IN THE SUPREME COURT OF THE STATE OF NEVADA

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 AUGUST 11, 1992, Appellants, vs. THE STATE OF NEVADA STATE ENGINEER; EDWARD H. GROENENDYKE, TRUSTEE OF THE GROENENDYKE FAMILY TRUST, Respondents.	**Supreme Court No. 67289** Ninth Judicial District Court Case No. 08-CV-0363-E

OPENING BRIEF
OF
APPELLANTS 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 AUGUST 11, 1992

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N.R.A.P. 26.1 DISCLOSURE STATEMENT

The undersigned certifies that Jerald R. Jackson, Trustee of the Jerald R. Jackson Trust, as amended, and Irene M. Windholz, Trustee of the Windholz Trust dated August 11, 1992, are Trustees of Intervivos Trusts with no parent corporations and with no publicly held companies that have an interest in them. Gordon H. DePaoli and Dale Ferguson, of Woodburn and Wedge, have been counsel to Appellants in the District Court since April 28, 2010, and are the only attorneys expected to appear in this Court. Appellants were initially represented in the District Court by George M. Keele, Esq., of Minden, Nevada. Appellants were represented before the Nevada State Engineer by Paul Taggart, of Taggart & Taggart, Carson City, Nevada.

WOODBURN AND WEDGE

Dated: May 12, 2015

By: Gordon H. DePaoli
Gordon H. DePaoli

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I. STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

The District Court obtained jurisdiction pursuant to the provisions of N.R.S. 533.165 when the Nevada State Engineer's Final Order of Determination was filed with the District Court, on October 28, 2008.

B. Jurisdiction of This Court.

The Findings of Fact, Conclusions of Law, Decree and Judgment were entered in this matter on September 29, 2014. At the time, all prior orders entered by the District Court, including its order of December 26, 2013, became final. Notice of Entry of the Judgment was given by mail on October 16, 2014. Appellants' Notice of Appeal was filed and served by mail on November 14, 2014. The appeal is timely, and this Court has jurisdiction over it pursuant to Nev. R. App. Proc. 3A(b)(1) and N.R.S. 533.200.

II. ROUTING STATEMENT

This appeal was docketed in the Supreme Court on December 12, 2014, prior to the issuance and effective date of this Court's December 18, 2014 Order adding Rule 17 to the Nevada Rules of Appellate Procedure. Therefore, this matter is retained by the Supreme Court.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court's finding that the predecessors-in-interest to current owners of lands within an area referred to as "Green Acres" directly diverted water from a spring located in California, "Spring (A)", and placed such directly diverted water to beneficial use on those lands at least prior to 1914 is clearly erroneous.

B. Whether, even if those predecessor owners of Green Acres lands acquired a right to water under the common law of California or Nevada directly from Spring (A), that right was acquired by prescription by the owners of land referred to as the "Berrum-Heritage Ranch" prior to 1949.

C. Whether, in a proceeding initiated under the provisions of N.R.S. 533.090, *et seq.*, to determine rights to water, a court may also grant the holder of a water right access to the lands of another party.

IV. STATEMENT OF THE CASE

The Findings of Fact, Conclusions of Law, Judgment and Decree in this action are the result of a determination, pursuant to the provisions of N.R.S. 533.090 through N.R.S. 533.185, of the relative rights of claimants to waters that flow into the Carson Valley in Douglas County, Nevada from the Eastern Slope of the Carson Range, near the Nevada/California border. Initially, the determination process took place before the State Engineer as provided in N.R.S. 533.090 through 533.160.

Pursuant to N.R.S. 533.140, the State Engineer issued an Abstract of Claims and Preliminary Order of Determination. The Preliminary Order recognized that Appellants ("Jackson") were entitled to vested water rights from Spring (A), Spring (B), Spring (C) and Spring (D) for lands within a portion of the former Berrum-Heritage Ranch. Pursuant to N.R.S. 533.145, Jackson requested clarification on whether the Preliminary Order of Determination established only drain and waste rights from Spring (A) for certain claims related to lands located within an area referred to as Green Acres. Without that clarification, Jackson objected because there was no evidence of a vested right to water from Spring (A) for those properties.

Pursuant to N.R.S. 533.165, the State Engineer issued a Final Order of Determination, which was filed with the Clerk of the District Court. In that Final Order of Determination, the State Engineer determined that certain Green Acres lands were entitled to water from Spring (A) as a direct diversion, and that it was the intent of the Preliminary Order of Determination to describe Spring (A) as "a direct diversion" for those Green Acres properties. 1AA 32.[1]

Pursuant to N.R.S. 533.170, exceptions to the Final Order of Determination were filed with the District Court, and at an April 1, 2009 hearing, the Court

[1] The abbreviation "AA" refers to Appellants' Appendix, which, with the exception of some very large exhibits, might constitute a Joint Appendix. The Appellants' Appendix consists of 5 volumes.

divided the exceptions and objections to the State Engineer's Final Order of Determination into six subparts, Subparts A through F, so that exceptions related to a common water source would be heard together and separate from exceptions to other water sources. 2AA 279. This appeal involves only Subpart E, the "Springs Arising on the West Side of Foothill Road on the Heritage Ranch."

The exceptions filed by Jackson and Respondent Edward H. Groenendyke, Trustee of the Groenendyke Family Trust ("Groenendyke") were directed primarily at the determination that certain of the Green Acres lands were entitled to a direct diversion of water from Spring (A). 2AA 240-247; 300-302. In addition, on September 21, 2012, Groenendyke filed a supplement to the exceptions, and among others, a motion for access to the Jackson lands for purposes of repairing a pipeline from Spring (A). 2AA 311-318. Jackson opposed that motion. 2AA 339-358.

The Court held a pretrial conference in this matter on October 10, 2012, and scheduled a hearing to hear and resolve those exceptions. 2AA 309-310. A field investigation was held on November 7, 2012, and pursuant to N.R.S. 533.170, an evidentiary hearing was held on November 30, 2012 concerning the issues involved in this appeal. 2AA 359-378; 3AA 379-518.

On December 26, 2013, the District Court entered an order resolving the exceptions to the State Engineer's Order of Determination. The Court adopted the

State Engineer's Final Order of Determination as it pertains to Spring (A). 4AA 772. The Court based its findings on several grounds. First, it concluded that a 1905 culture map and aerial photographs taken in 1938, 1939-1940 and 1954 illustrated homogenous vegetation and equivalent vegetative and irrigation patterns within Green Acres and the Berrum-Heritage Ranch. *Id.* 773-774. Second, it determined that certain comingling of water from Spring (A) with water from Spring (D) was not necessary to irrigate the properties, and would constitute a waste of water. *Id.* 773-774. Finally, it concluded that it was possible to divert water from Spring (A) to the Green Acres parcels. *Id.* 775. Based upon those findings, the Court overruled Appellants' exceptions to the Final Order of Determination.

