

ADJUDICATION

CARSON VALLEY

DOUGLAS COUNTY, NEVADA

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Presented herewith is the Final Order of Determination defining the rights in and to the waters of Mott Creek, Taylor Creek, Cary Creek (AKA Carey Creek), Monument Creek, Bulls Canyon, Stutler Creek (AKA Statler Creek), Sheridan Creek, Gansberg Spring, Sharpe Spring, Wheeler Creek No. 1, Wheeler Creek No. 2, Miller Creek, Beers Spring, Luther Creek and Various Unnamed Sources in Carson Valley, Douglas County, Nevada.

This Final Order is prepared under the provisions of chapter 533 of the Nevada Revised Statutes.



Tracy Taylor, P.E.

State Engineer

Made, filed and caused to be

Entered in this office of the

State Engineer this 14th day

of August, 2008.

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IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS IN AND TO THE WATERS OF MOTT CREEK, TAYLOR CREEK, CARY CREEK (AKA CAREY CREEK), MONUMENT CREEK, AND BULLS CANYON, STUTLER CREEK (AKA STATTLER CREEK), SHERIDAN CREEK, GANSBERG SPRING, SHARPE SPRING, WHEELER CREEK NO. 1, WHEELER CREEK NO. 2, MILLER CREEK, BEERS SPRING, LUTHER CREEK AND VARIOUS UNNAMED SOURCES IN CARSON VALLEY, DOUGLAS COUNTY, NEVADA.

I. GENERAL

On June 5, 1987, a petition was filed in the Office of the State Engineer requesting a determination of the relative rights of the claimants to the waters of Sheridan Creek, Douglas County, Nevada. This request was followed by an Order, dated, June 17, 1987, from the Ninth Judicial District Court in and for Douglas County, State of Nevada, requiring the State Engineer to proceed with the same.

The State Engineer considered the scope of other surface waters in Carson Valley and after close study of the evidence and locality determined the facts and conditions warranted the initiation of proceedings for determination of the relative rights of the claimants to the waters that drain into the Carson Valley from the Eastern slope of the Carson Range of mountains.

On October 22, 1990, the State Engineer entered Order No. 1031 initiating the proceedings to determine the relative rights of claimants of vested rights to waters located in T.12N., R.19E., M.D.B.&M. A copy of the Order was sent by certified mail to persons identified as owning land within the subject area that could be potential claimants. The notice was published on November 1, 8, 15, 22, and 29, 1990, in the Record-Courier located in Gardnerville, Nevada, a newspaper of general circulation within the boundaries of the subject adjudication area.

The State Engineer next prepared Order No. 1034 establishing January 11, 1991, as the date the State Engineer would commence taking proof of claims of the rights in and to the waters of the described sources, and establishing March 18, 1993, as the final date for filing said proofs in the Office of the State Engineer. The notice was published on January 17, 24, 31 and February 7 and 14, 1991, in the Record-Courier located in Gardnerville, Nevada, a newspaper of general circulation within the boundaries of the subject adjudication area.

On March 10, 1993, the State Engineer sent by certified mail to each potential claimant that could be reasonably ascertained a notice extending the

final date for filing said proofs in the Office of the State Engineer to March 18, 1994. Surveys and corresponding maps were caused to be executed and submitted by the claimants to the Office of the State Engineer. Nevada Revised Statute § 533.100 states that the map must depict the following:

- (a) The course of the stream.
- (b) The location of each ditch or canal diverting water therefrom, together with the point of diversion thereof.
- (c) The area and outline of each parcel of land upon which the water of the stream has been employed for the irrigation of crops or pasture.
- (d) The kind of culture upon each of the parcels of land.

On June 12, 2006, the State Engineer issued an Abstract of Claims, The Preliminary Order of Determination and Notice of Order Fixing and Setting Time and Place of Inspection in the Matter of the subject adjudication pursuant to NRS § 533.140. A copy of the aforementioned documents was sent to all claimants. The time for inspection was from August 15, 2006 to September 15, 2006, (Saturday, Sunday and legal holidays excluded) from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. of each day in the Office of the State Engineer in Carson City, Nevada. The letter further stated: "If no objections are received on or before September 15, 2006, the Order of Determination will be prepared and filed in accordance with the provisions of the NRS §§ 533.160 and 533.165."

Objections to the Preliminary Order of Determination are to be filed in the Office of the State Engineer on or before September 15, 2006, in accordance with NRS § 533.145.

A letter, dated September 15, 2006, from Paul G. Taggart was submitted to the State Engineer, Tracy Taylor, P.E., requesting "an extension of time of sixty (60) days for filing objections to the Preliminary Order of Determination".

An extension of time for the filing of objections to "the close of business on October 6, 2006" was granted as set forth in a letter, dated September 20, 2006, from Robert H. Zeisloft, P.E., Chief, Surface Water & Adjudication Sections.

Objections to the Preliminary Order of Determination were filed in accordance with provisions of Nevada Revised Statute § 533.145 by Elizabeth and Eric Park; by B.J.Vasey, P.E., PLS, on behalf of Edward Groenendyke; by Paul G. Taggart, Esq., on behalf of Jerald R. Jackson, Trustee of the Jerald R. Jackson 1975 Trust, as amended, and Irene M. Windholz, Trustee of the Irene M. Windholz Trust, dated 8/11/92; by B.J. Vasey, PE, PLS, on behalf Myles S. Douglas and Amy B. Douglas as Grantors and Trustees of the Bartholomew Family Trust; by John G. Stone on behalf of the current owners, Mr. and Mrs. McKay; by Ross E. de Lipkau, Attorney, on behalf of Gerald R. Novotny and Jeanne M. Moss-Novotny Trustees of the Novotny Family Trust Dated February 9, 1984; Donald E. Brooks, Co-Trustee, and Lynnette L. Brooks, Co-Trustee;

Bernard D. and Margaret W. Benz, as agents for the Mottsville Cemetery Association; by B.J. Vasey, PE, PLS, on behalf of Don F. & Carolyn L. Ahern; by B.J. Vasey, PE, PLS, on behalf Destination Sports Inc. Et Al; Donna Buddington; by B.J. Vasey, PE, PLS, on behalf of the Bartholomew Family Trust; by Jennifer Yturbide, Esq., on behalf of Thomas M. Yturbide and Paula J. Yturbide, Trustees of the Yturbide 1991 Family Trust.

All parties of interest were properly noticed by letter, dated January 16, 2007, titled "**NOTICE OF HEARING**", stating: "the hearing to consider said objections will convene at **9:00 a.m., Monday, March 5, 2007, continuing through Friday, March 9, 2007, at the Division of Water Resources, Hearing Room, 901 South Stewart, Second Floor, Carson City, Nevada.**"

After all parties of interest were properly noticed, a public administrative hearing on the objections to the Preliminary Order of Determination was held before representatives of the State Engineer on March 5 and March 7, 2007.

II. OBJECTIONS TO THE PRELIMINARY ORDER OF DETERMINATION

Objections to the Preliminary Order of Determination were filed in accordance with NRS § 533.145 and are summarized below:

- i. Objection filed in regard to Proof of Appropriation V-06350 by Elizabeth and Eric Park submitted September 29, 2006:
"The existing proof submitted" by Tom Yturbide for the waters of Mott Creek "shows irrigation ditches using the property V-06351 as historical water usage for the entire 10 acre parcel not complete usage on the property V-06350. Object to the objection submitted September 15, 2006 by Jennifer Yturbide ESQ Minden NV 89423"

- ii. Objection filed in regard to Proof of Appropriation V-08850 on behalf of Edward Groenendyke, by B.J.Vasey, P.E., PLS:

"The purpose of this letter is to object to the subject Preliminary Order of Determination on behalf of the Owner of Record of Proof V-08850.

Unnamed Spring (A) described in V-08850 can irrigate the entire 37.97 acres by direct diversion as described in the Proof. The reduction in acreage from 37.97 acres to 26.69 acres (11.28 acres) described on Pages 47 and 131 is incorrect because the area north of the drainage ditch as depicted on the beneficial use map filed under Permits 24918-9 is irrigated out of a 6-inch pipe under Foothill Road on the north side of the Groenendyke property.

The point at which the water discharges onto said property is shown on the Schematic drawing on Page 195 of the Preliminary Order. The 6" pipeline was also described in a letter dated September 12, 1996 signed by R. Michael Turnipseed, State Engineer (copy enclosed). Turnipseed's letter also refers to a statement by Matt Benson and recorded Document 262415 on file in your office which describe historic irrigation practices of the Heritage Ranch.

The duty shown as being owned by Groenandyke under Permit 24919 - Certificate 7842 in Turnipseed's letter is 58.19 acre feet and we request that the duty shown on Page 130 under Proof V-08850 also be at least 58.19 acre feet and the acre feet per acre adjusted to reflect the 37.97 acres as the Place of Use.

On Page 131 we request that the Place of Use in the NW NE be changed to 13.41 acres and the SW NE to 14.0 acres as shown in the original Claim. We also request that the Total Acres Claimed be changed to 37.97 acres.

We also request that the note on Page 131 be revised regarding the reduction of acreage from 37.97 acres to 26.69 acres and under Remarks state that 12.43 acres (1.15 AC NE NW, 5.39 AC NW NE, 4.89 AC SW NE) is not supplemental to Proof V-02856."

See attached letter, dated September 12, 1996, from R. Michael Turnipseed, P.E., State Engineer to Jerald R. Jackson.

- iii. Objection filed in regard to Proofs of Appropriation V-09264, V-09265, V-09266, V-09267, V-09268, V-09269, V-09270, V-02856, V-06342, V-06343, V-06344, V-06345 and Permits Nos. 24918, C-7843, and 24919, C-7842, on behalf of Jerald R. Jackson, Trustee of the Jerald R. Jackson 1975 Trust, as amended, and Irene M. Windholz, Trustee of the Irene M. Windholz Trust, dated 8/11/92, by Paul G. Taggart, Esq.:

"I. Drain and Waste Rights to Unnamed Jackson Spring "A" and Any Unnamed Creek that Issues There From.

Claimants seek clarification by the State Engineer that the Preliminary Order of Determination intended to create only drain and waste rights to Jackson Unnamed Spring "A" under the following claims: V-09264, V-09265, V-09266, V-09267, V-09268, V-09269 and V-09270.

