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

IN THE MATTER OF APPLICATIONS 81398, 81399, 81400 AND 81401 FILED TO CHANGE THE POINT OF DIVERSION AND PLACE OF USE OF THE PUBLIC WATERS OF AN UNDERGROUND SOURCE WITHIN THE FERNLEY AREA HYDROGRAPHIC BASIN (76), LYON COUNTY, NEVADA.

RULING

#6327

I.

Application 81398 was filed on December 19, 2011, by the City of Fernley to change the point of diversion and place of use of 1.9 cubic feet per second (cfs), not to exceed 1,375.54 acre-feet annually (afa), which represents a portion of the underground water previously appropriated under Permit 35976. The proposed point of diversion is described as being located within the NW¼ NW¼ of Section 24, T.20N., R.24E., M.D.B.&M. The existing point of diversion is described as being located within the NE¼ SW¼ of Section 5, T.20N., R.25E., M.D.B.&M. The proposed place of use is described as the entire City of Fernley utilities service area. The remarks section of the application indicates that the well is currently in place and is connected to the City of Fernley municipal water system.[1]

II.

Application 81399 was filed on December 19, 2011, by the City of Fernley to change the point of diversion and place of use of 1.0 cfs, not to exceed 723.97 afa, which represents a portion of the underground water previously appropriated under Permit 40004. The proposed point of diversion is described as being located within the NE¼ SE¼ of Section 11, T.20N., R.24E., M.D.B.&M. The existing point of diversion is described as being located within the SW¼ SW¼ of Section 8, T.20N., R.25E., M.D.B.&M. The proposed place of use is described as the entire City of Fernley utilities service area. The remarks section of the application indicates that the well is currently in place and is connected to the City of Fernley municipal water system.[2]

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[1] File No. 81398, official records in the Office of the State Engineer.
[2] File No. 81399, official records in the Office of the State Engineer.

III.

Application 81400 was filed on December 19, 2011, by the City of Fernley to change the point of diversion and place of use of 2.0 cfs, not to exceed 1,447.94 afa,[3] which represents the underground water previously appropriated under Permit 70288. The proposed point of diversion is described as being located within the NW¼ NW¼ of Section 24, T.20N., R.24E., M.D.B.&M. The existing point of diversion is described as being located within the NW¼ NE¼ of Section 10, T.20N., R.24E., M.D.B.&M. The proposed place of use is described as the entire City of Fernley utilities service area. The remarks section of the application indicates that the well is currently in place and is connected to the City of Fernley municipal water system.[4]

IV.

Application 81401 was filed on December 19, 2011, by the City of Fernley to change the point of diversion and place of use of 2.0 cfs, not to exceed 1,447.94 afa,[3] which represents the underground water previously appropriated under Permit 70289. The proposed point of diversion is described as being located within the NW¼ NW¼ of Section 24, T.20N., R.24E., M.D.B.&M. The existing point of diversion is described as being located within the NW¼ NE¼ of Section 10, T.20N., R.24E., M.D.B.&M. The proposed place of use is described as the entire City of Fernley utilities service area. The remarks section of the application indicates that the well is currently in place and is connected to the City of Fernley municipal water system.[5]

V.

Applications 81398, 81399, 81400 and 81401 were timely protested by the Pyramid Lake Paiute Tribe of Indians (PLPT) on grounds summarized as follows.[1,2,3,4]

1. The water rights sought for transfer have not been put to beneficial use within the periods prescribed by the State Engineer and beneficial use of those water rights has not been prosecuted with reasonable due diligence. The proof of beneficial use associated with the base rights sought for transfer was originally due over 30 years ago. Pursuant to NRS § 534.090, the water rights sought for transfer have been forfeited and/or abandoned.

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[3] The State Engineer has determined there was a slight error in the Applicant's calculation of total duty .

[4] File No. 81400, official records in the Office of the State Engineer.

[5] File No. 81401, official records in the Office of the State Engineer.