In addition, the Court ordered that "the Jackson Trustees are to allow the Groenendyke Trustees reasonable access to water facilities affecting the Groenendyke property but located on the Jackson property." 4AA 777. Findings of Fact, Conclusions of Law, and Judgment and Decree were entered on September 29, 2014, and this appeal followed.

V. STATEMENT OF FACTS

A. Background.

This appeal arises under the provisions of N.R.S. 533.090, *et seq.*, and involves the determination of relative rights of claimants of "vested water rights"

to various creeks, springs and other sources of water beneficially used in Douglas County, Nevada. Those provisions of Nevada's water law allow the State Engineer, initially, and the District Court, ultimately, to determine the relative rights to the use of that water.

B. The Foothill Road Springs, Green Acres and the Berrum-Heritage Ranch.

This matter involves "Springs Arising on the West Side of Foothill Road on the Heritage Ranch" (the "Foothill Road Springs"). The Foothill Road Springs are referenced in the Final Order as Spring (A)[2], Spring (B), Spring (C) and Spring (D). Those springs are shown on the Unnamed Springs Reference Guide, Figure 1. Add. 2.[3] Spring A originates on and is located in California on National Forest land. 1AA 23-24; 3AA 422. Springs (B), (C) and (D) all originate in Douglas County, Nevada. 1AA 24. The land on which they originate was once known as the "Berrum Ranch," and later became a portion of a larger ranch known as the "Heritage Ranch" (collectively, the "Berrum-Heritage Ranch"). 1AA 13; 215-218. In addition, there are two other water sources involved here, "Unnamed Creek," which receives water from a spring source on property referred to as the "Hill Property," and Miller Creek. 3AA 433; 1AA 226-227; 229.

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[2] Spring (A) is often referred to as "Unnamed Spring (A)" in the District Court's Order and also in the State Engineer's Final Order of Determination.

[3] The abbreviation "Add." refers to the Addendum which is a part of this Brief. The Addendum includes maps, illustrations and statutes relevant to this appeal.

The lands involved here are portions of the Berrum-Heritage Ranch and lands referred to as Green Acres. The Jackson property is the portion of the Berrum-Heritage Ranch located west of Foothill Road.[4] 1AA 13; 218. The Groenendyke property is a portion of the Berrum-Heritage Ranch east of Foothill Road. *Id.* 218. Green Acres is north of the Berrum-Heritage Ranch, and for purposes of this appeal, consists of 19 smaller parcels and are all east of Foothill Road. *Id.*

The Berrum-Heritage Ranch and Green Acres are shown on Figure 4, "Heritage Ranch Place of Use." Add. 4. They are also shown on the map of the entire adjudication.[5] Add. 1. On Figure 4, the Berrum-Heritage Ranch and Green Acres parcels have a number on them which corresponds with the "Proof of Appropriation" filed for that parcel pursuant to N.R.S. 533.125. The Berrum-Heritage Ranch parcels on the west side of Foothill Road include 06342, 06343, 06344 and 06345. The Berrum-Heritage Ranch parcels on the east side of Foothill Road include 08850 (Groenendyke) and 06323 and 06321. Add.4; 1AA 218. The Green Acres parcels include 06322, 06325, 06327, 06328, 06329, 06330, 06331, 06333, 06334, 07486, 09264, 09265, 09266 and 09270. Add. 4; 1AA 218.

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[4] Foothill Road can be seen on Add. 1. It shows only as "Road" on Add. 4.

[5] This map includes a north-south arrow, and when used in combination with Figure 4, Add. 4, is helpful in locating and understanding where these lands are in relation to one another. Those, coupled with Figure 1, Add. 2, also allow the reader to determine the location of these lands in relation to the various springs.

The primary dispute here involves rights to Spring (A). Spring (A) is improved at its source in California with a spring box and two buried pipelines. One pipeline is a 6" pipeline, and the other is a 2" pipeline. Both pipelines take the entire surface flow of Spring (A) south and east across National Forest lands, lands owned by David and Shelia Hill, and then onto the portion of the former Berrum-Heritage Ranch located on the west side of Foothill Road. 2AA 351-353; 3AA 438-443. Once on the Berrum-Heritage Ranch, the "2" Pipeline Diversion" takes the water to the Berrum home for domestic use, and also to the Berrum-Heritage Ranch barn area on the east side of Foothill Road for livestock water. 3AA at 422-423; 442.

Historically, the "6" Pipeline Diversion" split in two directions at a valve which may have been on the Hill property or a portion of the former Berrum-Heritage Ranch. The valve could direct the water to flow east into Unnamed Creek where the water was used to irrigate a portion of the former Berrum-Heritage Ranch owned by Groenendyke, and which is also east of Foothill Road. 1AA 24; 88-89; 3AA 443. The valve could also direct the water to the south where it is commingled with water from Spring (B) and is used to irrigate a portion of the former Berrum-Heritage Ranch on the west side of Foothill Road. 1AA 77. It appears that the valve may have been non-functional for a period of time. Sometime during the pendency of this matter before the State Engineer, the valve

and wooden pipe was replaced to allow water from Spring (A) to again directly reach the Groenendyke property east of Foothill Road. 3AA 442-443; 463-464.

When the valve which allows water to flow to the portion of the Berrum-Heritage Ranch east of Foothill Road is closed, the water can be directed further south where it is commingled with water from Spring (D). 3AA 423; 428; 436. The commingled Spring (A) and Spring (D) water is used to irrigate land on the east side of Foothill Road. *Id.* That water can be directed under Foothill Road and into a diagonal or "bisecting" ditch, and delivered to the "South Green Acres Ditch" for irrigation of Green Acres parcels. 3AA 436-437. It can also be directed under Foothill Road into the Black Bear Trail Ditch where it is used to irrigate portions of the former Berrum-Heritage Ranch owned by Groenendyke and two other parties. Both the Black Bear Trail Ditch and the South Green Acres Ditch terminate in the Fredericksburg Ditch. *Id.* 441. A schematic which illustrates those flows is Figure 2, "Heritage Ranch Spring Area Schematic." Add. 3. The Fredericksburg Ditch is shown on the adjudication map and also on Figure 4.[6] Add. 1; 4.

Water used to irrigate the portions of the former Berrum-Heritage Ranch on the east side of Foothill Road flows in a northeasterly direction. Run-off from the Berrum-Heritage Ranch historically flowed onto the Green Acres lands, and now

[6] On Figure 4, it shows up as "CKSBURG" in the upper left corner.

into the South Green Acres Ditch. 3AA 422. As the State Engineer witness explained, "they irrigate one pasture at a time, capture the water, release it, once the upper pasture is irrigated, and then it goes on down through the system." *Id.*

To a large extent, the subdivision of the Green Acres property and two Nevada cases concerning the nature of rights to return flow from the land of another party were at the heart of the State Engineer's and the District Court's determination of who held vested rights directly from Spring (A). *See, e.g.*, 1AA 54-55; 1AA 29; 3AA 397-398; 4AA 770; 773-774. As a result of those concerns, the District Court, recognizing that "although no water from Unnamed Spring (A) is asserted to have been historically diverted to reach the Green Acres parcels directly, the capability to do so exists today as observed during the site visit and is known to have existed historically based upon the early construction of a wooden pipeline allowing the diversion of water from Unnamed Spring (A) toward the east of Foothill Road, thereby allowing the source water to reach the Green Acre parcels if desired," concluded that the Green Acres parcels would be awarded a vested right directly from Spring (A). 4AA 776; 5AA 791; 943.