In the event the State Engineer does not confirm that these vested claims are solely for drain and waste, claimants object to the

granting of prime supply water rights under these vested claims, for the following reasons:

A. These rights are properly considered drain and waste uses because they are served downstream from the uses that are adjudicated under Proofs Nos. V-06342, V-06343, V-06344, and V-06345.

B. No competent evidence exists regarding the proper priority date for these claims; therefore, they should be considered junior in priority to Proofs Nos. V-06342, V-06343, V-06344, and V-06345.

"II. Stock Watering Rights."

"Claimants object to the rejection of stock watering rights as it relates to Proofs V-02856 (if at all), V-06342, V-06343, V-06344, V-06345; and Permits Nos. 24918 C-7843 and 24919 C-7842." The waters of the referenced Unnamed Springs were first put to beneficial use in 1853. In his "Evaluation of Vested Water Right [sic] from an Unnamed Spring in Alpine County, California" (a copy of which is attached hereto as Exhibit A and incorporated herein by this reference), Milton L. Sharp, P.E., as a consultant to the Jackson/Windholz Trusts, began his report by making the following declaration:

This report and the accompanying map have been prepared for the purpose of supporting a claim of vested right by Jerald R. Jackson, Trustee, Jerald R. Jackson 1975 Trust, to the waters originating from an unnamed spring located in Alpine County, California, only about 200 feet west of the Nevada-California State Line. The spring is located on the easterly slope of the Carson Range, a portion of the Sierra Nevada Mountains, so that water originating from the spring flows naturally into the Carson Valley in Douglas County, Nevada, and all of the water has been and is now used beneficially on land located in Douglas County, Nevada for agricultural irrigation, **stock watering** and domestic purposes. The unnamed spring, other water sources referred to in this report and lands referred to are all located within Section 26, township 12 North, Range 19 East, Mount Diablo Meridian. The unnamed spring is located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 26, and is referred to in this report as the Unnamed Spring (SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sect. 26). Location of the Unnamed Spring, topographic features in the vicinity, property delineation and other significant features are indicated on the attached map. (Sharp, page 1, emphasis added.)

Therefore, stock watering has always been associated with the water from this spring.

Mr. Sharp next addressed the history of these uses.

Historically, the land owned by Jerald R. Jackson, Trustee, was a part of a ranch referred to as the Heritage Ranch or the old Berrum Ranch. The Heritage Ranch land has been under cultivation since the early days of white settlement in the Carson Valley, extending back to the 1850's [sic]. (See Section 5.) The old original ranch house is located adjacent to Foothill Road on the Jackson property as indicated on the attached map. The Jackson property is the most westerly part of the old Heritage Ranch or Berrum Ranch and is in close proximity to the Unnamed Spring (SW¼NW¼, Sect. 26). (Sharp, page 4.)

As the Berrum Ranch was divided over time, it continued to be farmed and it continued to have livestock that included horses and cattle. The area of the former Heritage Ranch that is still owned by the Claimants and subject to Proofs V-02856, 06342, 06343, 06344, and 06345 is entitled to water 25 head of cattle and four horses. (See Affidavit of Jerald R. Jackson, attached hereto as Exhibit B and incorporated herein by this reference.) The following elaboration from the Sharp report confirms the integrity of the claims of all such vested rights:

Historical documents and publications indicate that agricultural activity, including irrigation, began in the Carson Valley during the 1850's and 1860's. Mormon settlers began cultivation and irrigation of land along the foothills of the Carson Range as early as 1851. One historian, Grace Dangberg, states that the land in the vicinity of the town of Sheridan, a few miles north of the Jackson property, was cultivated in the early 1850's (ref. no. 9). Fred Settemeyer, a pioneer rancher, states in his "recollections" that 3,000 to 4,000 acres were irrigated in the Carson Valley in the early 1850's (ref. no. 8). The land which later become [sic] know [sic] as the Berrum Ranch and later the Heritage Ranch was part of the early agricultural development. (Sharp, pp. 6-7.)

The claim of vested right to the waters of the Unnamed Spring (SW¼NW¼, Sect. 26) for irrigation and domestic use on the land owned by Jerald R. Jackson is justified as follows:

1. The land which was formerly known as the Berrum Ranch or the Heritage Ranch, including the land owned by Jackson, was developed and irrigated during the early settlement and development of the Carson Valley.
2. The diversion from the spring to the Jackson land and to the old ranch house was established prior to 1890 during

the original development of the land. The historical record indicates that all of the water was diverted from the spring.

3. Physical conditions establish that the Unnamed Creek (NW¼NW¼, NE¼NW¼, Sect. 26) exists as a source of water separate from the Unnamed Spring.
4. Nevada State Engineer appropriation of water from the Unnamed Spring in 1972 is superseded by the vested right claim, but the appropriation and supporting map verify continued existence of the pipeline diversion and use of the waters on land now owned by Jerald R. Jackson.

The Jackson vested right should provide for a date of priority of use coinciding with the earliest date of agricultural development in Carson Valley, established as 1852 in the Barber Creek Decree. The vested right should provide for domestic use, **stock watering** and irrigation of 22.26 acres with a duty of 4.0 acre feet per acre from all sources. (Sharp, pp. 11-12; emphasis added.)

"III. Rotation Schedule."

"A. Claimants object to the requirement of a rotation schedule pertaining to any water rights claimed under V-06342, V-06343, V-06344 and V-06345, because these water rights are primary to all other water rights at the source."

"B. Should the State Engineer determine that there is more than one priority user on Unnamed Spring "A" or on any unnamed creek flowing therefrom, then Claimants seek confirmation by the State Engineer that the Preliminary Order of Determination does not preclude establishing a rotation schedule for water use."

Respectfully, Claimants also draw to the attention of the State Engineer the Affidavits and statements made by long-time ranchers and residents of the Carson Valley and of the vicinity of the subject properties, in related and unrelated Objections; the court records and testimony; and the maps submitted, as well as all applicable filings and archival data on file with the Office of the State Engineer, without limitation.

Dated this 16th day of October, 2006.

Also, included is the following exhibit to the Jackson objection to the Preliminary Order of Determination.

EXHIBIT B

AFFIDAVIT OF JERALD R. JACKSON

STATE OF NEVADA)
) SS.
COUNTY OF DOUGLAS)

I, JERALD R. JACKSON, hereby swear (or affirm) under penalties of perjury, that the follow assertions are true of my personal knowledge:

1. I am the Trustee of the Jerald R. Jackson 1975 Trust, as amended 8/11/92, and I make this Affidavit as such Trustee and on behalf of such trust, as amended, as well as on behalf of Irene M. Windholz, Trustee of the Irene M. Windholz Trust dated 8/11/92, which two trusts are the owners of 100% of the water rights for which Proofs V-02856, V-06342, V-06343, V-06344, V-06345 are being submitted; that I have read the within Objection to Preliminary Order of Determination, and know the contents thereof; that it is true to the best of my own knowledge, except as to those matters stated therein on information and belief, and that as to such matters, I believe it to be true.

2. Since I, as Trustee of the above-referenced Jerald R. Jackson 1975 Trust, and Irene M. Windholz, as Trustee of the Irene M. Windholz Trust, acquired ownership of the real property to which the water rights which are the subject of the above-referenced Proofs are appurtenant, Ms. Windholz, as Trustee, and I, as Trustee, have run, continually, at least 25 head of cattle and between 2 and 4 horses for the past 16 years, prior to which the Heritage Ranch, operated by Matt and Ken Benson, and the Berrum Ranch, since 1853, ran as many and more cattle and horses on the subject real property.

3. I respectfully ask, through the within Objection, that the State Engineer and the Division of Water Resources revise the Preliminary Order of Determination to recognize the stock watering rights that have been enjoyed and used continually for more than 150 years on the areas of the said ranches that are still owned by Claimants and , subject to Proofs, that the Claimants should be entitled to continue to divert and use for the stock watering continually of including but not limited to 25 head of cattle, 2 to 4 head of horses, or the equivalent other, similar stock.

4. I have personal knowledge of the foregoing and could and would so testify if called as a witness.

Signature on Original

Jerald R. Jackson

SIGNED AND SWORN TO (or affirmed)

Before me on October 16, 2006,

by JERALD R. JACKSON

Signature on Original

NOTARY PUBLIC

Notary Stamp on Original

- iv. Objection filed in regard to Proofs of Appropriation V-02856, V-06321 and V-06322 on behalf Myles S. Douglas and Amy B. Douglas as Grantors and Trustees of the Bartholomew Family Trust by B.J. Vasey, PE, PLS:

"Dear Mr. Walmsley:

As we discussed at our meeting September 5, 2007, we submitted request to the Division of Water Resources to assign a portion of Proof Nos. 02856, 06321 and 06322 from Nevada Mountain View, LLC, to Myles D. Douglas and Amy B. Douglas as Grantors and Trustees of the Bartholomew Family Trust on May 23, 2006.

On March 10, 2006, we submitted requests to the Division to assign all of Proof 06331 from Casteel and all of Proof 06335 from Clelland to Bartholomew Trust.

The Preliminary Order of Determination indicates that Nevada Mountain View, LLC owns a portion of Proof Nos. 02856, 06321 and 06322 and that Harold and Viola Casteel and Charles E. and Fay E. Clelland own Proof Nos. 06331 and 06335, respectively.

The purpose of this letter is to request that the final Order of Determination indicate the present ownership of Proof Nos. 02856, 06321, 06322, 06331 and 06335 as indicated in the aforementioned requests for assignment."

In response to this objection the State Engineer has reviewed the associated reports of conveyance, and changed the owner of record for Proof Nos. 02856, 06321, 06322, 06331, and 06335. This Final Order of Determination now currently reflects the ownership requested above.

- v. Untimely objection filed on December 5, 2006 regarding Proof of Appropriation No. V-06349, by John G. Stone on behalf of the current owners, Mr. and Mrs. McKay:

"On behalf of the current owners of the property in the NE¼ of the NW¼ Section 3, T12N,R19E, I would like to draw your attention to an apparent error in the distribution schedule on pp17 and Table 2 (p158) in the preliminary Order of Determination dated May 22, 2006

Irrespective of the actual acres irrigated, the purchase contract whereby we acquired the property in 1986 specifically indicated the purchase of "¼ of ¼ of the water rights from Mott Creek". Inasmuch as the original Mott/Allerman holding enjoys a full ¼ of the flow of Mott Creek, the rotation schedule should be adjusted to reflect our original purchase."

The State Engineer has taken administrative notice of this objection; however due to the untimely filing of this objection, it was not reviewed in the hearing of protests for the Preliminary Order of Determination.