2. Under Applications 81398, 81400 and 81401, the proposed point of diversion (existing well) is in close proximity to the Truckee Canal. Water pumped from the well would include Truckee Canal seepage and the proposed increase in pumping would adversely affect the local and regional groundwater supply. Granting the application and the subsequent development of groundwater under the application would conflict with existing rights and threaten to prove detrimental to the public interest by lowering the groundwater levels and detrimentally affecting groundwater resources.
3. Under Application 81399, the proposed point of diversion is in close proximity to the boundary of the Tracy Segment Basin (83). Granting the application and the subsequent development of groundwater under the application would conflict with existing rights and threaten to prove detrimental to the public interest by lowering the groundwater levels and detrimentally affecting groundwater resources in Basin Number 83.
4. Under Applications 81398, 81400 and 81401, increasing the pumping from the existing well at the proposed point of diversion would result in increased diversions from the Truckee River to the extent that pumping water from the well would affect flows in the Truckee Canal. As such, the applications should be denied, or at a minimum, the Applicant should be required to prepare the studies required under NRS § 533.368 to allow the State Engineer to make an informed decision as to the potential adverse impacts.
5. The proposed points of diversion are in close proximity to the boundary of the Pyramid Lake Indian Reservation and in close proximity to the Tribe's existing municipal and domestic wells and in close proximity to an area needed for future development of the Tribe's potable water supply expansion, and will lower regional groundwater levels in the Wadsworth area and reduce flows to the lower Truckee River and these impacts threaten to prove detrimental to the Tribe and the public interest.
6. Under Applications 81398 and 81399, the proposed place of use expands the existing place of use into multiple basins. The use of water outside of the basin of origin results in losses and return flows that cannot be utilized within the basin of origin.
7. The manner of use specified for the applications is municipal. The applications should be rejected pursuant to NRS § 533.340 for the lack of information regarding the number of persons to be served, and the approximate future requirement.

8. Granting the applications, and the subsequent development of groundwater under the applications would threaten to prove detrimental to the Tribe, to the purposes for which the Pyramid Lake Indian Reservation was created, and to the public interest by:
    a. Depleting flows in the lower Truckee River and impairing instream flows;
    b. Degrading or impairing water quality in the lower Truckee River;
    c. Adversely affecting regional groundwater levels and the productivity of the Tribe's existing and planned wells in the Wadsworth area;
    d. Adversely affecting groundwater quality in the Wadsworth Area;
    e. Preventing or interfering with the conservation or recovery of the two principal fish in the Lower Truckee River and Pyramid Lake, the endangered cui-ui and the threatened Lahontan cutthroat trout, in violation of the Endangered Species Act, 16 U.S.C. 1531 *et seq.,* and Nevada law protecting the cui-ui; and adversely affecting the recreational value of Pyramid Lake.
9. Granting the application would threaten to prove detrimental to the public interest.
10. Granting the applications would threaten to prove detrimental to the public interest in light of the declining quantity and quality of the groundwater available in the Fernley hydrographic basin to serve existing permits and commitments, and in light of the obligations of the State Engineer pursuant to NRS Chapters 534 and 278 to require that there be adequate plans to protect existing uses and commitments of groundwater and to require that the subject rights, or an appropriate portion of them, be devoted to groundwater recharge to protect existing users and customers before any additional rights are allocated to new development.
11. Granting the applications would threaten to prove detrimental to the public interest in ways that are not yet known to this Protestant, but which may arise or first become known to this Protestant in the period between the date of filing of the application and the hearing on the protested Application – by way of example Fernley's Application #57555 was filed on May 1, 1992, and the hearing was not held until February 6, 2006 – and in light of the position of the State Engineer that a specifically stated protest ground may not be amended regardless of the extensive passage of time between the date the protest is required to be filed, and the date of the hearing on the protested application.

12. The Protestant asserts that it incorporates in its protests by reference every relevant protest ground set forth by any other protest filed by any other protestant.

VI.

On April 6, 2012, the City of Fernley filed an Answer to the Protests asserting that the Applications are not new appropriations of groundwater, but merely seek to align the burden on wells that can support the appropriations and allow the City to utilize its water rights in the most efficient manner. It asserts that the basin-wide impact on groundwater resources will remain unchanged. In response to the specific protest grounds the City asserts:

1. The water rights involved are in good standing with proof of beneficial use not yet due and the permits that are in good standing are not subject to cancellation as set forth in State Engineer's Ruling No. 5823 at 38. Nor is forfeiture applicable, as forfeiture only applies to certificated water rights.
2. The changes in points of diversion will not increase the net diversion or adversely affect the groundwater supply. The Tribe's assertion that the water pumped will include canal seepage, which is true, in that the Truckee Canal provides substantial recharge to the Fernley Area Groundwater Basin, but the State Engineer has already held that the local recharge belongs to the groundwater basin. State Engineer's Ruling No. 5823 at 40. The State Engineer has already held that by moving points of diversion closer or further from the source, the principal effect will be the timing of potential interaction with the source. State Engineer's Ruling No. 5823 at 39. All the proposed points of diversion are existing wells within the original basin of appropriation and there will be no net increase in pumpage under the Applications; therefore, the assertion that the use of water under the Applications will lower groundwater levels and prove detrimental to the groundwater resources is unsupported by scientific evidence.
3. There will be no increased groundwater withdrawals within the basin, no effect on Truckee Canal flows and no increase on Truckee River diversions. The City asserts that there is no need for a study under NRS § 533.368 as the State Engineer has sufficient understanding of the Fernley Area Groundwater Basin to grant the Applications.
4. The use of water from the proposed points of diversion will not affect groundwater levels on the Reservation and will not interfere with any of the Tribe's permitted wells. Only one of the proposed points of diversion moves closer to the Reservation and