The exact date when Spring (A) was first diverted into the 6" and 2" Pipeline Diversions is not known. The State Engineer acknowledges that fact, and also admits that such diversions existed sometime before 1938. 3AA 422; 433-434. The Berrum House appears on the 1904 plain table map. 3AA 453. A buried

pipeline would not appear on the plain table map. *Id.* Dorothy Berrum, born in 1900 and interviewed in 1992, stated that the house was built prior to 1890, and always received its domestic water from Spring (A). 4AA 726-727. In addition, when the new portion of the 6" Pipeline Diversion taking water to the Groenendyke Property east of Foothill Road was installed, it replaced a wooden pipeline. 3AA 463-464.

Without the 2" and 6" Pipeline Diversions in place, water from Spring (A) would have flowed naturally into Unnamed Creek. In that circumstance, the water would have been unavailable for use on the portion of the Berrum-Heritage Ranch west of Foothill Road, and unavailable to nearly all of the Berrum-Heritage Ranch east of Foothill Road. It would have been available to the Green Acres land.

C. The Development of the Berrum-Heritage Ranch and Green Acres.

The settlement and development of the Berrum-Heritage Ranch and Green Acres in the 19th century can be seen through a series of patents and deeds. Those patents and deeds show that Green Acres and the Berrum-Heritage Ranch were settled and developed as separate ranches. 3AA 478-490. They were in separate ownership from prior to 1864 until 1916, when they came into common ownership. 3AA 488. That common ownership was separated in 1930 when they were sold to separate owners as separate ranches. *Id.* 489.

The United States issued land patents in square blocks without regard to topography and other natural features. Four such land patents were issued by the United States to W.H.H. Cary, Edwin R. Cary, Joseph Kirk and William Wyatt. 3AA 521-529. In those patents, the United States conveyed title to property which became Green Acres and the Berrum-Heritage Ranch. After the lands were fully surveyed, a series of eleven deeds, each dated December 10, 1864, show that the recipients of those land patents, and in some instances adjacent landowners under different patents, adjusted the property boundaries between them, from the areas described within the four patents to actually reflect what each had settled and developed on the ground. 3AA 481-482; 4AA 737-761; 764. As of December 11, 1864, the configuration of property owned by W.H.H. Cary was part of Green Acres, and property then owned by Edwin R. Cary was property which became the Berrum-Heritage Ranch. 3AA 487; 4AA 764.

A review of the chain of title for the lands of Edwin R. Cary (the Berrum-Heritage Ranch) and of the lands of William H.H. Cary (Green Acres) shows that at all times from December 11, 1864 through January 24, 1916 the Berrum-Heritage Ranch was owned as a single ranch and separate and apart from the ownership of Green Acres. 3AA 488-489; 530-591; 4AA 592-666. On January 24, 1916, E. Bokelman acquired ownership of both ranches, which was separated again in the same Berrum-Heritage Ranch/Green Acres configuration in 1930.

3AA 488-489. The ranches were separately owned thereafter. 3AA 530-591; 4AA 592-666.

D. Actions of the Owners of the Berrum-Heritage Ranch and Green Acres During the 20th Century.

Because these proceedings did not begin until 1990, the water rights established under the common law for the Berrum-Heritage Ranch and Green Acres were not recognized by or in any particular official governmental act. In the 1960s, in an effort to make their water rights more secure, the owners of Green Acres, the Martins, and the then owner of the Berrum-Heritage Ranch, McGah, each filed applications to appropriate with the Nevada State Engineer. 4AA 667-672.

In 1968, the Martins filed Application Nos. 24525 and 24526. 4AA 667-670. Application 24525 was for water from Miller Creek. *Id.* 667. Miller Creek is north of Spring (A), and provides water to the Scossa Ranch and also to Green Acres. 1AA 51; 226-227. It provides no water to the Berrum-Heritage Ranch. 1AA 226-227. Application 24526 was for water from Unnamed Creek, the creek into which Spring (A) would flow, were it not for the 2" and 6" Pipeline Diversions. That Application for water from Unnamed Creek did not show Spring (A) as the point of diversion of water from Unnamed Creek. The point of diversion shown for Unnamed Creek is on the east side of Foothill Road. 4AA 669.

In 1969, the Heritage Ranch, McGah, filed Application 24919. 4AA 670-671. That Application, which was ultimately permitted and certificated, was for a diversion directly from Spring (A) by way of the 2" and 6" Pipeline Diversions. *Id.* 671. It was for use on the Berrum-Heritage Ranch. *Id.* The remarks section states that "this system has been in existence almost 100 years and has undergone improvements several times." *Id.* 672.

Thus, at nearly simultaneous times, the owners of Green Acres did not claim water directly from Spring (A), and the owner of the Berrum-Heritage Ranch did claim water from Spring (A). Both Applications were permitted in 1969, and later certificated. 4AA 670; 672.

Matt Benson managed the Berrum-Heritage Ranch from 1964 until 1990, and his son managed it thereafter. In a statement given in 1992, he confirms that water from 2" and 6 Pipeline Diversions from Spring (A) was used exclusively for irrigation, domestic and stock water purposes on the Berrum-Heritage Ranch. 4AA 724-725. None of that water was directed to Green Acres. *Id.* Ed Brown, the irrigator on the Berrum-Heritage Ranch for 16 years, confirmed those facts. *Id.* 728. Matt Benson also states that he had spoken to one of the Martins when Application 24526 was pending, and that Martin had confirmed that he was making no claim to water directly from Spring (A). *Id.* 724.

E. Proofs Filed By or On Behalf of Green Acres Land Owners.

When these proceedings began before the State Engineer, he ordered that claimants file proofs of appropriation pursuant to N.R.S. 533.125. None of the Green Acres land owners who filed proofs of appropriation on their own behalf claimed a right to water directly from Spring (A). 4AA 673-723. All of their proofs claimed a right to water from Miller Creek and Unnamed Creek. 4AA 673; 677; 680; 684; 688; 692; 696; 700; 704. Their proofs do recognize that at times water from the 6" Pipeline Diversion was directed into Unnamed Creek necessitating a "split" of Spring (A) water and Unnamed Creek water. *See, e.g.*, 4AA 675-676.