- vi. Amended Objections, regarding Proof of Appropriation V-06350, filed on behalf of Gerald R. Novotny and Jeanne M. Moss-Novotny Trustees of the Novotny Family Trust Dated February 9, 1984, by Ross E. de Lipkau, Attorney:

"1. A portion of proof of appropriation, 06350, now owned by the Thomas M. and Paul J. Yturbide, Trustees of the Yturbide 1991 Family Trust has been diverted in a "triangular" fashion, as to ensure that the water continuously flows through the Yturbide property irrespective of whether or not it is allowed to receive water, under the rotation schedule. The Yturbide Trust is lawfully entitled to place his water to a beneficial use, but only pursuant to the rotation schedule established the State Engineer. The rotation schedule of this particular branch being 25 percent of the entire flow of Mott Creek is not objectionable. Rather, the entire flow is, as has occurred in recent times, been diverted by the Yturbide Trust to ensure that it flows through its property at all times. This is a waste of water, and allows the Yturbide Trust to gain an unfair advantage over the other water uses to this particular branch of Mott Creek. Water belonging to others is being consumed by the unlawful use of the Yturbide Trust.

The State Engineer should therefore order the Yturbide Trust to restore the flow of Mott Creek flow to its historic course.

The Novotny Trust has no further objections to the Preliminary Order of Determination."

- vii. Objection in regard to Proof of Appropriation V-06365 filed by Donald E. Brooks, Co-Trustee, and Lynnette L. Brooks, Co-Trustee:
"RE: Objections to Water Rights Proposals of the Relative Rights in and to the waters of Luther Creek in Carson Valley, Douglas County, Nevada. Proof No. V-06365."

"(1) In the Abstract of Claims, it is shown as 59.20 acres claimed, and in the Preliminary Order of Determination, it is shown as 43.61 total acres claimed, a Reduction of 17.59 acres. In discussing this matter with Mr. Walmsley of your office, he has determined that the 59.20 acres shown in the Abstract of Claims, is in fact the true acreage."

"(2) According to the plot map, (attached, please note the area marked in RED,) there are approximately 7 acres that were not included that are irrigated, and we would appreciate them being included in our acreage that should give us a total of approximately 66.20 acres."

After further review of the evidence submitted, the State Engineer has determined that due to an error comparing claimed acreage to the Douglas County Assessor's parcel maps, 59.20 acres is the correct acreage for this Proof of Appropriation. However, the State Engineer finds that due to the lack of submitted evidence and the submission of an amended supporting map drawn by a licensed State Water Rights Surveyor the State Engineer has determined that the additional 7 acres requested shall be denied in the Final Order of Determination.

- viii. Objection/Correction request filed in regard to Proof of Appropriation V-05819 by Bernard D. and Margaret W. Benz, as agents for the Mottsville Cemetery Association:

"Request for Correction, Proof V-05819 of MCA

re: 05/22/2006 Preliminary Order of Determination, Mott Creek"

"I wish to call to your attention an apparent error in the subject Proof, as to the diversion source from which the subject water is drawn.

Table 2, Mott Creek Diversions, pg. 158, showing subject Proof as drawing waters from the Third Diversion, is incorrect. In reality this usage draws water from the Southern Diversion (sic). The irrigation pipe for this Proof is tapped into the Southern Diversion's (sic) sand settling tank located immediately below the four way diversion box. Apparently, such has been the case for at least as long as the existing diversion and sand boxes have been in existence.

Your attention to this error correction will be greatly appreciated."

A hearing of objections to the Preliminary Order of Determination was held by staff¹ of the State Engineer's Office on March 5, 2007. The State Engineer finds that the location of the pipeline for the Mottsville Cemetery is as stated in your correction request. The table has been corrected for publication in the Final Order of Determination.

- ix. Objection filed in regard to Proof of Appropriation V-02858 on behalf of Don F. & Carolyn L. Ahern, by B.J. Vasey, PE, PLS:

"The subject proof claimed a vested right to stock water use in addition to irrigation, but did not indicate the number and type of stock watered.

The present owner of Parcel 1219-25-002-002 (portion) which is covered under the proof has requested that the Preliminary Order of Determination be changed to reflect the use of stock water for sixty (60) cattle and ten (10) horses under Proof V-02858 on Parcel 1219-25-002-002."

A hearing of objections to the Preliminary Order of Determination was held by staff of the State Engineer's Office on March 5, 2007. The State Engineer finds that the number and type of livestock claimed is consistent with historic stock watering use on the acreage irrigated under Proof of Appropriation No. V-02858, therefore, this claim is modified to include seventy (70) head of livestock.

- x. Objection filed in regard to Proof of Appropriation V-06316 on behalf of Destination Sports Inc. Et Al, by B.J. Vasey, PE, PLS:

"The subject proof claimed a vested right to stock water use in addition to irrigation, but did not indicate the number and type of stock watered.

The present owner of Parcel 1219-03-001-075, has requested that the Preliminary Order of Determination be changed to reflect the use of stock water for sixty (60) cattle under Proof V-06316 on Parcel 1219-03-001-075."

A hearing of objections to the Preliminary Order of Determination was held by staff¹ of the State Engineer's Office on March 5, 2007. The State Engineer finds that the number and type of livestock

¹ Kelvin Hickenbottom, P.E., Deputy State Engineer, Bob Zelsloft, P.E., Manager II, and Steve Walmsley, Staff Engineer III.

claimed is consistent with historic stock watering use on the acreage irrigated under Proof of Appropriation No. V-06316, therefore, this claim is modified to include sixty (60) head of livestock.

xi. Objection filed in regard to Proof of Appropriation V-06319 by Donna Buddington:

"I am filing an objection to the Preliminary Order of Determination of the relative water rights on and to Mott Creek. The report is dated 5/22/06 and states that objections should be received by 9/15/06. My concern is regarding proof V-06319 on page twenty-three. The proof was filed on 3/18/94 by Glen and Sue Ellen Wright claiming a vested interest in Mott Creek for irrigation of 10.0 acres of land. Domestic and stock water uses are also claimed. I am the current owner of record Donna Buddington. A vested right for 10.0 acres of irrigation and domestic uses from the above named source is established under this proof. However under section IX the portion for stock water use was denied. It is to this denial I object and I ask that stock watering be reinstated in this proof.

Kelvin Hickenbottom of your office explained to me that the denial was a result of an omission by the Wrights to state the type and number of stock and livestock which receive water on this property. He said I could correct that omission by sending this letter stating that ten horses always have been, and hopefully always will be watered off of the irrigation ditch.

I am particularly anxious that the stock water provision be established because the flowing, and therefore ice-free water, in the ditch is essential to the health of my stock in the winter months. As the demographics in these ranch lands have changed problems have arisen. Our new upstream neighbor, who does not keep stock, feels he has a right to use the water in the winter months to flush his recently constructed ornamental pond. This was a hardship for us last year because he refused to release the water to its customary termination. I realize that you all want nothing to do with neighborhood squabbles, but a denial of stock water lessens my position for the coming winter. My hope and desire is to use my allocated water for best use practices maintaining my pasture grass and health of my stock. Thank you for reinstating my right to stock water."

A hearing of objections to the Preliminary Order of Determination was held by staff¹ of the State Engineer's Office on March 5, 2007. The State Engineer finds that the number and type of livestock claimed is consistent with historic stock watering use on the acreage irrigated under Proof of Appropriation No. V-06319, therefore, this claim is modified to include ten (10) head of livestock.

- xii. Objection filed in regard to Proofs of Appropriation V-06331 and V-06335 on behalf of the Bartholomew Family Trust, by B.J. Vasey, PE, PLS: "The subject Proofs claimed a vested right to stock water use in addition to irrigation, but did not indicate the number and type of stock watered.

The present owner of these Proofs has requested that the Preliminary Order of Determination be changed to reflect the use of stock water for six (6) horses under Proof V-06331 and Proof V-06335."

A hearing of objections to the Preliminary Order of Determination was held by staff¹ of the State Engineer's Office on March 5, 2007. The State Engineer finds that the number and type of livestock claimed is consistent with historic stock watering use on the acreage irrigated under Proof of Appropriation Nos. V-06331 and V-06335, therefore, these claims are modified to include six (6) head of livestock.

- xiii. Objection filed in regard to Proofs of Appropriation V-06350 and V-06351 on behalf of Thomas M. Yturbide and Paula J. Yturbide, Trustees of the Yturbide 1991 Family Trust, by Jennifer Yturbide, Esq.:

"1. Claimant is in agreement with the State Engineer's determination that the existing diversion box located on the Yturbide property be used for the continued distribution of the Mott Creek waters. (Preliminary Order of Determination, discussion under Proof V-05314 at pages 16-17.) The Objections to the Preliminary Order of Determination filed on behalf of the Novotny Trust on August 30, 2006, by Parsons Behle & Latimer should be disregarded and dismissed outright because the objection is not supported by factual allegations, evidence, and verified affidavit of the Objector, his agent or attorney as required by NRS 533.145(2).

2. **Stock Watering Rights:** Claimant objects to the rejection of stock watering rights as it relates to Proofs V-06350 and V-06351. The Mott Creek stream was first put to beneficial use by the Mott family in 1852. A few years after the Mott Family settled the land,

in 1855, George H. Goddard, the civil engineer employed by the State of California to survey the Carson Valley area, wrote that: "[t]he farming establishment of Mr. Mott and his sons surpassed all the rest (in the Carson Valley) not only in size, and the amount of land under cultivation, but in its valuable improvements and large amount of stock." (Goddard, George H., Report of a survey of a portion of the Old Carson and Johnson Immigrant roads over the Sierra Nevada. Annual Report of the Surveyor General of California. Document No. 5, Senate Session of 1856, pp. 88-186.) By historical accounts, the Mott family livestock included a vast herd of cattle, oxen and horses. The livestock were fed hay and grain grown on the land, and watered from Mott Creek waters. As the Mott ranch was divided over time, it continued to be farmed and continued to have livestock that included horses and cattle. The area of the prior Mott Ranch owned by Claimant and subject to Proofs V-06350 and V-06351 is entitled to water 12 head of cattle and horses.