involves the smallest quantity of water. The other three Applications move points of diversion farther away from the Reservation and the Tribe's existing wells and none of the points of diversion are close enough to the Tribe's wells to cause interference or adversely affect water levels at those wells. The Tribe asserts that the proposed points of diversion are in an area that the Tribe argues is needed for the development of the Tribe's water supply expansion. The Tribe cannot claim protection of rights it does not have.

5. Although the proposed place of use is the city limits of Fernley and does span multiple groundwater basins, the City does not intend to deliver water to all areas within the City limits or multiple groundwater basins; but rather, the City limits was identified for the purpose of simplifying the filings. This allows the City to proceed with developing its municipal water supply without having to constantly update water right maps each time the City limits change.
6. The Applications are not a new appropriation of water; therefore, the provisions of NRS § 533.340 are not applicable. Nevada Revised Statute § 533.340 only applies to new applications to appropriate and not to change applications.
7. The Tribe provides no information or evidence to support its assertions that use of water under the Applications will lower groundwater levels, diminish Truckee River flows, impair water quality in the Truckee River or jeopardize the recreational value of Pyramid Lake or the recovery of listed species. The Applications involve no net increase in the use of groundwater and the majority of the Applications move points of diversion further away from the Reservation, existing wells and the Truckee River; therefore, the public interest will not be harmed.
8. The Tribe's mere assertion that the use of water under the Applications threatens to prove detrimental to the public interest fails to describe in sufficient detail allegations that support the claim.
9. The Tribe fails to describe how shifting points of diversion from an existing well to another existing well will impair either quality or quantity of groundwater in the Fernley Area Groundwater Basin. It makes no sense that the existing groundwater rights should be devoted to groundwater recharge as the water is already groundwater. The existing rights are not surface water and do not contribute to recharge.

10. The Tribe's tenth protest ground that use of water under the Applications would threaten to prove detrimental to the public interest in ways not yet known to the Protestant, should be dismissed as it has previously been found to be an invalid protest ground and rejected. State Engineer's Ruling No. 6121 at 4.
11. The Tribe's protest ground that it incorporates by reference any and all other protest grounds filed by other protestants has also previously been found impermissible by the State Engineer. State Engineer's Ruling No. 6121 at 4. The Tribe is the only protestant; therefore, the protest ground is impermissible and irrelevant.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(4) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of Nevada. The State Engineer finds that in the case of Applications 81398, 81399, 81400 and 81401, there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

II.

Impacts to existing water rights

An analysis of potential impacts to existing rights was conducted by the State Engineer's Office. Two sets of Theis analyses were performed; one for impacts associated with Application 81399 and one for the combined impacts associated with Applications 81398, 81400, and 81401. In the latter set of analyses, the three applications were considered together because they propose to move water to two existing wells that are within 800 feet of each other, making the combined impact of pumping from all three applications an important consideration.

Application 81399 proposes to move a duty of 723.97 acre-feet per year approximately 12,000 feet west from its existing point of diversion at well COF #8 to existing well COF #14. The nearest water right to the proposed point of diversion is approximately 3,200 feet away.[6] Several domestic wells may exist in the area based on well logs found in Nevada Division of Water

[6] Nevada Division of Water Resources' Water Rights Database, July 7, 2015, official records in the Office of the State Engineer.

Resources' Well Log Database.[7] Wells associated with Well Log Nos. 13199 and 32741 are both approximately 2,000 feet from the proposed point of diversion. The Applicant independently identified eleven addresses within 2,500 feet of the proposed point of diversion that potentially contain a domestic well. Transmissivity and storage coefficients were estimated using well test data and lithologic information, also derived from well logs found in the Well Log Database. For this analysis, transmissivity values of 3,500 feet^2/day for the region around COF #14 and 1,500 feet^2/day for the region around COF #8 were calculated based on information from well logs within 10,000 feet of both the proposed and existing points of diversion. A specific yield of 0.15 was used based on the available lithologic information, and is considered appropriate for this basin-fill aquifer system. The results of the analysis simulated drawdown at the nearest domestic well of approximately 5 feet after 2 years of pumping, and between 7 and 9 feet after 20 years of pumping at the full proposed duty of 723.97 acre-feet per year. Nevada Revised Statute § 534.110(5) does not prevent the granting of permits to applicants on the ground that the diversions under the proposed appropriations may cause the water level to be lowered at the point of diversion of an existing well owner, so long as any protectable interests in existing domestic wells and rights of holders of existing appropriations can be satisfied. The State Engineer finds that the predicted amount of drawdown represents a reasonable lowering of the water table and will not conflict with existing rights.