Proofs were filed by the State Engineer under N.R.S. 533.125 on behalf of four Green Acres land owners. Those proofs claimed a right to water from Miller Creek and Unnamed Creek. 4AA 708-723. None of those proofs refer to Spring (A). The only parties who filed proofs claiming vested rights directly from Spring (A) were Jackson, Groenendyke and the Prather Family Trust, whose lands are portions of the Berrum-Heritage Ranch. 1AA 77; 88-89; 67.

F. The Court's Order.

The Judgment and Decree recognizes that Jackson holds vested water rights from Spring (A) (06342); Spring (B) (06343); Spring (C) (06344); and Spring (D) (06345). 5AA 841-844. The water rights are for irrigation, stockwater and domestic uses. It also recognizes that Groenendyke holds vested water rights from

Spring (A) under Proof 08850 for 12.43 acres and from Spring (D) under that same Proof for 25.54 acres. *Id.* 873. The District Court also determined that Green Acres Proofs 06322, 06325, 06327, 06328, 06329, 06330, 06331, 06333, 06334, 07486, 09264, 09265, 09266 and 09270 are entitled to a direct diversion of water from Spring (A). *Id.* 943. That determination was based upon the same rationale and information that the State Engineer used to reach the same conclusion. 5AA 939.

The District Court concluded that culture maps from the U.S. Geologic Survey in 1905 show "homogenous vegetation" on the Berrum-Heritage Ranch and Green Acres and that aerial photographs taken in 1938, 1939-1940 and 1954 "illustrated equivalent vegetative and irrigation patterns" within Green Acres and the Berrum-Heritage Ranch. 5AA 941. Second, he determined that comingling of water from Spring (A) with water from Spring (D) was not necessary to irrigate the properties, and would constitute a waste of water. *Id.* 942. He concluded that it was possible to divert water from Spring (A) to some of the Green Acres parcels, "if desired." *Id.* He found that use of drain and waste water was not assured, and that subdivision of the ranches precluded the ability to irrigate in a manner consistent with historic practices. *Id.* 940-941.

The District Court also ordered that "the Jackson Trustees are to allow the Groenendyke Trustees reasonable access to water facilities affecting the

Groenendyke property but located on the Jackson property." 5AA 944. The specific facilities referred to in the order are not identified. To the extent that the order refers to the valve on the 6" Pipeline Diversion, no evidence was offered to even show that the valve is actually on property owned by Jackson. The legal principle on which the District Court relied in making that order was not stated.

VI. SUMMARY OF THE ARGUMENT

In order to conclude that Green Acres land owners had a vested right to directly divert water from Spring (A), the District Court needed evidence which showed that the predecessors-in-interest to those owners diverted water directly from Spring (A) and applied the water to beneficial use on those lands at least prior to 1914. The evidence the District Court relied on for that conclusion does not support it.

First, the District Court relied upon a 1904 map which would not show a buried pipe, but which did show the Berrum home. Second, he relied upon maps and aerial photographs which show that, at the times the map was made and photographs were taken, Green Acres and the Berrum-Heritage Ranch received similar quantities of water. They show nothing about where the water was coming from. The evidence showed that Green Acres had sources of water independent of Spring (A). Third, he relied on the fact that it was physically possible to get water from Spring (A) to the Green Acres lands, *i.e.*, that if left undiverted, water will

run downhill. Finally, the District Court essentially concluded that the historic commingling of Spring (A) and Spring (D) water constituted "waste" as a matter of law. The evidence showed that Spring (A) and Spring (D) water will eventually reach the same location, regardless of whether they are commingled, and that they are not wasted. None of that evidence supports a legal conclusion that a Green Acres land owner diverted water directly from Spring (A) before 1914.

The evidence did show that Spring (A) has been diverted from its source away from Green Acres and onto the Berrum-Heritage Ranch, where it was used for water in the Berrum home and for irrigation, well before 1914. The two ranches were separately developed and, except for a brief period from 1916 to 1930, were always separately owned. Actions taken by the owners of both in the 1960s support the conclusion that the Green Acres land owner did not claim a direct diversion right to Spring (A) and the Berrum-Heritage Ranch owner did. Furthermore, assuming for the sake of argument that the prior owners of Green Acres somehow acquired rights to use water directly from Spring (A) before 1914, those rights were acquired thereafter by the Berrum-Heritage Ranch through the application of Nevada and California law concerning prescriptive water rights.

Issues related to whether an owner of a water right may access the lands of another person are not issues to be heard and determined in an adjudication under Nevada's water law. Those are matters which must be determined separately

under principles of real property law related to express or prescriptive easements or condemnation. Such a determination must involve all necessary parties. The District Court's order concerning access to the Jackson lands is not supported by any facts or relevant legal principles.

VII. STANDARD OF REVIEW

Pursuant to the provisions of N.R.S. 533.170 and N.R.S. 533.185, the district court must make its own findings and draw its own conclusions. *Vineyard Land & Stock Co. v. Dist. Court*, 42 Nev. 1, 171 P. 166, 172-74 (1918); *Scossa v. Church*, 43 Nev. 407, 409, 187 P. 1004, 1005-06 (1920). Under the provisions of N.R.S. 533.200, appeals from the decree of the district court are taken to the Supreme Court "in the same manner and with the same effect as in civil cases." Therefore, the standard of review here is the same as review of a trial court's decision after a bench trial.

The district court's findings of fact must be supported by substantial evidence, and not be clearly erroneous. *Trident Construction Corp. v. West Electric, Inc.*, 105 Nev. 423, 426, 776 P.2d 1239, 1241 (1989). Substantial evidence is "that evidence which a reasonable mind might accept to support a conclusion." *Bacher v. State Engineer*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (Nev. 2006). A finding is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm

conviction that a mistake has been made." *Union America Mortgage and Equity Trust v. MacDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272 (1981) (citing *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1918)). Where there is no support in the record to support a finding, it will be set aside. *See, Hermann v. Varco-Pruden Buildings*, 106 Nev. 564, 566-67, 756 P.2d 591-92 (1990); *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984). The district court's conclusions of law are reviewed de novo. *Kiefe v. Logan*, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003).

VIII. ARGUMENT

A. The Evidence Does Not Support a Conclusion That Water Was Diverted Directly From Spring (A) and Placed to Beneficial Use on a Green Acres Parcel Prior to 1914.

The proceedings before the State Engineer and the District Court were to determine claims to vested water rights in the water sources, here, Spring (A). A vested water right is a right to use water established prior to the enactment of any statutory process for appropriation of water. In Nevada, that is prior to 1905, and in California, that is prior to 1914.[7] *See, In Re Application of Filippini*, 66 Nev. 17, 22, 202 P.2d 535 (1949); *In Re Waters of Horse Springs*, 99 Nev. 776, 671 P.2d 1131, 1132 (1983); *Duckworth v. Watsonville Water and Light Company*, 158 Cal. 206, 211, 110 P. 927 (1910). In order to establish a valid appropriation of water

[7] The 1914 date is used here because this water source is in California and the direct diversions from Spring (A) through the 6" and 2" Pipeline Diversions take place in California.

under the common law of Nevada and California, the evidence must show that prior to those dates, the water was diverted from its source and applied to beneficial use. *Walsh v. Wallace*, 26 Nev. 299, 327, 67 P. 914 (1902); *Duckworth v. Watsonville Water and Light Co.*, 158 Cal. 206, 211, 110 P. 297 (1910).