3. **Rotation Schedule:** Claimant seeks clarification of the Preliminary Order of Determination. According to the Claimant's reading of the Order, on a seven-day rotation schedule, Claimant is entitled to distribution of water from Friday 6:00 a.m. until Friday at 6:00 p.m. pursuant to Proof V-06350. Additionally, pursuant to Proof V-06351, Claimant is entitled to share distribution of water from Friday at 6:00 p.m. until Saturday 6:00 a.m. with Neuffer, Claimant and Neuffer's predecessor in interest, Ladell Allerman, owned approximately 30 acres, more or less. She sold 20 acres to Yturbide and 10 acres to Neuffer during the pendency of the proceedings before the State Water Engineer. Allerman conveyed 2/3 of her interest in Mott Creek water to Claimant (Yturbide Family Trust) and 1/3 of her interest in Mott Creek water to Neuffer. (See Grant Deed attached as Exhibit A from Allerman to Neuffer, recorded in the Douglas County Official Book of Records at Book 0194, Page 3843 as Document 328017.) Therefore, if both of the subject Proofs are entitled to a full day of distribution of water (or 24 hours), 2/3 of the allotted should be given Claimant for a total of 16 of the 24 hours, from Friday at 6:00 a.m. until Friday at 10:00 p.m. Claimant seeks clarification because other parties to the seven-day rotation have taken the position that Neuffer's successor in interest, the Parks, are entitled to the water for 12 hours (from Friday at 6:00 p.m. until 6:00 a.m. on Saturday). Clarification would be

appreciated to avoid future misunderstandings. Claimant also requests clarification whether the 7-day rotation schedule could be modified by mutual agreement of all the parties as to the length of the rotation schedule, and time of commencement.

- 5. Reconsideration of Determination in Light of the Weight of Evidence Submitted:** The Preliminary Order essentially establishes that the right to distribution and the rotation schedule for division of Mott Creek waters is based upon raw acreage that was put to beneficial use prior to 1905. While the task before the State Engineer was weighty, the ultimate finding and the division of the water did not give due consideration to the significant evidence submitted on the historical patterns and practices of irrigation, crops, the lay of the land, and the percentage of land found in wet areas that were unlikely to have been irrigated (except perhaps, for argument sake, on rare occasions). Please see September 1, 2006 letter from Bruce R. Scott, P.E. of Resource Concepts, Inc. attached hereto and incorporated herein as Exhibit B. Also, please give reconsideration to the historical summary provided by John Stone herein, the Affidavits submitted by long time ranchers in the vicinity of the subject properties, court records and testimony, and maps submitted."

FINDINGS OF FACT AND CONCLUSIONS

After review and consideration of evidence, testimony at the public administrative hearing held by staff¹ of the State Engineer's Office on March 5 & 7, 2007, to the objections to the Preliminary Order of Determination, and all relevant files in the State Engineer's office, the following is determined:

Objections regarding Unnamed Springs (A), (B), (C) and (D) located within the old Heritage Ranch and the Green Acres Subdivision:

In order to avoid further confusion regarding the names and locations of spring sources that provide water to the Heritage Ranch and the Green Acres Subdivision these sources are given the following standard descriptions which will apply to all claims submitted for these sources. These descriptions are utilized throughout the remainder of the Final Order of Determination (see Figure 1):

Spring (A): Is located in Alpine County, California, in the SW¼ NW¼ Sec. 26, T.12N., R.19E., M.D.B.&M. Spring "A" is further described as

the northern most and western most spring in the Unnamed(A), (B), (C) & (D) Spring complex.

Spring (B): Exists entirely in Douglas County, Nevada, located in the SE¼ NW¼ Sec. 26, T.12N., R.19E., M.D.B.&M. and is the second most western spring in the Unnamed Spring complex, situated west of spring (D) and north of spring (C).

Spring (C): Exists entirely in Douglas County Nevada, with the greater portion located in the SE¼ NW ¼ Sec. 26, T.12N., R.19E., M.D.B.&M. and the lesser portion lying in the SW¼ NE¼ Sec. 26, T.12N., R.19E. M.D.B.&M. Spring (C) is further described as the southernmost spring in the unnamed spring complex.

Spring (D): Exists entirely in Douglas County Nevada, with a greater portion lying in the SE¼ NW¼ Sec. 26, T.12N., R.19E., M.D.B.&M. and the lesser portion lying in the SW¼ NE¼ Sec. 26, T.12N., R.19E., M.D.B.&M. Spring (D) is further described as the largest (area) of the unnamed spring complex, and is situated east of spring (B) and north of spring (C).

A. Edward Groenendyke objection to the Preliminary Order of Determination:

An objection to the Preliminary Order of Determination regarding Proof V-08850 as filed by B.J. Vasey, P.E., PLS on behalf of Edward Groenendyke. The basis of the objection is acreage that can be irrigated from Unnamed Spring (A), the duty of water and irrigated acreage.

Mr. Vasey testified that the entire 37.97 acres claimed under Proof of Appropriation No. V-08850 is able to be irrigated from "Unnamed Spring (A)".² Cross-examination by Paul Taggart, Esq., did not produce any evidence to refute the 37.97 acres ability to be irrigated from Unnamed Spring (A).³ A formal field investigation of the water sources and irrigated acreage was conducted on July 26, 2007, as an extension of the March 5, 2007, hearing. The field investigation revealed that 12.43 acres of land lying to the north of the northeast trending drain ditch that bisects the Groenendyke under this claim is irrigated exclusively from "Unnamed Spring (A)". The remaining acreage located to the south and east of

² Transcript, pp. 8-12, public administrative hearing on objections to the Preliminary Order of Determination before the State Engineer, March 5, 2007. Hereafter Transcript 3/5/2007

³ Transcript 3/5/2007, pp. 12-15.

the described drain ditch consists of 25.54 acres irrigated by "Unnamed Spring (B)".

Unnamed Spring (B), hereafter referred to as "Unnamed Spring (D)" (Refer to spring descriptions/locations on pages 16-17), is the water source for Proof V-06321, 40.36 acres; Proof V-06323, 40.35 acres; and Proof V-08850, 25.54 acres; for a total of 106.25 acres. Proof of Appropriation V-02856 claims a diversion rate of 3.5 cfs for the irrigation of 117.6 acres. Monthly flow measurements were conducted during the 1997⁴ and 1998⁵ irrigation seasons by staff of the Division of Water Resources. The measurements from this spring source ranged from a low of 1.45 cfs in July of 1998 to a high of 4.17 cfs in June of 1997. A flow rate from Unnamed Spring (D) of 1.20 cfs during the 198-day growing season will provide a duty of 4.0 acre-feet per acre on the original 117.6 acres. A flow rate of 1.45 cfs will provide 4.83 acre-feet per acre, 3.50 cfs will provide a duty of 11.67 acre-feet per acre and 4.17 cfs will provide a duty of 13.90 acre-feet per acre. The standard consumptive use figure for irrigated crops in northern Nevada is 4.0 acre-feet per acre. Pasture grass, native hay, and various grain types require substantially less water than alfalfa. The dominant crop type within the area of these water claims is pasture grass. The TR-21⁶ and FAO Blaney-Criddle⁷ methods were utilized to establish consumptive use values⁸ for "Pasture" based on climatic conditions in the Minden area of Nevada. The TR-21 method estimated a consumptive use value of 26.7 inches and the FAO method estimated 39.8 inches. These values convert to a seasonal irrigation requirement that ranges from 2.23 acre-feet per acre and 3.32 acre-feet per acre, respectively. Actual consumptive use is considered to be somewhere between these two numbers.

⁴ 1997 CARSON VALLEY STREAMFLOW MEASUREMENT REPORT, Mark Beutner, Andrea Squatrito, March 27, 1998.

⁵ 1998 CARSON VALLEY STREAMFLOW MEASUREMENT REPORT, Mark Beutner, Andrea Squatrito, April 21, 1999.

⁶ Irrigation Water Requirements, SCS Technical Release 21, Revised September 1970.

⁷ FAO Irrigation and Drainage paper No. 24, Crop Water Requirements, Revised 1977.

⁸ NEVADA IRRIGATION GUIDE, United States Department of Agriculture, Soil Conservation Service, Reno, Nevada. (NV210-VI-NVIG, Sept. 1981), § Part 683 – Water Requirements, NV683-50.

Aerial photography from 1938⁹, 1939-1940¹⁰, and 1954¹¹ illustrate equivalent vegetative and irrigation patterns within the confines of all irrigated acreage within the Heritage Ranch and Green Acres subdivision areas.

The State Engineer determines that it would not be suitable irrigation practice to apply more water than is necessary to irrigate pasture/harvest lands as listed under Proof V-06321, Proof V-06323, and Proof V-08850. The NEVADA LAW OF WATER RIGHTS¹² authored by Wells A. Hutchins states:

Needs of appropriator. – The appropriative right is restricted to the quantity of water actually needed for irrigation, watering of stock, domestic use, or other beneficial purpose for which the appropriation is made.(cite omitted) It is recognized that the quantity of water varies with the seasons, and that a decree that authorizes the diversion of specific quantity at all time regardless of necessity is erroneous.(cite omitted) The appropriator is entitled to enough water for his reasonable needs,(cite omitted) but any quantity of water diverted in excess of existing needs is not taken in exercise of a right, but is part of the water to which junior appropriators are entitled.(cite omitted)

The State Engineer further finds that the 3.5 cfs from Unnamed Spring (D) used for the irrigation of the above listed acreage yields 3 times the volume of water necessary for the irrigation of the existing and historic crops on this acreage.

The State Engineer determines that Unnamed Spring (A) is the primary source of water for the following claims: Proof V-06342, 7.20 acres; Proof V-08850, 12.43 acres; Proof V-06322, 2.47 acres; Proof V-06325, 2.54 acres; Proof V-06326, 2.50 acres; Proof V-06327, 4.90 acres; Proof V-06328, 5.55 acres; Proof V-06329, 5.22 acres; Proof V-06330, 5.08 acres; Proof V-06331, 4.88 acres; Proof V-06333, 4.98 acres; Proof V-06334, 2.55 acres; Proof V-07486,

⁹ CARSON VALLEY BOTTOM LANDS, NEVADA, BPB – 13 – 92, dated 10-20-38.

¹⁰ CARSON VALLEY DISTRICT, NEVADA, QUADRANGLE NUMBER 20 B, PHYSICAL SURVEYS 1939-1940.

¹¹ Unknown origin, possibly Carson Valley Conservation District or Soil Conservation Service, dated 9-5-54, flight line 3-16, GS-VEV.