Applications 81398, 81400 and 81401 propose to move duties totaling 4,271.42 acre-feet per year into two existing wells that are 800 feet apart. Application 81398 would move 1,375.54 acre-feet per year from well COF #5, which is located approximately 3 miles northeast of downtown Fernley, to existing well COF #4, located south of Fernley and just south of the Truckee Canal. This is a move of approximately 18,300 feet to the southwest. Applications 81400 and 81401 would move 1,447.94 and 1,447.94 acre-feet per year, respectively, from well COF #13, which is located about 1.5 miles northwest of downtown Fernley, to well COF #11 located about 800 feet northeast of COF #4. This is a move of roughly 12,400 feet to the southeast. The nearest water right not held by the Applicant is over 6,000 feet from the proposed points of diversion.[6] Based on data from the Well Log Database, several domestic wells exist in the area including wells associated with Well Log Nos. 10999, 12338 and 28494. The Applicant independently identified

[7] Nevada Division of Water Resources' Well Log Database, July 7, 2015, official records in the Office of the State Engineer (hereinafter Well Log Database).

five addresses within 2,500 feet of the proposed points of diversion that potentially contain a domestic well. A transmissivity of 10,000 feet^2/day and a specific yield of 0.15 were used in this Theis analysis and were derived in the same manner as for the previously described analysis. Results from the analysis yielded drawdown of as much as 14 feet at the nearest domestic well during the first two years of pumping at full duty. The State Engineer finds that should actual water levels decline in amounts greater than the simulated amount of 14 feet in two years, there may be the potential to conflict with the existing rights of domestic well owners that are within 2,500 feet of the proposed points of diversion. As a result, any approval of Applications 81398, 81400 or 81401 will be subject to monitoring as a condition of the permit terms.

III.

Forfeiture and/or Abandonment

The Protestant alleges that the water rights sought to be transferred have not been put to beneficial use within the periods prescribed by the State Engineer and have been forfeited and/or abandoned. The date for filing Proof of Beneficial Use for the water rights sought for transfer under Application 81398 is July 2, 2016. The date for filing Proof of Beneficial Use for the water rights sought for transfer under Application 81399 is May 1, 2016. The date for filing Proof of Beneficial Use for the water rights sought for transfer under Applications 81400 and 81401 is April 17, 2016. Proof of Beneficial use is not due for any of the water sought for transfer under the Applications.

Nevada Revised Statute § 534.090 provides that except as otherwise provided in this section, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right or a right for which a certificate has been issued pursuant to NRS § 533.425, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse. None of the Applications seek to change a certificated water right. The State Engineer finds the doctrine of forfeiture is not applicable to the water rights that form the basis for the change applications and the water rights sought to be changed by the Applications are all permitted rights in good standing and not subject to forfeiture.

Nevada Revised Statute § 534.090(4) provides that the "right to use underground water whether it is vested or otherwise may be lost by abandonment." Abandonment of a water right is the voluntary "relinquishment of the right by the owner with the intention to forsake and desert it."

In re Manse Spring, 60 Nev. 280, 108 P.2d 311, 315 (1940). Abandonment is the union of acts and intent; and, under Nevada law is "a question of fact to be determined from all the surrounding circumstances." *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also In re Manse Spring*, 108 P.2d at 316 (stating that courts must determine the intent of the claimant to decide whether abandonment has taken place, and in this determination may take non-use and other circumstances into consideration). The State Engineer finds the Applicant has kept these water rights in good standing and the facts and circumstances do not support a claim or finding of abandonment.

IV.

Impact from Proximity to Truckee Canal or Tracy Segment

The Protestant asserts that the proposed points of diversion under Applications 81398, 81400 and 81401, which are existing wells, are in close proximity to the Truckee Canal and that water pumped from the wells would include Truckee Canal seepage and the proposed increase in pumping would adversely affect the local and regional groundwater supply. The Protestant also asserts that granting the applications and the subsequent development of groundwater under the applications would conflict with existing rights and threaten to prove detrimental to the public interest by lowering the groundwater levels and detrimentally affecting groundwater resources.

The State Engineer finds that it has been recognized that recharge from precipitation to the Fernley Area groundwater basin is limited and irrigation water also recharges the groundwater basin.[10] The State Engineer finds these water rights are permitted within the quantity of water the State Engineer determined was available from these recharge sources and all of the proposed points of diversion are existing wells within the original basin of appropriation and there will be no net increase in water appropriated in the basin. The State Engineer also finds that the results of the Theis analysis for Applications 81398, 81400 and 81401 described in Section II address this protest ground and are sufficient for assessing the lowering of groundwater levels, and any associated potential conflict to existing rights or impacts that would threaten to prove detrimental to the public interest.