In order for the District Court to conclude that the owners of the Green Acres parcels hold a vested right to a direct diversion of water from Spring (A), he needed substantial evidence that predecessors in interest of the owners of the Green Acres parcels had, in fact, diverted water directly from Spring (A) and applied it to beneficial use on the Green Acres parcels at least prior to 1914. Admittedly, in 2012, the evidence on this issue necessarily had to be circumstantial. However, the circumstantial evidence relied upon by the District Court does not support that conclusion.

First, the District Court relied upon a 1904 plain table map. As the State Engineer's witness admitted, this map would not show a buried pipeline. Second, the Court relied upon a 1905 culture map and aerial photography from 1938, 1939-1940 and 1954 which suggested that areas within the Berrum-Heritage Ranch and Green Acres had homogenous vegetation and were equivalently irrigated during those snapshots in time. The fact that the Green Acres parcels and the Berrum-Heritage Ranch illustrate homogenous vegetation and equivalent vegetative and irrigation practice patterns at a particular snapshot in time, says nothing more than

at the time those parcels received similar amounts of water for irrigation purposes. It does not say anything about where the water was coming from.

The evidence showed that the Green Acres parcels had several water sources. They received water from Miller Creek and Unnamed Creek. In addition, they received water from Spring (D) by way of the Diagonal ditch and Black Bear Trail Ditch. They also received water running off (tailwater) of the Berrum-Heritage Ranch lands on the east side of Foothill Road. It is a common practice in the Carson Valley that lands are irrigated by return flows. Water is diverted into ditches or canals, and the water is run over the lands of others until it eventually returns to the river or another diversion canal. The United States District Court for the District of Nevada expressly found that this return flow method of irrigation in the Carson Valley was an efficient irrigation method, and encouraged it. *See, United States v. Alpine Land & Reservoir Company*, 503 F.Supp. 877, 891-92 (D.Nev. 1980) *mod.*, 697 F.2d 851 (9th Cir. 1983). Thus, there is no doubt there was adequate water from sources other than Spring (A) when the map was made and those photographs were taken for Green Acres to show homogenous equivalent vegetative and irrigation patterns with the Berrum-Heritage Ranch.

The State Engineer's and the District Court's concern that under Nevada law there may be no continuing right to drain and waste waters, and that the subdivision of lands made it difficult to irrigate in a manner "completely

consistent" with historic practices, were and are irrelevant. The obligation here was to determine the rights as established under the common law, and to do so in a manner which did not "impair the vested right of any person to the use of water." N.R.S. 533.085. *See, In Re Waters of Manse Spring*, 60 Nev. 280, 288-290, 108 P.2d 911 (1940). Neither the State Engineer nor the District Court had any authority to impair vested rights to Spring (A) established in the 19th and early 20th centuries in order to mitigate conditions which developed in the late 20th and 21st centuries.

The District Court also concluded that the commingling of water from Spring (A) and Spring (D) provided more water than was necessary to irrigate portions of the Berrum-Heritage Ranch, and that comingling of water from Spring (A) with Spring (D) constituted a waste of water under Chapter 533 of the Nevada Water Law, and specifically N.R.S. 533.070.

Allowing Spring (A) water to directly or indirectly commingle with Spring (D) water is not a waste of water, and there is nothing in N.R.S. 533.070 which suggests otherwise. N.R.S. 533.070 limits the amount of water which can be appropriated to that reasonably required for a beneficial use. The appropriation of the Berrum-Heritage Ranch from Spring (A) was limited to the duty of water recognized in the Carson Valley and elsewhere of 4.0 acre feet per acre delivered

to the farm. Water diverted from Spring (A) in excess of that amount does supplement the flow of Spring (D), but that is not "waste."

"Waste" is defined in N.R.S. 533.463(1)(a) as diverting water and retaining it or causing it to be held without making any use of it. The water diverted from Spring (A) was and is used. It was and is used in the Berrum Home and to directly irrigate Berrum-Heritage Ranch lands on the west and east sides of Foothill Road. After being commingled with Spring (D) water, it was and is used to irrigate lands on the east side of Foothill Road, including those in Green Acres.

N.R.S. 533.463 (1)(b) defines "waste" as diverting and conducting the water away from any creek or stream, and allowing the water to run to waste on sagebrush or greasewood land. N.R.S. 533.463(1) expressly provides that irrigation of unimproved pasture is not deemed to be a waste of water. There is no evidence in the record that water from Spring (A) was being allowed to run to waste on sagebrush or greasewood land. Moreover, the water from Spring (A) and Spring (D) will eventually make their way to the very same place, whether Spring (A) is allowed to flow down Unnamed Creek, or is diverted to the south and ultimately commingled with Spring (D). That same place is the Fredericksburg Ditch which is recognized in the Alpine Decree and is used to irrigate other lands in Carson Valley. 3AA 456-458; 473; Add. 1; 4.

Finally, the Court determined that it was and is physically possible to direct water from Spring (A) to the Green Acres parcels. That is true because, if not diverted, water runs downhill. However, in order to establish a vested right, the facts must show more than the physical possibility that land can receive water from a source. They must show that the lands did receive water from that source by reason of a diversion from it, *i.e.*, an application to beneficial use on those lands. Here, it is undisputed that the 2" and 6" Pipeline Diversions divert water from Spring (A) and out of Unnamed Creek where it would naturally flow.

The undisputed evidence shows that Spring (A) has been placed in a springbox and diverted into two buried pipelines at its source for a considerable period of time. The clear purpose of those pipelines was and is to divert that water away from Green Acres, and onto the Berrum-Heritage Ranch. While we do not know the exact date when Spring (A) was first diverted into those pipelines, we know that it was done at a time when wooden pipe was used. We also know that it has provided domestic water to a house which appears on a 1904 map, and which Dorothy Berrum said was built prior to 1890. We know that the Berrum-Heritage Ranch and Green Acres Ranches were separate ranches from 1864 until 1916, and that their common ownership from 1916 to 1930 was separated again in 1930 in the same configuration.

In addition, in the 1960s, the actions of the Martins, as owners of Green Acres, and McGah, as owner of the Berrum-Heritage Ranch, are such that, at nearly simultaneous times, the Martins did not claim water directly from Spring (A), and McGah did. McGah, the Berrum-Heritage Ranch owner, stated in an application filed with the State Engineer at that time that the pipelines had been in place for almost 100 years and had undergone improvements on several occasions.