¹² Hutchins, Wells A., LL.B. THE NEVADA LAW OF WATER RIGHTS, Production Economics Research Branch, Agricultural Research Service, United States Department of Agriculture, 1955.

4.86 acres; Proof V-09264, 2.53 acres; Proof V-09265, 2.55 acres; Proof V-09266, 5.18 acres; Proof V-09270, 5.18 acres; for a total of 80.60 acres. The State Engineer finds that the duty of water for the described acreage is 2.43 acre-feet per acre from Unnamed Spring (A) with the understanding that the total duty of water shall be limited to 4.0 acre-feet per acre from any and/or all sources.

Paragraph No. 2 of the objection requests that the duty of water "under Permit 24919 – Certificate 7842 in Turnipseed's letter is 58.19 acre feet and we request that the duty shown on Page 130 under Proof V-08850 also be at least 58.19 acre feet and the acre feet per acre adjusted to reflect the 37.97 acres as the Place of Use." Proof of Appropriation V-08850 claims a vested water right from both Unnamed Spring (A) and Unnamed Spring (D). Permit 24919, Certificate 7842, is certificated for the waters of Unnamed Spring (A) for irrigation purposes within the same place of use as claimed under Proof V-08850. Both water sources, Unnamed Spring (A) and Unnamed Spring (D), are claimed by Proof of Appropriation Nos. V-06321, V-06323, V-06342, V-06345 (claimed as "UNNAMED SPRING, DESIGNATED JACKSON SPRING "D" "), and V-08850. Permit 24918, Certificate 7843, and Proof of Appropriation No. V-02856 claim water from an Unnamed Spring, also known as "Unnamed Spring "B" or Jackson Spring "D", for irrigation purposes within the same or portions of the place of use as the aforementioned proofs in the preceding sentence.

The information contained in Permits 24918 and 24919 and Proof of Appropriation V-02856¹³ was reviewed and considered in determining the final disposition of Proof Nos. V-06321, V-06323, V-06342, V-06345 and V-08850. The State Engineer determines that it would not be prudent to attempt to administer the waters of the two spring sources under a minimum of three layers of permits and claims of vested rights. Therefore, the State Engineer determines that Permit 24918, Certificate 7843; Permit 24919, Certificate 7842; and Proof of Appropriation V-02856 are superseded by Proof of Appropriation Nos. V-06321, V-06323, V-06342, V-06345 and V-08850.

The State Engineer determines that the duty of water for Proof V-08850 shall be limited to 2.43 acre-feet per acre from Unnamed Spring (A) for the 12.43 acres lying north of the diagonal drainage ditch for a total of 30.20 acre-feet of water. The 25.54 acres of land lying to the south of said diagonal ditch are determined to have a duty of water of 4.00 acre-feet per acre from Unnamed Spring (D) for a total of 102.16 acre-feet of water. The State Engineer determines that Proof V-08850 shall be limited to a total duty of 132.36 acre-feet of water on the north and south sides of the dividing ditch.

¹³ Public record in the Office of the State Engineer.

Finally, the State Engineer determines that Unnamed Spring (A) is physically capable of being diverted to any area within the 37.97 acres claimed under Proof V-08850. The State Engineer determines that water from Unnamed Spring (A) is not necessary for the irrigation of the 25.54 acres lying south of the diagonal ditch under this claim and Proofs V-06321 and V-06323 based on prior findings within the scope of this objection to the Preliminary Order of Determination. The State Engineer further determines that the commingling of Unnamed Spring (A) with Unnamed Spring (D) directs excessive water onto lands irrigated by the claims referred to in this paragraph. These waters then become drain and waste that may or may not be able to be effectively utilized by claimants within the Green Acres Subdivision.

Mr. Brant Honkanen testified¹⁴ that the reason that his grandfather purchased Lot 4 within the Green Acres Subdivision "was because it had the best water rights." Mr. Honkanen stated that the water from the "spring" (referring to Unnamed Spring (D)) flowed on a continuous basis over the "last 40 years"¹⁵ through the Groenendyke property to the point where it intersected the south ditch that supplies water from Unnamed Spring (A) and Miller Creek near the center of the south line of the Honkanen property (APN 1219-26-001-031). Mr. Honkanen said that the stream of water from Unnamed Spring (D) created "a natural pond"¹⁵ at the confluence of the south Green Acres ditch and the diagonal ditch that flows through the Groenendyke property (APN 1219-26-001-035). Mr. Honkanen's description of the confluence of the Unnamed Spring (D) and the South Green Acres Ditch was confirmed during the July 26, 2007, field investigation.¹⁶

A field investigation¹⁷ of the irrigation system conducted on August 6, 1992, revealed that the spring source, "Unnamed Spring D", aka Jackson Spring "D", claimed under Proofs V-02856, V-08850, V-06321 and V-06323 was capable of being diverted approximately 150 feet north from the claimed point of diversion. The water was transmitted to the east through a culvert beneath Foothill Road and into the "bisecting ditch" that separates the north and south portions of Proof V-08850. Water was also transmitted through the Foothill Road culvert from a spring and swamp area that now comprises the "Jackson Pond"

¹⁴ Transcript, 3/5/2007, p. 124.

¹⁵ Transcript, 3/5/2007, p. 125.

¹⁶ Report of Field Investigation No. 1081, In the Matter of a Complaint Regarding Water Distribution from Unnamed Creek/Unnamed Spring to the Green Acres Subdivision, Carson Valley, Douglas County, Nevada, dated Aug. 24, 2007.

¹⁷ Field Investigation No. 916, dated Nov. 30, 1992, Public Record in the Office of the State Engineer.

that was the primary issue of the aforementioned field investigation. The existence and location of this diversion and associated culvert/headgate substantiates the Honkanen testimony referred to in the preceding paragraph.

Staff¹⁸ of the State Engineer's Office has observed that the construction of the pond near the southeast corner of the Jackson property precludes the ability to divert water through the headgate and existing culvert that routes water through the "bisecting ditch" through the Groenendyke property. The preceding findings are resolved in the subsequent State Engineer's Order:

The State Engineer therefore orders the reconstruction of the headgates and distribution system. The design and construction plans of the diversion/distribution structures are subject to the approval of the State Engineer prior to commencement of construction.

The State Engineer finds that the subdivision of the land that once comprised the two separate ranches that are the subject of this objection precludes the ability to irrigate the acreage in the manner that is completely consistent with the historic practices that were in effect prior to the 1960's.

Based on the preceding findings, the State Engineer finds that any flow from Unnamed Spring (D) in excess of 1.5 cfs¹⁹ shall be divided in a 60%/40% split with 40% of the water above 1.5 cfs diverted to the north through the diversion and culvert in the aforementioned paragraph, thence, flow to the east beneath Foothill Road and through the ditch that bisects the acreage listed under Proof V-08850. This water will intersect the ditch that flows from west to east along the south boundary of the Green Acres subdivision at a point near the middle of the south boundary of the irrigated acreage under Proof V-09264. The water from Unnamed Spring (D) shall have a direct diversion right, and will be available for use during the rotation schedule as set forth for Unnamed Spring (A) with the exception of Claims V-06321, V-06323, V-06334, V-06342, V-06345, and V-08850 that cannot physically receive water from this diversion. The remaining 60% of the flow in excess of 1.5 cfs will remain in the ditch that provides water to Heritage Ranch water users under Claims V-06321, V-06323 and V-08850.

The State Engineer determines that Hutchins definition of the "Needs of appropriator" as discussed on page 19 of this Final Order precludes the use of water from Unnamed Spring (A) to supplement flows from Unnamed Spring (D)

¹⁸ Steve Walmsley, Staff Engineer III and Reed Cozens, Engineering Technician III.

¹⁹ 1.5 cfs will yield a potential duty of water of 5.5 acre-feet per acre over a 198 day growing season for Claims V-06321, V-06323 and V-08850.

that are in excess of what is considered a reasonable duty of water to accomplish the needs of the irrigators under Claims V-06321, V-06323 and V-08850. Therefore, the State Engineer finds that Unnamed Spring (A) shall henceforth be appurtenant to lands described under Proof V-06342, 7.20 acres; Proof V-08850, 12.43 acres; Proof V-06322, 2.47 acres; Proof V-06325, 2.54 acres; Proof V-06326, 2.50 acres; Proof V-06327, 4.90 acres; Proof V-06328, 5.55 acres; Proof V-06329, 5.22 acres; Proof V-06330, 5.08 acres; Proof V-06331, 4.88 acres; Proof V-06333, 4.98 acres; Proof V-06334, 2.55 acres; Proof V-07486, 4.86 acres; Proof V-09264, 2.53 acres; Proof V-09265, 2.55 acres; Proof V-09266, 5.18 acres; Proof V-09270, 5.18 acres; for a total of 80.60 acres.

The State Engineer determines that water from Unnamed Spring (A) can be distributed over the entire 37.97 acres claimed under Proof V-08850. The State Engineer finds that the 12.43 acres lying north of the bisecting ditch receive water as a direct diversion from Unnamed Spring (A). The State Engineer determines that the primary source of water for the 25.54 acres lying south of said ditch is Unnamed Spring (D). The State Engineer finds that commingling the waters of Unnamed Spring (A) with the waters of Unnamed Spring (D) is not necessary for the irrigation of lands that are exclusively irrigated by said Spring (D). Further, the State Engineer determines that the commingling of Unnamed Spring (A) water with the waters of Unnamed Spring (D) allows the application of more water than is necessary to adequately irrigate land covered by said Unnamed Spring (D), therefore, the State Engineer concludes that the continued use of Unnamed Spring (A) water to supplement Unnamed Spring (D) constitutes a waste of water that is not allowed under Chapter 533 of the Nevada Water Law.^{20,21}

²⁰ **NRS 533.530 Unlawful diversion and waste of water; penalty.**

1. It is an unlawful use and waste of water for any person during the irrigating season:

(a) To divert and conduct the water, or portion thereof, of any river, creek, or stream into any slough, dam or pond and retain, or cause the water to be held or retained therein, without making any other use of the water, or

(b) To divert and conduct the water, or portion thereof, away from any river, creek or stream, and run or allow the water to run to waste on sagebrush or greasewood land.

2. The irrigation of unimproved pasture which has a surface water right shall not be deemed to be a waste of water.

3. Any person who wastes water in violation of any of the provisions of subsection 1 is guilty of a misdemeanor.

Further discussion regarding a rotation schedule for the waters of Unnamed Spring (A) and Unnamed Spring (D) will be covered under the Jackson objection: "Objection filed in regard to Proofs of Appropriation V-09264," et al.