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[10] State Engineer's Ruling No. 2394, dated August 29, 1978, official records in the Office of the State Engineer.

As to Application 81399, the Protestant asserts that the proposed point of diversion is in close proximity to the boundary of the Tracy Segment Basin (83) and asserts that granting the application and the subsequent development of groundwater under the application would conflict with existing rights and threaten to prove detrimental to the public interest by lowering regional groundwater levels and detrimentally affecting the groundwater resources in Hydrographic Basin 83. The State Engineer finds that there is no assertion of conflict with any particular water right in Basin 83 and nothing in the water law provides that drawdown in one basin cannot approach the boundary of another basin. The State Engineer finds the net effect of the four change applications moves points of diversion away from the basin boundary. Additionally, the State Engineer finds that although Application 81399 does move the point of diversion to a point nearer to the Tracy Segment Basin than the previous point of diversion, it is a move to an existing well that is still thousands of feet away from the Tracy Segment Basin. Nonetheless, applying the same Theis analyses as described in Section II to simulate drawdown at these nearest points along the Tracy Segment yields less than 2 feet of water level declines after 2 years, and between 4 and 5 feet of water level declines after 20 years of pumping at maximum permit amount under Application 81399. Based on the preceding analysis, the State Engineer finds that Application 81399 would not move water rights sufficiently close to the Tracy Segment to conflict with existing groundwater water rights or to threaten to prove detrimental to the Tribe and the public interest.

The State Engineer finds that all of the proposed points of diversion are existing wells, all points of diversion will remain in the original basin, and there will be no net increase in water permitted for appropriation under the Applications as the water rights are currently permitted within the perennial yield of the basin. The State Engineer also finds that while the proposed changes would locally impact water levels in the vicinity of proposed points of diversion for Applications 81398, 81400 and 81401, there will be no larger scale impacts that would conflict with existing rights in the Tracy Segment.

V.

Adverse Impacts to Truckee River Flow Caused by Pumping Influence on Truckee Canal Flow and Need for a Study

The Protestant asserts that under Applications 81398, 81400 and 81401 there will be increased pumping from the existing wells at the proposed points of diversion that will result in increased diversions from the Truckee River to the extent that pumping water from the well would

affect flows in the Truckee Canal. As such, the Protestant asserts that the applications should be denied, or at a minimum, the Applicant should be required to prepare the studies required under NRS § 533.368 to allow the State Engineer to make an informed decision as to the potential adverse impacts.

Based on the State Engineer's review of published hydrologic investigations for the Fernley Area - most notably studies by the Desert Research Institute (DRI) - there are ample hydrologic studies concerning Truckee Canal seepage and potential interrelationships between groundwater and flows in the Truckee Canal.[11,12,13,14] The results from each of these studies are consistent with a determination that the Truckee Canal is physically separated from the water table and therefore is not hydraulically connected to the groundwater system. In DRI #41229, as part of the discussion of the conceptual model for the development of a regional groundwater model for Fernley/Wadsworth area, it was stated that: "The Truckee Canal is hydraulically disconnected from the regional groundwater (Mihevc, et al., 2002). The water table is always below the bottom of the canal, which indicates that the canal always acts as a recharge source to the groundwater system." The determination that the canal is not hydraulically connected to the groundwater system is an important distinction because the existence of a hydraulic connection determines whether increased pumping nearer to the Truckee Canal can induce increased seepage from the canal into the groundwater system. Because the canal and groundwater system are not hydraulically connected, any exchange of water from the canal to the groundwater passes through an unsaturated zone where the rate of seepage depends on properties in the unsaturated zone, and is independent of any decline in the water table caused by groundwater pumping. Based on this review, the State Engineer finds that appropriate studies have already been done that support a conclusion that the Truckee Canal and the regional groundwater system in the Fernley Area are not hydraulically connected.

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[11] A. S. Van Denburgh and F. E. Arteaga, *Revised water budget for the Fernley Area, West-Central Nevada, 1979, Open-file Report 84-712*, (United States Geological Survey), p. 17, 1985.
[12] Greg Pohll, et al., *Evaluation of Groundwater and Solute Transport in the Fernley-Wadsworth Area, Publication No. 41173*, (Desert Research Institute), November 2001.
[13] Todd Mihevc, et al., *Truckee Canal Seepage Analysis in the Fernley/Wadsworth Area, Publication No. 41176*, (Desert Research Institute), January 2002.
[14] Brian Epstein, et al., *Regional Groundwater Model Development for the Fernley/Wadsworth Hydrographic Basins, Nevada, DHS Publication No. 41229*, (Desert Research Institute), February 2007, p. 11, (hereinafter DRI#41229).