Lastly, the Green Acres parcel owners themselves did not file any proof of appropriation claiming a right to divert water directly from Spring (A). All of their proofs claimed a right to water from Miller Creek and Unnamed Creek. In addition, proofs filed on behalf of some of those owners pursuant to N.R.S. 533.125 by the State Engineer himself made no claim to a direct diversion right from Spring (A).

If ever there was a case where there is no evidence in support of a trial court's findings, this is that case.

B. Any Direct Diversion Right From Spring (A) Which Owners of Green Acres May Have Had Was Acquired by Prescription by the Berrum-Heritage Ranch Owners Prior to 1949.

Under California law, a prescriptive right to the use of water may be obtained by showing that the use of water is actual, open and notorious, hostile and adverse to the original owner's title, continuous and uninterrupted for five years, and under a claim of title. *Pleasant Valley Canal Co. v. Borror*, 61 Cal.App. 4th

742, 72 Cal. Rptr.2d 1, 29-30 (Cal. App. 5th D. 1998). Until the enactment of an amendment to N.R.S. 533.060(5) in 1949, a prescriptive right to the use of water in Nevada could also be established by uninterrupted adverse use under claim of right, with knowledge, for a period of at least five years. *See, Franktown v. Marlette*, 77 Nev. 348, 353, 364 P.2d 1069 (1961); *Application of Filippini*, 66 Nev. 17, 23, 202 P.2d 535 (1949).

The evidence here, not disputed by the State Engineer, is that the 2" and 6" Pipeline Diversions have been in place at least since sometime between 1904 and 1938. Those Pipeline Diversions are in place today. They diverted Spring (A) away from Unnamed Creek and Green Acres under a claim of right for well over five years before 1949. A Green Acres predecessor in interest had to know of that diversion because, without the diversion, that water would have flowed into Unnamed Creek and downstream to Green Acres. This diversion was made under a claim of right as evidenced by the application filed by McGah and the permit granted by the Nevada State Engineer in 1969.

Therefore, even if there was any evidence to support a conclusion that the Green Acres parcels had a vested right to a direct diversion from Spring (A), that right was lost prior to 1949. It was acquired by prescription by the Berrum-Heritage Ranch owners.

C. A Determination of the Relative Rights of Parties to Water Under N.R.S. §§ 533.090, *et. seq.*, Does Not Encompass the Extent to Which Parties With Water Rights Recognized in the Determination Are Entitled to Enter Lands of Others.

1. Introduction.

In September of 2012, Groenendyke filed a motion which, in part, sought an order for access to Jackson property to repair the 6" Pipeline Diversion at Spring (A). In response, Jackson pointed out that Spring (A) was located in California on National Forest lands, and that, in addition, portions of the pipeline were on property owned by the Hills.

In its Final Order and in its December 26, 2013 Order, the Court ordered "that the Jackson Trustees are to allow the Groenendyke Trustees reasonable access to water facilities affecting the Groenendyke property but located on the Jackson property." The Court did not specifically indicate which facilities it referred to, presumably portions of the pipeline and the valve. In addition, the Court did not support its order with any principle or conclusion of law.

2. The Recognition of a Water Right Is Not a Determination That the Appropriator Has the Right to Enter the Lands of a Third Party.

The provisions of N.R.S. 533.090-533.200 do not provide for a determination of rights one party may have to enter the land of another party in connection with their water rights. The State Engineer is not required to investigate or determine that. Claimants are not required to provide proof of that.

See, e.g., N.R.S. 533.100; N.R.S. 533.115; N.R.S. 533.140. The Court is not required to determine that. N.R.S. 533.185.

In addition, the law is well established that the acquisition of water by appropriation does not authorize, and could not authorize, another person to have access to the lands of either the United States or a third party for purposes of that appropriation. Those rights must be established by an instrument in writing, by prescription, or by condemnation. *See e.g., In Re General Determination of Rights of the Payette River Basin*, 107 Ida. 221, 687 P.2d 1348, 1354-55 (1984); *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081, 1083 (1909); *see also* 1 S. Wiel, Water Rights in the Western State at Sections 221-226, (3rd Ed. 1911); 2 C. Kinney, Irrigation and Water Rights, Sections 770; 972-987 (1912). Nevada law, as evidenced by the provisions of N.R.S. 536.060, *et seq.*, recognizes the fact that the right to enter the lands of another to construct and maintain facilities essential to a water right must be established by real property interests separate and apart from the water right itself. *See* N.R.S. 536.070 authorizing condemnation; *see also* N.R.S. 37.010(1)(e) (ditches, canals, aqueducts declared public use for eminent domain purposes).

Although Groenendyke has a right to water from Spring (A) through the 6" Pipeline Diversion, that right to water does not carry with it a right to access the lands of others for purposes of repairing or replacing the facilities and pipeline. If

they exist, such rights must be established separate and apart from any right to water.

Here, the spring itself, portions of the diversion facilities related to that spring, and a portion of the 6" Pipeline, are located in California on National Forest lands owned by the United States. The right to have such facilities on federal lands and for access to federal lands for their maintenance and repair may be established under complex provisions of federal law. In part, they depend upon the date the National Forest was established, and on the applicable federal statute. There are two federal acts which may apply. One is the Act of July 26, 1866, 43 U.S.C. § 661. The other is the Act of March 3, 1891. 43 U.S.C. §§ 946-949. The continued application of both of those acts was repealed by the Federal Land Policy Management Act of 1976 ("FLPMA"). *See* 43 U.S.C. § 1769. However, FLPMA included savings provisions protecting rights previously acquired under the 1866 and 1891 Acts. *See* 43 U.S.C. § 1701. It is likely that there is a valid right on National Forest lands for the diversion facilities and pipeline as they exist today under either or both of the 1866 and 1891 Acts.

The line also traverses through Douglas County Assessor Parcel No. 1219-26-001-006, owned by David T. Hill and Sheila R Hill. Rights related to use of that property for, among other things, the pipeline were the subject of litigation in a matter entitled *Jerald R. Jackson, et al., vs. David and Sheila Hill*, Case No. 08-

CV-0144 in the Ninth Judicial Court of the State of Nevada in and for the County of Douglas. That action was resolved by settlement on August 5, 2009. As a part of that settlement, Jackson was granted an easement for the benefit of the Jackson property for purposes, among other things, to maintain and improve the pipeline. That easement and that litigation were paid for by Jackson without participation by any other party, including Groenendyke. 2AA 352-357.

The issues related to access to the Jackson property, the National Forest land and the Hill property were not issues properly before the State Engineer or the District Court in a proceeding concerning entry of a judicial decree based upon the State Engineer's Final Order of Determination. Moreover, all of the parties who would be necessary to any such proceeding were not before the District Court. There is nothing in the record which even shows the location of the facilities to which the Order refers, or whose land they are located on.

IX. CONCLUSION

For all of the foregoing reasons, the District Court erred in finding and concluding that the Green Acres land owners had a vested right to directly divert water from Spring (A). Only Jackson, Groenendyke and other successors-in-interest to the Berrum-Heritage Ranch have such vested rights. The District Court also erred in determining access rights to the Jackson property.