B. Jerald R. Jackson objection to the Preliminary Order of Determination:

An objection to the Preliminary Order of Determination regarding Proofs of Appropriation V-09264, V-09265, V-09266, V-09267, V-09268, V-09269, V-09270, V-02856, V-06342, V-06343, V-06344, V-06345 and Permits Nos. 24918, C-7843, and 24919, C-7842, was filed by Paul G. Taggart, Esq. on behalf of Jerald R. Jackson, et al. The basis of the objection is clarification of "drain and waste rights, priority date, exclusion of stock watering rights and the inclusion of the claimant's proofs in the rotation schedule.

In response to objection section I. Drain and Waste Rights to Unnamed Jackson Spring "A" and Any Unnamed Creek that Issues Therefrom.

[1:48:1889; C § 430; RL § 4721; NCL § 8006] + [2:48:1889; C § 431; RL § 4722; NCL § 8007]—(NRS A 1967, 609; 1983, 352)

²¹ **NRS 533.070 Quantity of water appropriated limited to amount reasonably required for beneficial use; duties of State Engineer in connection with water diverted or stored for purpose of irrigation.**

1. The quantity of water from either a surface or underground source which may hereafter be appropriated in this state shall be limited to such water as shall reasonably be required for the beneficial use to be served.

2. Where the water is to be diverted for irrigation purposes, or where the water is to be stored for subsequent irrigation purposes, the State Engineer in determining the amount of water to be granted in a permit to appropriate water shall take into consideration the irrigation requirements in the section of the State in which the appropriation is to be made. The State Engineer shall consider the duty of water as theretofore established by court decree or by experimental work in such area or as near thereto as possible. He shall also consider the growing season, type of culture, and reasonable transportation losses of water up to where the main ditch or channel enters or becomes adjacent to the land to be irrigated, and may consider any other pertinent data deemed necessary to arrive at the reasonable duty of water. In addition, in the case of storage of water, reservoir evaporation losses should be taken into consideration in determining the acre-footage of storage to be granted in a permit.

[11:140:1913; A 1945, 87; 1943 NCL § 7899]

A hearing of objections to the Preliminary Order of Determination was held by the staff of the State Engineer's Office on March 5, 2007. A formal field investigation of the water sources and irrigated acreage was held on July 26, 2007, as an extension of the March 5, 2007, hearing. The field investigation revealed that Proofs of Appropriation V-09267, V-09268, and V-09269 do not receive water from Unnamed Spring (A)²², therefore the State Engineer determines that Unnamed Spring (A) is not a valid source of water for said Proofs of Appropriation. However, the State Engineer has determined that Proofs of Appropriation V-09265, V-09266 and V-09270 can receive water from Unnamed Spring (A) as a direct diversion. It was the intent of the Preliminary Order of Determination to describe Unnamed Spring (A) as a primary source of water to V-09265, V-09266 and V-09270, and remains the intent of this Final Order of Determination to describe the same. Culture maps from the U.S. Geologic Survey show homogenous vegetation on the parcels of land that make up the Heritage Ranch and the Green Acres subdivision prior to 1905²³. In addition, aerial photography from 1938, 1939-1940, and 1954²⁴ illustrate equivalent vegetative and irrigation patterns within the confines of all irrigated acreage within the Heritage Ranch and Green Acres subdivision areas.

In response to objection section II. **Stock Watering Rights.**

The State Engineer determines that stockwatering shall be appurtenant to Proofs of Appropriation V-06342, V-06343, V-06344, and V-06345. The use of this stockwater shall be subject to the guidelines set forth in this Final Order of Determination (see Sec. XII, Stockwater and Domestic Use, pg. 93).

Under "Section II" of the objection it states that Proofs "V-06342, V-06343, V-06344, V-06345" are all appurtenant to the entire "22.26 acres" acres of land. Further investigation of these claims resulted in a reconfiguration of acreage based on ground able to be irrigated by the separate spring sources under the aforementioned claims. Proof V-06342 is appurtenant to 7.20 acres, Proof V-06343 is appurtenant to 9.73 acres of which 7.20 acres are supplemental to Proof V-06342, Proof V-06344 is appurtenant to 2.98 acres of stand-alone subirrigated land, and Proof V-06345 is appurtenant to 13.35 acres of subirrigated land. Therefore, the State Engineer finds that the total acreage irrigated under Proofs V-06342, V-06343, V-06344 and V-06345 shall be limited to 26.60 acres. The State Engineer determines that stand-alone acreage that is

²² Unnamed Spring (A) is the same source of Jackson Spring "A".

²³ U.S. Geologic Survey Hydrographic Branch, Map Dated July 27, 1904.

²⁴ Public record on file in the Office of the State Engineer.

Irrigated by direct diversion under Proof V-06342 is 7.20 acres with a duty of 2.43 acre-feet per acre.

Research of the Humboldt River Adjudication indicated that lands that are subirrigated by springs or are classified as "swamp area" are subject to the following restriction: "Swamp area. No water to be diverted from the creek for this area until the same becomes dry or is drained."²⁵ Under Claim No. 00502²⁶ of the aforementioned decree with regard to Deering Creek and Ackler Creek the court states that: "No water is to be diverted until swamp becomes dry or is drained." While the court recognized that this ground is productive and is acknowledged under the Bartlett Decree for the waters of the Humboldt River and its tributaries, no duty of water is recognized until such time the necessity to divert water and irrigate this land arises due to the loss of subirrigation or the drying of swamp land.

Claim No. 574²⁷ of the Orr Ditch Decree states that a portion of the acreage "of these areas are swamp for which no water is to be diverted until same is drained or becomes dry." This bracketed clause pertains to portions of the acreage that are decreed as "Wild Hay" under the decree.

The State Engineer finds that land is subirrigated under Proofs V-06343, V-06344 and V-06345 with stock watering allowed. A duty of 2.8 acre-feet per acre²⁸ will be allowed at any time the subirrigated ("swamp") land under the aforementioned proofs becomes dry by any natural occurrence. The State Engineer finds that the artificial draining and drying of the subirrigated acreage would be injurious to all other water users that obtain their irrigation water from these spring areas, therefore; it is not allowed under the Final Order of Determination. The Nevada Irrigation Guide recommends that "A practical actual consumptive use value probably lies between the values obtained by the TR-21 and FAO Blaney-Criddle methods" of crop water consumptive use

²⁵ In the matter of the Determination of the Relative Rights of the Waters of the Humboldt River Stream System and Tributaries, Case No. 2804, Sixth Judicial District Court of Nevada, In and for the County of Humboldt, 1923-1938. See Claim No. 00454, Bartlett Decree, p. 185, (Humboldt Decree).

²⁶ Humboldt Decree, Claim No. 00502, Bartlett Decree, p. 192.

²⁷ Final Decree, *United States of America vs. Orr Water Ditch Company, et al.*, Equity (D. Nev. 1944), Claim No. 574, p. 58, (Orr Ditch Decree).

²⁸ Nevada Irrigation Guide, United States Department of Agriculture, Soil Conservation Service, Reno, Nevada (NV210-VI-NVIG, Sept. 1981), Part 683 - Water Requirements, Subpart F - Tables NV683-51.(Nevada Irrigation Guide).

determination.²⁹ Refer to pages 70 and 71 of the Final Order of Determination for a more detailed description of land irrigated under these claims.

In response to objection section III, **Rotation Schedule**.

The State Engineer determines that a rotation schedule is needed for the fair and objective distribution of water in and around the Green Acres subdivision, including the Heritage or Berrum Ranch. This rotation schedule shall be based on historic evidence, field investigations made by staff from the Nevada Division of Water Resources, testimony from the hearing on the objections and soils data made available through the United States Department of Agriculture.

Historic evidence compiled by the Office of the State Engineer shows that the Heritage or Berrum Ranch was operated as a combined place of use that shared water from the several spring sources that support the irrigated acreage. Since this land has subsequently been parceled and divided into many different pieces, the only fair and equitable solution to distribute water is based on a rotation schedule. The rotation schedule devised for this area will start with the highest (elevation) user of the water system and move down stream until it reaches the end user. This rotation schedule will be based upon time, not water quantity. In this way all participants in the rotation schedule of this water will receive an equitable distribution of water based upon the water available at the time. In essence, during times of water shortage, all participants will share in the shortage; likewise, during times of ample supply, all participants will receive excess water.

Observations were made by Staff³⁰ of the Division of Water Resources during the field investigation July 25, 2007, that supported the need of a rotation schedule. During this investigation statements were made by those most familiar with the use of water, for particular parcels, in and around the Green Acres Subdivision. The statement of water usage for the Green Acres parcels is as follows:

"The next parcel visited is owned by Gena Guerriero, APN 1219-26-001-024. Mike Catherwood, acting as agent, stated that this parcel is irrigated by the northerly Miller Creek ditch that supplies water to the Green Acres Subdivision. He stated that it

²⁹ Nevada Irrigation Guide, Part 683-Water Requirements, NV683.2(b)(8), paragraph (8).

³⁰ Steve Walmsley, Staff Engineer III and Reed Cozens, Engineering Technician III.

took approximately ½ day to irrigate the 2.51 acre parcel based on a 10 to 14 day rotation period.³¹

"Continuing east, the next parcel visited is owned by Pedro and Margaret M. Villalobos, APN 1219-26-001-032. Mr. Villalobos stated that water is diverted at the southwest corner of his parcel from the south Green Acres irrigation ditch. The water then flows in a north to northeasterly direction to irrigate the 2.55 acre parcel. Mr. Villalobos said that it takes him approximately ½ day to 18 hours to adequately irrigate his parcel as stated under oath in the hearing on objections to the Preliminary Order of Determination.³²

"The next lot that was visited was the fourth parcel on the north side of the street, APN 1219-26-001-025, owned by the Libbon's. Mr. Libbon stated that his property currently receives an 11 hour rotation of Miller Creek water every two weeks and he is "a happy guy".³³

"Mr. Douglas called at an earlier date and said that he would not be able to attend the field investigation. In Lieu of a personal appearance he submitted an Email to the State Engineer's Office, dated Tuesday, July 24, 2007, 3:40 P.M. The Email stated:

"Dear Steve

This is in follow up to our telephone conversation yesterday concerning the water distribution within the Green Acres Subdivision. As we discussed, our trust, the Bartholomew Family Trust, and our LLC, Nevada Mountain View own three (3) properties in the area in question known as the Green Acres Subdivision.