Nevada Revised Statute § 533.368 provides the State Engineer with the discretion to determine whether a hydrological, environmental or other study is necessary before acting on an application. The State Engineer finds that a study is not necessary to act on these Applications. The State Engineer also finds that increased pumping at the proposed points of diversion closer to the Truckee Canal will not influence Truckee Canal seepage and will not adversely affect the Truckee Canal flows, and therefore will not increase diversions from the Truckee River.

VI.

Impacts to Groundwater Levels Beneath Tribe's Reservation and to Truckee River Flow

The Protestant alleges that the proposed points of diversion are in close proximity to the boundary of the Pyramid Lake Indian Reservation and are in close proximity to the Tribe's existing municipal and domestic wells. Further, the Tribe asserts the Applications are close proximity to an area needed for future development of the Tribe's potable water supply expansion, and that the applications will lower regional groundwater levels in the Wadsworth area and reduce flows to the lower Truckee River. Together these impacts threaten to prove detrimental to the Tribe and the public interest.

Of the four applications, only Applications 81398 and 81399 will move the point of diversion closer to the Pyramid Lake Indian Reservation. The other two Applications will move points of diversion farther away from the Reservation and from the Tribe's existing wells and therefore would reduce any potential to impact the Tribe's water rights compared to their current existing locations. In fact, Applications 81400 and 81401 will move the point of diversion of over 2,800 acre-feet annually that is currently located 1,100 feet from the Tribe's boundary to a point of diversion that is approximately 9,000 feet farther away from the Tribe's Reservation. For both Applications 81398 and 81399, the proposed change would move a water right from its existing point of diversion to a proposed point of diversion that is closer to the Tribe's boundary. These proposed points of diversion are relatively far from the Tribe's Reservation, at approximately 12,900 and 8,500 feet from the Tribe's nearest boundary respectively. Nonetheless, applying the same Theis analyses as described in Section II to simulate drawdown at these nearest points along the Tribe's boundary yields 0.6 and 0.7 feet of water level declines after 2 years, and 3 and 4 feet of water level declines after 20 years of pumping at maximum permitted amounts under Applications 81398 and 81399, respectively. Based on the preceding analysis, the State Engineer finds that none of these applications would move water rights sufficiently close to the Tribe's Reservation to

conflict with existing groundwater rights or to threaten to prove detrimental to the Tribe and the public interest.

With regard to the Protestant's assertion that the Applications would reduce flow in the Truckee River, Applications 81398 and 81399 will each move the point of diversion closer to the Truckee River. The other two Applications will move points of diversion farther away from the river and therefore reduce any potential impact to the Truckee River flows compared to their current existing locations. For Application 81398, the proposed point of diversion would move the right from the existing point of diversion that is 23,300 feet from the Truckee River to approximately 15,800 feet from the river's nearest point. The Glover's analytical solution was applied to simulate streamflow depletion from moving this water right closer to the river. A transmissivity of 10,000 $feet^2$/day and specific yield of 0.15 were used in this analysis. These hydraulic parameters are the same as those utilized for the Theis analysis for the same point of diversion, as described in Section II. Results from the analysis yield a simulated river depletion in the amount of 0.5% of the total pumped amount, or 7 acre-feet during one year of pumping at the maximum proposed amount of 1,375.54 acre-feet per year. For Application 81399, the proposed point of diversion would move an existing right that is 23,400 feet from the Truckee River to approximately 10,900 feet from the river. In this case, a transmissivity of 3,500 ft^2/day and specific yield of 0.15 were used in the Glover's analytical solution. Results from the analysis yielded a simulated river depletion in the amount of 0.15% of the total pumped amount, or 1.1 acre-feet during one year of pumping at the maximum proposed amount of 723.97 acre-feet per year. Based on the preceding analysis, the State Engineer finds these amounts are a worst case scenario and result in changes that are too small to be measurable and that none of these applications would move water rights sufficiently close to the river to conflict with existing surface water rights or to threaten to prove detrimental to the Tribe and the public interest.

None of the proposed points of diversion are proximate to a point of diversion for which the Tribe has filed an application. The Tribe asserts that the area proximate to the proposed points of diversion is "needed for development of the Tribe's potable water supply expansion." In essence, the Tribe asserts that the State Engineer should deny the Applications because they will interfere with the Tribe's future plans, for which no applications have been filed.