Accordingly, the District Court's order must be reversed and remanded with instructions to the District Court to modify the Final Decree to reflect that no Green Acres land holds a vested right to water from Spring (A), and to delete the provision in its order concerning access to the Jackson property.

WOODBURN AND WEDGE

Dated: May 12, 2015

By: Gordon H. DePaoli

Gordon H. DePaoli
Attorneys for Appellants Jerald R. Jackson, Trustee of the Jerald R. Jackson 1975 Trust, as amended, and Irene M. Windholz, Trustee of the Windholz Trust dated August 11, 1992

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,987 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

WOODBURN AND WEDGE

Dated: May 12, 2015

By: Gordon H. DePaoli

Gordon H. DePaoli

ADDENDUM

ADDENDUM

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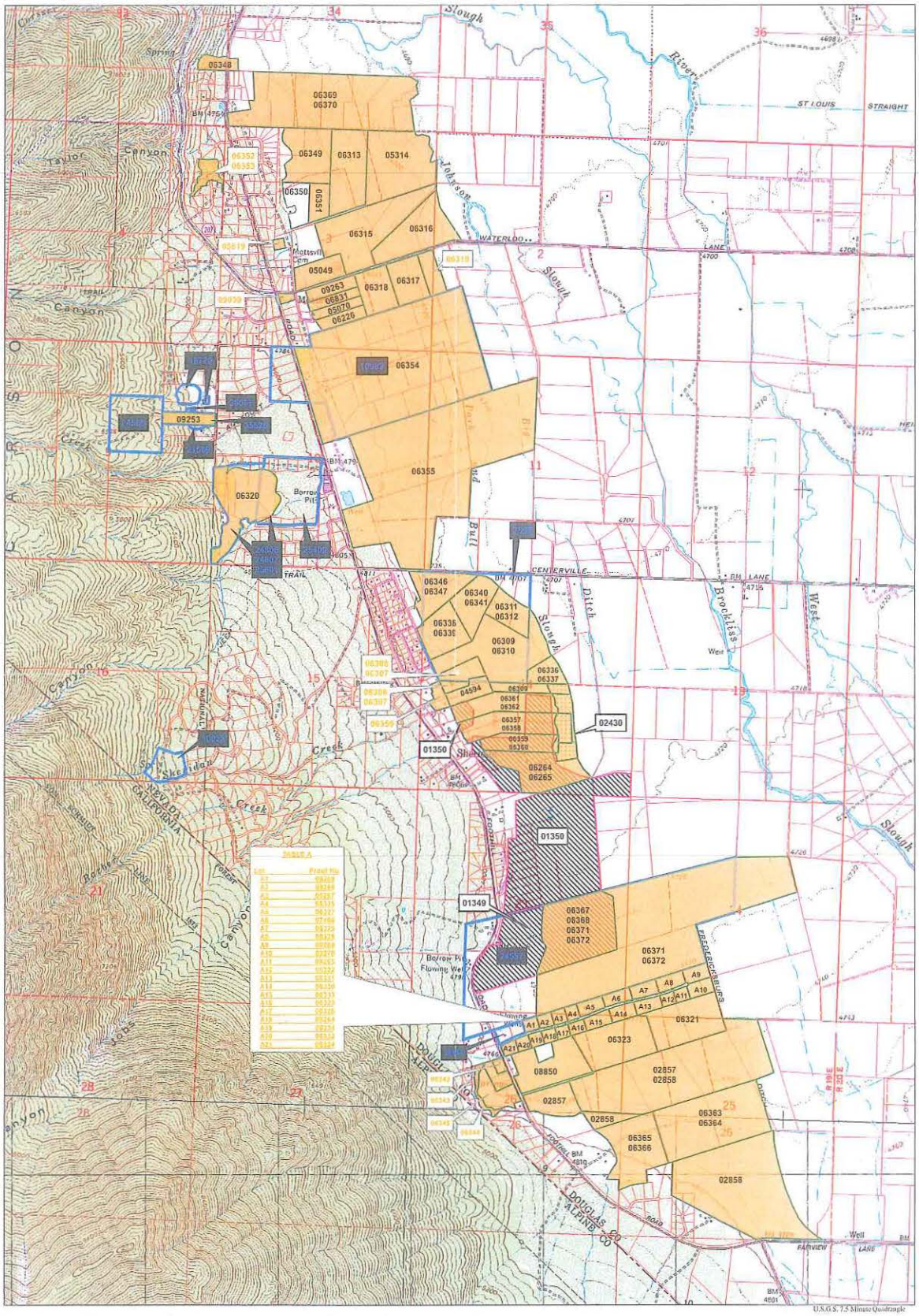
Carson Valley-Mott Creek, Et Al. Adjudication
Douglas County, Nevada



U.S.G.S. 7.5 Minute Quadrangle

State of Nevada
Division of Water Resources
901 S. Stewart St.
Carson City, Nevada 89701

Map Compiled by: R.A. Cozens 4/2/2008

Legend

- Points of Appropriation
- Permit Swamp (Permit V-00438)
- Relief Creek Dozer
- Permits