Property #1, [Source Unnamed Spring B] 605 Skyhawk Ranch Rd, is the twenty plus acre parcel on which our home and ranch are located.

This parcel flood irrigates from a ditch on the southern border of the property known to you along side of Black Bear Rd. We irrigate from this source about 4 days every three (3) weeks, which has been the cycle here for the last seven years that we have owned the property and was the cycle of last owner as well. Russell Scossa has been managing this for us.

³¹ State Engineer Field Investigation No. 1081, p. 7.

³² State Engineer Field Investigation No. 1081, p. 7.

³³ State Engineer Field Investigation No. 1081, p. 10.

Property #2, [Source Unnamed Spring "A"] five acres, is the parcel immediately adjacent to parcel one and in front and to the west along Green Acres Rd. It irrigates from a ditch between these two properties and flood irrigates about every two to three weeks for two days.

Property #3, [Source Unnamed Spring "A"] 534 Green Acres, is 2.5 acres with a home and irrigates from a pump in the adjacent ditches when they are full.

This is as accurate a description of our flood irrigation practices as I can describe. If you have any further questions please do not hesitate to contact me. Thank you for your assistance with this matter.

Respectfully,

Myles & Amy Douglas for The Bartholomew Family Trust and Nevada Mountain View, LLC³⁴

"At approximately 1:35 P.M. staff and claimants arrived at APN 1219-23-002-013, also known as the Catherwood property... He said that he takes 24 hours to fully irrigate his land [approximately 5 acres] using this method of irrigation.³⁵

"After leaving the Catherwood property, the Water Resource's staff and the remaining claimants visited the eighth parcel on the south side of the street, APN 1219-23-002-014. This parcel is owned by Mr. Gary Casteel Jr. Mr. Casteel said that he uses water from Unnamed Creek and that with two head gates it takes approximately 24 hours to irrigate five acres.³⁶

"The ninth parcel on the south side of Green Acres Drive is owned by Myles S. and Amy B. Douglas, APN 1219-24-002-010. Mike Catherwood stated that this property, takes approximately 24 hours to irrigate [approximately 5 acres] from the South Green Acres Ditch. Mr. Casteel also supported this time period.³⁷

"At approximately 2:00 P.M. the staff from the Division of Water Resources and the remaining claimants visited APN 1219-24-002-005, also known as the Della Rosa property... Mr.

³⁴ State Engineer Field Investigation No. 1081, p. 11-12.

³⁵ State Engineer Field Investigation No. 1081, p. 14.

³⁶ State Engineer Field Investigation No. 1081, p. 14.

³⁷ State Engineer Field Investigation No. 1081, p. 15.

Villalobos said that this practice takes about 12 hours [to irrigate approximately 2.5 acres].³⁸

"The next to last parcel visited was the Currie property, also known as APN 1219-24-002-014. Mr. Currie stated that it takes approximately 12 hours to irrigate his parcel [approximately 5 acres].³⁹

"The last parcel visited during the field investigation was APN 1219-24-002-009, also known as the property of Stephen H. and Patricia Christian... He said that it takes approximately two (2), fifteen (15) hour days to completely irrigate his land [approximately 5 acres].⁴⁰

"Staff of the State Engineer's Office questioned Mr. Jackson regarding the amount of time necessary to irrigate the acreage around the Old Berrum Ranch House. Mr. Jackson stated that he would defer to evidence and testimony presented in the Hearing for Objections to the Preliminary Order of Determination. He said that he had carefully prepared for the hearing and wished to stand on the record created at that time.⁴¹

During the hearing held March 5, 2007, Jerry Jackson stated: "Two to three times is about what it takes to get an adequate watering, two to three two-day sessions with the gap in the middle of two to three days between each one."⁴²

The United States Department of Agriculture, Natural Resources Conservation Service, describes two soil types associated with lands irrigated from Unnamed Spring (A). These soils types are listed as Ophir, sandy gravelly loam, with 0 to 2 percent slope and Ophir, sandy gravelly loam, with 2 to 8 percent slope.⁴³ Consideration of the slope variances was made in the rotation schedule (see rotation schedule Table 8). Acreage with greater slopes are allotted additional hours due to decreased infiltration rates that coincide with increased potential runoff rates on similar soil types.

A rotation schedule was developed based on the preceding observations and testimony of the parties affected by the distribution of water under Proof V-06322, 2.47 acres; Proof V-06325, 2.54 acres; Proof V-06326, 2.50 acres; Proof

³⁸ State Engineer Field Investigation No. 1081, p. 15.

³⁹ State Engineer Field Investigation No. 1081, p. 15.

⁴⁰ State Engineer Field Investigation No. 1081, p. 16.

⁴¹ State Engineer Field Investigation No. 1081, p. 5.

⁴² Transcript 3/5/2007, p. 35.

⁴³ USDA/NRCS Soils Data Mart, NV773, Douglas County Area.

V-06327, 4.90 acres; Proof V-06328, 5.55 acres; Proof V-06329, 5.22 acres; Proof V-06330, 5.08 acres; Proof V-06331, 4.88 acres; Proof V-06333, 4.98 acres; Proof V-06334, 2.55 acres; Proof V-06342, 7.20 acres; Proof V-07486, 4.86 acres; Proof V-08850, 12.43 acres; Proof V-09264, 2.53 acres; Proof V-09265, 2.55 acres; Proof V-09266, 5.18 acres; and Proof V-09270, 5.18 acres.

Refer to Table 8 for a source by source breakdown of the water claims associated with springs associated with irrigated acreage within the Heritage Ranch and Green Acres Subdivision. Also, see Table 8 for the rotation schedule for Unnamed Spring (A).

Mott Creek Objections regarding Proofs V-05314, V-06313, V-06349, V-06350 and V-06351:

Park Objection:

An objection to the Preliminary Order of Determination was filed by Elizabeth and Eric Park regarding the shared rotation of Mott Creek water with the Yturbides.⁴⁴

Stone Objection on behalf of McKay:

An untimely objection was filed on December 5, 2006, regarding Proof of Appropriation No. V-06349, by John G. Stone on behalf of the current owners. Mr. Stone stated that there is an "apparent error in the distribution schedule" and that the distribution of water within the original Mott Creek Ranch should be controlled by "purchase contract". Mr. Stone states that when he acquired the property in 1986 "the purchase contract" "specifically indicated the purchase of 1/4 of 1/4 of the water rights from Mott Creek."⁴⁵

The State Engineer has taken administrative notice of this objection; however due to the untimely filing of this objection, it was not reviewed in the hearing of protests for the Preliminary Order of Determination.

Novotny Objection:

An objection to Proof of Appropriation V-06350 filed on behalf of Gerald R. Novotny and Jeanne M. Moss-Novotny Trustees of the Novotny Family Trust

⁴⁴ Refer to page 3 of this Final Order of Determination.

⁴⁵ Letter, dated Dec. 1, 2006, to Hugh Ricci, State Engineer, from John G. Stone. Refer to page 10 of this Final Order of Determination.

Dated February 9, 1984, by Ross E. de Lipkau, Attorney, requests the removal of the "loop ditch" or "triangular" ditch located within the Yturbide property. Mr. de Lipkau further requests that the Yturbides only receive stock water during their respective allotment of time within the "rotation schedule" and that "the Yturbide Trust to restore the flow of Mott Creek flow to its historic course", i.e., the ditch located within the Allerman Road and ditch easement.⁴⁶

Yturbide Objection:

An objection was filed in regard to Proofs of Appropriation V-06350 and V-06351 on behalf of Thomas M. Yturbide and Paula J. Yturbide, Trustees of the Yturbide 1991 Family Trust, by Jennifer Yturbide, Esq.: The Yturbides support the location of the existing diversion box on the "loop ditch" located on their property. They request stock watering for 12 head of cattle and 12 head of horses within the place of use of Proof V-06350 and V-06351.⁴⁷

The Yturbides seek clarification of the rotation schedule regarding shared time with the Parks predecessors, the Neuffers. The Yturbides request a shared rotation with the Parks based on a joint filing of Proof V-06351 with the Yturbides. The Yturbides further seek a 2/3 (Yturbide), 1/3 (Park), division of water based on the Grant Deed from Allerman to Neuffer and a Court Order No. 28332, described below.

The Yturbides request that the length of the rotation schedule be lengthened to greater than 12 hours and greater than seven day rotation schedule.

The Yturbides request that historical irrigation practices be reviewed in light of historical evidence and soil/water characteristics within the confines of the original Mott Ranch.

A hearing of objections to the Preliminary Order of Determination regarding the second (going from north to south) 1/4-split of Mott Creek was held

⁴⁶ Refer to page 10 of this Final Order of Determination.

⁴⁷ Refer to pages 14-16 of this Final Order of Determination.

by the staff⁴⁸ of the State Engineer's Office on March 7, 2007. The State Engineer has reviewed the historical record submitted in support of claims V-05314, V-06313, V-06349, V-06350 and V-06351 and finds that the existing evidence supports a priority date of 1852 for all of the aforementioned Proofs of Appropriation.

The State Engineer finds that Mott Creek is equally split into an equal four way division of the stream with $\frac{1}{4}$ of the flow going to four separate ranches as follows: 1. Northern Diversion - Proofs V-06369 and V-06370. 2. Second Diversion from North to South - V-05314, V-06313, V-06349, V-06350 and V-06351. 3. Third Diversion from North to South - V-05049, V-06315 and V-06316. 4. Southern Diversion - V-05070, V-05819 (Mottsville Cemetery), V-06226, V-06317, V-06318, V-06319, V-06831, V-09039 and V-09263. This decision is pursuant to the agreement between the four ranches as they existed in 1952 that allotted one-fourth ($\frac{1}{4}$) of the flow of Mott Creek to each ranch.⁴⁹

The original objection by the Parks (V-06351) was to the shared rotation of water with the Yturbides (V-06350). This controversy precipitated a deed⁵⁰, dated January 14, 1994, from LaDell (Philips) Allerman, a single woman, and Michael Phillips, a single man, to Mark C. Neuffer and Susan L. Neuffer, husband and wife. The deed states: "TOGETHER WITH one-third ($\frac{1}{3}$) of the total water rights allotted to APN 19-060-52 from which the subject property has been partitioned, as such water rights may be further determined according to the final order of adjudication by the Nevada Department of Conservation and Natural Resources, State Engineer, and as currently set forth in the Stipulation of Counsel issued in the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas, Case No. 25256..."