The State Engineer finds that the Tribe has no additional water rights in the lower Truckee River basins nor does it have pending senior applications for future development, and both the State

Engineer and Nevada Supreme Court have clearly indicated that the Tribe has no implied reserved groundwater rights in the lower Truckee River area.[15] Nevada is a prior appropriation state and first in time is first in right. Water right applications are not denied on grounds that a party claims they intend to use the water sometime in the future. The State Engineer finds this protest ground is contrary to NRS § 533.370, as there are no existing rights or protectable interests that would be injured by approval of Application 81399.

VII.

Expansion of Place of Use

The Protestant asserts that under Applications 81398 and 81399, the proposed place of use expands the existing place of use into multiple basins, which will result in losses and return flows that cannot be utilized within the basin of origin. The Applicant clarified that the reason for this proposed place of use is due to considerations of simplicity in filing, and does not reflect any intent on the part of Fernley to deliver water to other basins. By using the city limits as the place of use, Fernley can reference that area in each water right application without updating the place of use map for all of its permits if the city limits actually change. These city limits are defined by statute, and were not defined with groundwater basins in mind. The State Engineer finds that at this point in time, Fernley has neither the infrastructure nor the intent to deliver water to all locations within its city limits and neither does the City intend to expand its service area beyond the limits of the basin and the place of use granted under the applications will be limited to the Fernley Area Hydrographic Basin.

VIII.

Lack of Information Pursuant to NRS § 533.340

The Protestant alleges that because the manner of use specified for the Applications is municipal, the Applications should be denied pursuant to NRS § 533.340 for failure to state information regarding the number of persons to be served and the approximate future requirement. Nevada Revised Statute § 533.340 provides that additional information is required for applications seeking to *appropriate* water for specific uses. When water is to be *appropriated* for municipal purposes, the approximate number of persons to be served must be included. The State Engineer finds these Applications are not to appropriate water, but rather are applications to change the points

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[15] *See, Pyramid Lake Paiute Tribe of Indians v. Ricci*, 126 Nev. Adv. Op. 48, 55, 245 P.3d 1145, 1149 (2010) (stating that the *Orr Ditch* Decree fully adjudicated the Tribe's implied water rights).

of diversion and places of use of already permitted rights for municipal use, and are not a change from another manner of use to municipal thereby triggering the requirements of NRS § 533.340.

IX.

Applications Threaten to Prove Detrimental to Tribe, Purposes of Reservation, and Public Interest

The Protestant alleges that approval of the Applications will threaten to prove detrimental to the Tribe and the public interest for multiple reasons, all of which involve lowering the groundwater table or diminished flows to the Truckee River. The Tribe asserts that Truckee River flows will be depleted and that water quality will be impaired. It also asserts that groundwater levels will be adversely affected and subsequently, water quality will be diminished. Finally, the Tribe asserts that the recreational value of Pyramid Lake and recovery of listed species will be threatened.

The State Engineer finds that the Applications involve no net increases in water allocated in the basin and contemplate no new wells. The total combined duty of the City's groundwater rights remains constant. The total duty remains within the established perennial yield of the basin. The proposed points of diversion for the majority of the duty under the Applications are farther away from the Tribe's reservation, existing wells, and the Truckee River than previous points of diversion.

X.

Applications Threaten to Prove Detrimental to Public Interest

In one protest ground, the Protestant simply asserts that granting the Applications would threaten to prove detrimental to the public interest in general. It then asserts the granting of the Applications could prove detrimental to the public interest in that the approval of the Applications will be a detriment to the public interest in light of the declining quality and quantity of groundwater available in the Fernley Area Hydrographic Basin to serve existing permits and commitments, and in light of the obligations that the State Engineer pursuant to Chapters 534 and 278 that there shall be adequate plans to protect existing users and commitments of groundwater and that the State Engineer should require that the subject rights be devoted to groundwater recharge to protect existing users and customers before additional rights are allocated to new development.

Nevada Revised Statute § 533.365 provides that "[a]ny person interested may, within 30 days after the date of last publication of the notice of application, file with the State Engineer a written protest against the granting of the application, setting forth with reasonable certainty the

grounds of such protest, which, except as otherwise provided in subsection 2, must be verified by the affidavit of the protestant, or an agent or attorney thereof." The State Engineer finds that merely asserting that the granting of the applications would prove detrimental to the public interest is not stated with reasonable certainty and does not provide sufficient information to be a valid protest ground.

The State Engineer finds that the Applications request only a change in points of diversion of pre-existing permitted groundwater rights and do not request either a new appropriation or an increase in total combined duty. The Protestant fails to describe how shifting points of diversion from one existing well to another existing well will impair either quality or quantity of groundwater in the Fernley Area Hydrographic Basin.

