes that the bed and banks of the river are held by the State of Nevada and the United States as trustee for Pyramid Lake Paiute Tribe of Indians and there is no complaint by either the State of Nevada, the United States as Trustee for the Pyramid Lake Paiute Tribe or the Tribe as to use of the river; therefore, by their silence and signature as parties to the Water Quality Settlement Agreement they have acquiesced in the use of the river for these instream flow purposes thereby allowing the Applicants to demonstrate the ability to place the water to beneficial use.

VI.

Protestants argue that granting the application would conflict with, injure and impair the existing permitted water rights owned by the City of Fallon, which supply its municipal water system upon which 8,500 residents rely for their drinking water, specifically, Permits 19859, 19860, 26168, 40869 and 55507. It is argued that granting the permit would be detrimental to the City of Fallon as a Newlands Project water right owner, as well as detrimental to the public interest of the state of Nevada and Churchill County, because it would reduce water available to supply water rights for use upon appurtenant lands within the Newlands Project, which recharges the ground-water aquifer consequently depleting the ground-water supply from which the City of Fallon appropriates water under its referenced water rights and would deplete the ground water from which Churchill County's residents rely on to supply their domestic wells, which have a protectible interest under Nevada water law.

In effect the Protestants' assertions are that this Truckee River water cannot be returned to its original source, but rather all or a substantial part of it must continue to be diverted and used for irrigation to maintain water-table levels and wetlands that did not otherwise naturally exist. The Applicants argue that sound public and water law policy should not prohibit a change application in order to indirectly and artificially maintain ground-water levels and wetlands that did not naturally exist. Such a ruling would potentially require the denial of changes of irrigation rights in areas that are in transition from rural to urban development such as Fernley, Dayton, and Fallon. Applicants allege that such a ruling would suggest that Nevada water law policy discourages efficient irrigation

practices such as canal lining, laser leveling and sprinkler irrigation, which reduce seepage and deep percolation. Protestants' argument indicates that the canals should continue to leak so that more water will seep from them and fields must be flood irrigated to promote secondary recharge and that failure to do so will impact their existing rights and threaten to prove detrimental to the public interest.

The Applicants note that the Nevada legislature has provided a mechanism for the recharge of ground water with surface water and for the recovery of that water under NRS §§ 534.250, et seq., and that clearly the public policy of Nevada is that artificial ground-water recharge can occur, but must be done pursuant to applications for the use of water in such a manner. Additionally, they note that the Nevada legislature has allowed for changes to existing water rights for the purposes of maintaining wetlands.³⁷

Churchill County and the Fallon area are changing from a rural agricultural area to a more residential area and the State Engineer cannot say that artificial recharge must continue to support the City of Fallon's existing water rights and interests in domestic wells. Denial of the change application will not change the situation on the ground because the existing places of use will not be irrigated in any event.³⁸ Areas irrigated with Newlands Project water are urbanizing and farmers are ceasing to irrigate, perhaps finding more value in selling their water rights than continuing to farm. To deny change applications such as the one under consideration here will not change the fact that less and less land is being irrigated with surface water in the area of the Newlands Project. It is the farmers who are selling the water rights or the land or both and it is the Protestants who need to be planning for how to address these changes. When large quantities of surface water were brought in to irrigate land within the Newlands Project it created an unnatural system of recharge to the ground-water aquifer. Protestants argue that this unnatural system must be maintained because ground-water rights were granted that used the water that seeped into the ground from ditches or drains and created recharge from the water not consumptively used by the crops. While the water that leaked or seeped into the ground from the ditches, drains or irrigation became a source of recharge, the State Engineer concludes he cannot compel the continuation of that situation in order

³⁷ See, NRS § 533.030; *State v. Morros*, 104 Nev. 709, 716 P.2d 263 (1988); *United States v. Alpine Land & Reservoir Co.*, 341 F.3d 1172 (9th Cir. 2003).

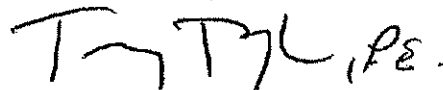
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to create that recharge and removal of the recharge is not the type of injury to existing rights contemplated under the water law. On this basis, the State Engineer concludes that granting the change application will not conflict with, injure or impair the Protestants water rights or protectible interests in domestic wells nor will granting the change application threaten to prove detrimental to the public interest.

RULING

The protests to Application 70934 are hereby overruled and the application granted subject to the payment of statutory permit fees, existing rights and a neutral effect on efficiency calculations under OCAP. If the effect of granting this application does not have a neutral effect on the efficiency calculations under OCAP, adequate mitigation must be provided.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 21st day of
August, 2007.

³⁸ Exhibit no. 33, pp. 32-33.