A copy of the case of *Ladell Phillips, Plaintiff, v. Michael W. Phillips, Order Partitioning Real Property, Case No. 28332, Ninth Judicial District Court of*

⁴⁸ Susan Joseph-Taylor, Hearing Officer; Kelvin Hickenbottom, P.E., Deputy State Engineer, Bob Zeisloft, P.E., Manager II, and Steve Walmsley, Staff Engineer III.

⁴⁹ Book G, p. 566, Doc. No. 8714, Ditch and Water Claims, Douglas Co. Recorder's Office.

⁵⁰ Exhibit No. 14, Item No. 18, Yturbide, Bk.0394, Pg.0654, Doc. No. 331491, also referred to as Bk.0194, Pg.3843, Doc. No. 328017, Douglas County Recorder's Office, submitted during the Public Hearing on Wednesday, March 7, 2007 Carson City, Nevada.

Nevada, June 30, 1993, is filed as a supporting document under Proof V-06351.⁵¹ Item No. 4 of the decree states: "The water rights appurtenant to the real property described in Paragraph 1" (refers to the original parcel of land prior to division and sale to the Yturbides and Neuffers) "hereinabove shall be prorated between the parcels as follows: (a) One-third (1/3) of the total appurtenant water rights shall be allotted to Parcel A" (currently, Parks) "described in Paragraph 2 hereinabove; and, (b) Two-thirds of the total appurtenant water rights shall be allotted to Parcel B" (currently, Yturbide) "described in Paragraph 3 hereinabove."

The deed⁵², dated September 28, 1993, from Ladell Allerman to Thomas M. Yturbide and Paula J. Yturbide, Trustees of the Yturbide 1991 Family Trust, dated August 1, 1991, transferred the 19.91 acres, further described as Douglas County APN 19-060-52 (current APN's 1219-03-001-073, 057). The deed states: "TOGETHER WITH all water rights appurtenant to the land conveyed herein including but not limited to the rights of L.A. Philips, as successor in interest to Hiram Mott, the Mott heirs, et al. under Petition No. 94662 as filed with the State Engineer appurtenant to said land."

Proof of Appropriation V-06351 was submitted in the names of "Mark C. and Susan L. Neuffer, and Thomas M. and Paula J. Yturbide, Trustees of The Yturbide 1991 Family Trust Dated August 1, 1991". The land on which said proof was submitted was owned by the Neuffers at the time the claim was submitted. The Neuffers subsequently sold the land with appurtenances to the current owners of record, Eric Song J. Park and Elizabeth Park, Douglas County Assessor's Parcel No. 1219-03-001-060. By Nevada Revised Statute 111.167, water rights are presumed to transfer with the land to which appurtenant, unless the Grantor in conveyance documents specifically reserves the water rights.⁵³

⁵¹ Public Record in the Office of the State Engineer.

⁵² Exhibit No. 14, Item No. 17, Yturbide, Bk.0998, Pg.6499, Doc. No. 319101, Douglas County Recorder's Office, submitted during the Public Hearing on Wednesday, March 7, 2007 Carson City, Nevada.

⁵³ **NRS 111.167 Presumption of conveyance with land: Water rights, permits, certificates and applications appurtenant to land.** Unless the deed conveying land specifically provides otherwise, all:

1. Applications and permits to appropriate any of the public waters;
2. Certificates of appropriation;
3. Adjudicated or unadjudicated water rights; and

Document No. 0647194⁵⁴ is a Grant, Bargain and Sale Deed that transfers the above described property "with all tenements, hereditaments and appurtenances, including easements and water rights, if any, thereto belonging or appertaining" to the Park parcel.

The State Engineer finds that Mott Creek water under Claim V-06351 is appurtenant to land owned by the Parks and shall be assigned a separate time allocation in the rotation schedule. The State Engineer does not make a determination regarding the removal of the Yturbide Trust from Proof V-06351. This is a separate matter to be resolved by the two parties or through the court system.

The State Engineer finds that the water appurtenant to the Yturbide parcels (APN 1219-03-001-057, Paul Joseph Yturbide; APN 1219-03-001-073, 1991 Yturbide Trust) and the Park parcel (APN 1219-03-001-060) shall be further allocated as set forth in the aforementioned Case No. 28332, Ninth Judicial District Court of Nevada. The decree allocates 1/3 of the water to parcel A (Parks) and 2/3 to parcel B (Yturbide). The final rotation schedule will be adjusted to be in compliance with the court decree.

An aerial photograph⁵⁵, dated 9-13-89, Frame No. 4-14, was flown for Douglas County by Cooper Aerial of Nevada, Las Vegas, Nevada. In this photograph the contested "loop ditch" on the Yturbide property, APN 1219-03-001-073, is clearly evident. A line that parallels the current Allerman Lane is also evidenced, but it is not supported by phreatophytic vegetation that is associated with a waterway. The aforementioned line is interpreted to be a fence that continues on the north side of the irrigation ditch that parallels Allerman Lane. A second aerial photograph⁵⁶, dated 6-1-77, clearly illustrates the "loop ditch" within

4. Applications or permits to change the place of diversion, manner of use or place of use of water, which are appurtenant to the land are presumed to be conveyed with the land.

(Added to NRS by 1995, 438)

⁵⁴ Official records of the Douglas County, Nevada, Recorder's Office, BK-805, PG-8040, 3 pgs.

⁵⁵ Public record in Proof V-06313, Aerial Photograph Section, vol. 5 of 5, dated 9-13-89, Douglas County, No. 4-14, Cooper Aerial of Nevada.

⁵⁶ CARSON VALLEY AERIAL MAPPING PROJECT, Carson Valley Conservation District, Douglas County, Nevada, Genge Aerial Surveys, 6220 24th Street,

the southwest corner of the Yturbide claim. A final photograph⁵⁷, dated 10-20-38, also illustrates the "loop ditch" with a continuation of the ditch to the north from the northernmost point of the "loop".

Based on the unbiased evidence of the preceding aerial photographs, the State Engineer determines that the "loop ditch" located within the southwest corner of Proof V-06350 existed prior to the eventual parceling of the Allerman (Mott) Ranch. Therefore, the State Engineer does not require the removal of the "loop ditch" and the requested relocation of the ditch into the Allerman Lane ditch right-of-way as set forth in the Novotny objection and the Davis objection⁵⁸ to the Preliminary Order of Determination. The State Engineer further finds that the watering of stock under Claim V-06350 is a *de minimus* use of water and will have no effect on the amount of irrigation water delivered to the other claimants within this ¼ split of Mott Creek. To put it into further perspective, the watering of livestock for the 12 head of horses at 20 gallons per day per head will utilize a maximum of 240 gallons per day. If the ¼ split of Mott Creek is receiving 1 cfs (cubic foot per second) that generates 645,000 gallons of water per day, 240 gallons/645,000 gallons equals 0.037% of the total flow in the stream. Finally, the State Engineer finds that when a large tract of land is parceled into smaller lots, each lot will have characteristics unique to each subdivision. The Yturbide parcel happened to have the "loop ditch" in place prior to said parceling. Therefore, the Yturbide's will have an advantage in stock water availability over other land owners of portions of the original Mott Ranch.

The State Engineer finds that it is not practical to keep all of the ditches charged in order to provide stock water to all of the downstream owners within the Mott Ranch. Water should be stored in ponds for stock watering purposes when a party is not in rotation. The State Engineer further determines that storage of water shall occur only when a claimant is in priority in the rotation schedule.

Sacramento, California, Sheet 4 of 51. Public record in the Office of the State Engineer.

⁵⁷ Public record in the Office of the State Engineer, aerial photograph obtained from the Carson Valley Conservation District office on an unknown date. Photo No. BPB-13-89, dated 10-20-38.

⁵⁸ Transcript, p. 30, public administrative hearing on objections to the Preliminary Order of Determination before the State Engineer, March 7, 2007. (Hereafter Transcript, 3/7/2007).

The final argument regards the rotation schedule and historically irrigated acreage for each of the claimants. Ms. Yturbide testified that "a twelve hour rotation does not work." When each party irrigated under the 25% (¼) schedule, her client had the opportunity to saturate more ground even though the rotation didn't come back for three weeks.⁵⁹ Ms. Yturbide argues that the soil type on the Yturbide land is comprised of soil type no. 642⁶⁰, described as Ophir gravelly sandy loam, 2 to 8 percent slopes, that is granular and better drained with a much lower water holding capacity.⁶¹ Bruce Scott consultant for the Yturbides; further testifies under direct examination by Ms. Yturbide that this soil requires a greater head of water and a longer period of time for the water to be pushed over the "642" soil type.⁶² Review of the map which illustrates the location of the different soil types indicates that the 642 soil covers most of the Yturbide land, all of the Park land, the north and eastern half of the McKay parcel, the north part and eastern 2/3 of the Novotny parcel and the south central and northwest part of the Davis land.

Mr. Scott continued to be directly examined by Ms. Yturbide regarding soil types and their location on the five (5) parcels of land. Mr. Scott states that the northeast corner of the map, also known as the northeast corner of the Davis parcel is comprised of a 555⁶³ soil type, Kimmerling clay loam, clay substratum. The Natural Resource Conservation Service classifies this soil as poorly drained, moderately low to moderately high (0.06 to 0.20 in/hr) capacity to transmit water, a 12 to 24 inch depth to water and subject to occasional flooding.⁶⁴ Mr. Scott testifies that this land is subject to flooding.⁶⁵ Mr. Scott goes on to identify the 622 and 431 soil types on the Davis land as clayier soils with a higher water holding capacity and less permeability.⁶⁶ The 431 soil type is identified as Shalcar family peat.⁶⁷ This soil is very poorly drained with a depth to the water table at zero (0) inches.

⁵⁹ Transcript, 3/7/2007 p. 48.

⁶⁰ USDA/NRCS Soils Data Mart, NV773, Douglas County Area.

⁶¹ Transcript, 3/7/2007 p. 73.

⁶² Transcript, 3/7/2007 p. 76.

⁶³ Transcript, 3/7/2007 p. 76.

⁶⁴ USDA/NRCS Soils Data Mart, NV773, Douglas County Area.

⁶⁵ Transcript, 3/7/2007 p. 77.

⁶⁶ Transcript, 3/7/2007 p. 79.

⁶⁷ USDA/NRCS Soils Data Mart, NV773, Douglas County Area.