The State Engineer finds the Applications cannot be devoted to groundwater recharge as the subject rights are themselves groundwater. The State Engineer finds that in essence the Protestant is asserting that the Applicant not be permitted to use its water rights, but rather should "retire" them for the benefit of the groundwater basin, which is a position that is not required by law.

XI.

Applications Threaten to Prove Detrimental in Ways Not Yet Known

The Protestant alleges that granting the Applications would threaten to prove detrimental to the public interest in ways not yet known to the Protestant, but which may become known prior to any hearing on the Applications. The State Engineer finds that this protest ground has previously been found to be invalid, and has been rejected.[16] This protest ground is no more valid in this instance than it was when previously dismissed.

XII.

Incorporation of Other Protests

The Tribe's final protest ground is an assertion that it can by reference incorporate any and all other protest grounds filed by other protestants. Nevada Revised Statute § 533.365 provides that "[a]ny person interested may, within 30 days after the date of last publication of the notice of application, file with the State Engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which, except as otherwise provided in subsection 2, must be verified by the affidavit of the protestant, or an agent or attorney

[16] State Engineer's Ruling No. 6121 at 4, dated June 2, 2011, official records in the Office of the State Engineer.

thereof. The water law requires that a protest be verified by affidavit, which means that the person who swears to the document verifies that the statements contained therein are true. The Protestant cannot swear to another person's statements that may be filed in another protest and this protest ground has no merit. Additionally, the State Engineer finds that since the Tribe is the only protestant to the Applications, the allegation is moot, and even if that was not the case, would be dismissed as violating NRS § 533.365.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.[17]

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:[18]

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 protectable 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 Legislature declares in Nevada Revised Statute § 533.024(1)(b) that it is the policy of this State "[t]o recognize the importance of domestic wells as appurtenances to private homes, to create a protectable interest in such wells and to protect their supply of water from unreasonable adverse effects which are caused by municipal, quasi-municipal or industrial uses and which cannot reasonably be mitigated."

IV.

The State Engineer concludes that the water rights sought to be changed are in good standing and are not subject to a determination of forfeiture or abandonment. The State Engineer concludes that the doctrine of forfeiture is not applicable to the water rights that form the basis for change in the Applications and there is no information or evidence that supports a claim or finding of abandonment.

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[17] NRS Chapters 533 and 534.
[18] NRS § 533.370(2).

V.

Application 81398 seeks to move the point of diversion approximately 2½ miles in a southwest direction from the current location to an existing well. Application 81399 seeks to move the point of diversion approximately 2 miles west from the current location to an existing well. Applications 81400 and 81401 seek to move the point of diversion approximately 2 miles southeast from the current location to an existing well. The existing water rights are permitted underground water rights in good standing. The combined duty of existing water rights of the City of Fernley will remain unchanged. The water rights are currently permitted within the perennial yield of the basin. The State Engineer concludes that the Applications need not be denied due to the proximity of the proposed points of diversion to either the Truckee Canal or the Tracy Segment Basin as no information supports interference with water rights in either the canal or the Tracy Segment Hydrographic Basin. The State Engineer also concludes that the Applications will not conflict with existing rights, but could have impacts to protectable interests in existing domestic wells. Specifically, water level declines simulated to occur in the vicinity of proposed points of diversion for Applications 81398, 81400 and 81401 are of a magnitude that indicates monitoring is needed. The State Engineer has regulatory authority to order mitigation should any unanticipated impacts to domestic wells occur. Mitigation may include, but is not limited to, deepening of an existing well, lowering the pump, or drilling a replacement well.

VI.

The State Engineer concludes that no information supports a finding that approval of the Applications will threaten to prove detrimental to the public interest. The Applications involve no net increase in water appropriated in the basin and contemplate no new wells. The total combined duty of the City's groundwater rights remains constant. The total duty remains within the established perennial yield of the basin. The proposed points of diversion for two of the Applications are farther away from the Tribe's Reservation, existing wells, and the Truckee River than previous points of diversion. For the two that are closer, the State Engineer concludes that potential impacts to the water resources are *de minimus* to none.

VII.

The State Engineer concludes that the protest ground that granting the Applications would threaten to prove detrimental to the public interest in ways not yet known to the Protestant, but which may become known prior to any hearing on the Applications is invalid and rejected. The

State Engineer concludes that the water law does not allow for co-opting another protestant's protest and said protest ground is rejected.

RULING

The protest is overruled and Applications 81398, 81399, 81400 and 81401 are hereby approved subject to:

1. Existing water rights;
2. The place of use is limited to the Fernley Area Hydrographic Basin;
3. A groundwater level monitoring plan; and
4. Payment of the statutory permit fees.

Respectfully submitted,

P.E.

JASON KING, P.E.
State Engineer

Dated this 2nd day of December, 2015.