0 0.25 0.5 1

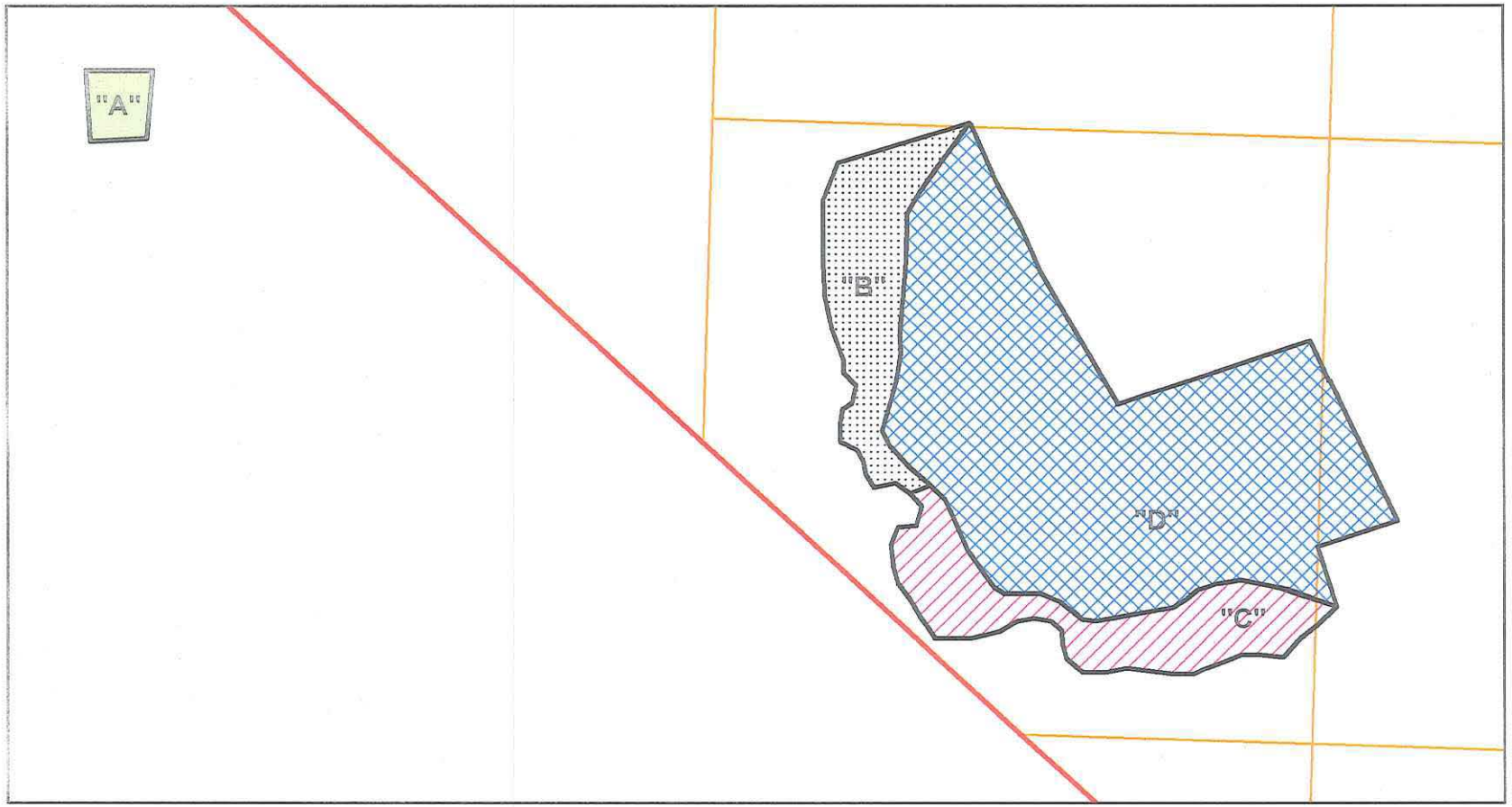
N W E

This map is intended solely for the purpose of illustrating areas in which water rights were allowed by the Final Decree for the Mott Creek Et Al. Adjudication, Douglas County, Nevada and the weather project. This map should not be relied

Add. 001

Figure 1

Unnamed Springs Reference Guide
T.12N., R.19E., Sec. 26, M.D.B.&M.



Legend

- Spring "A"
- Spring "B"
- Spring "C"
- Spring "D"
- Stateline
- Quarter

0 260 520 1,040 Feet

This map is intended for the sole purpose of describing spring names used in the Final Order of Determination for the adjudication of the West Carson Valley.
This map should not be relied upon as a legal description of any specific parcel, or as to the exact location to which any water under any specific Proof of Appropriation or Permit are appurtentant.

Figure 2

HERITAGE RANCH SPRING AREA SCHEMATIC

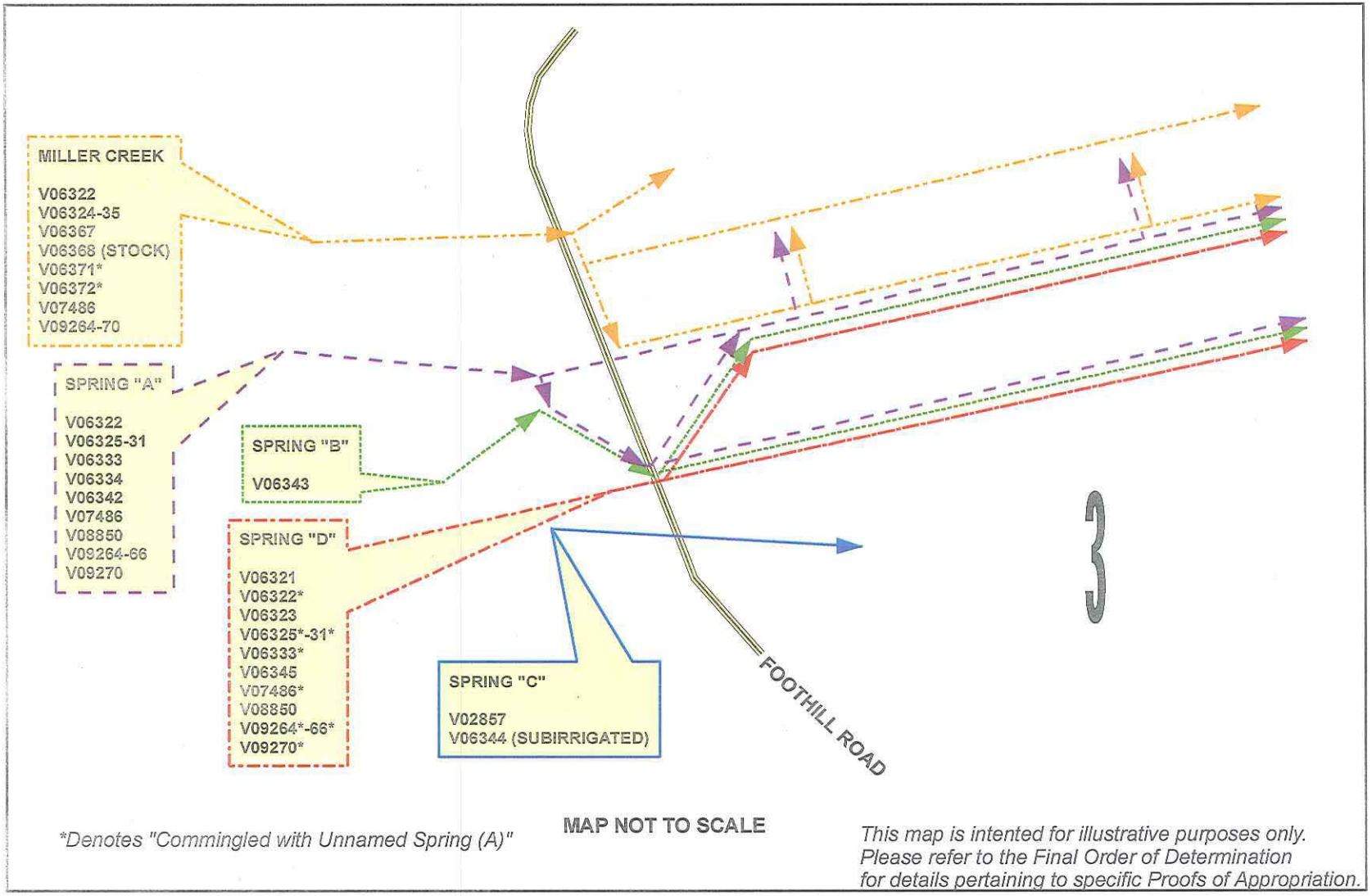
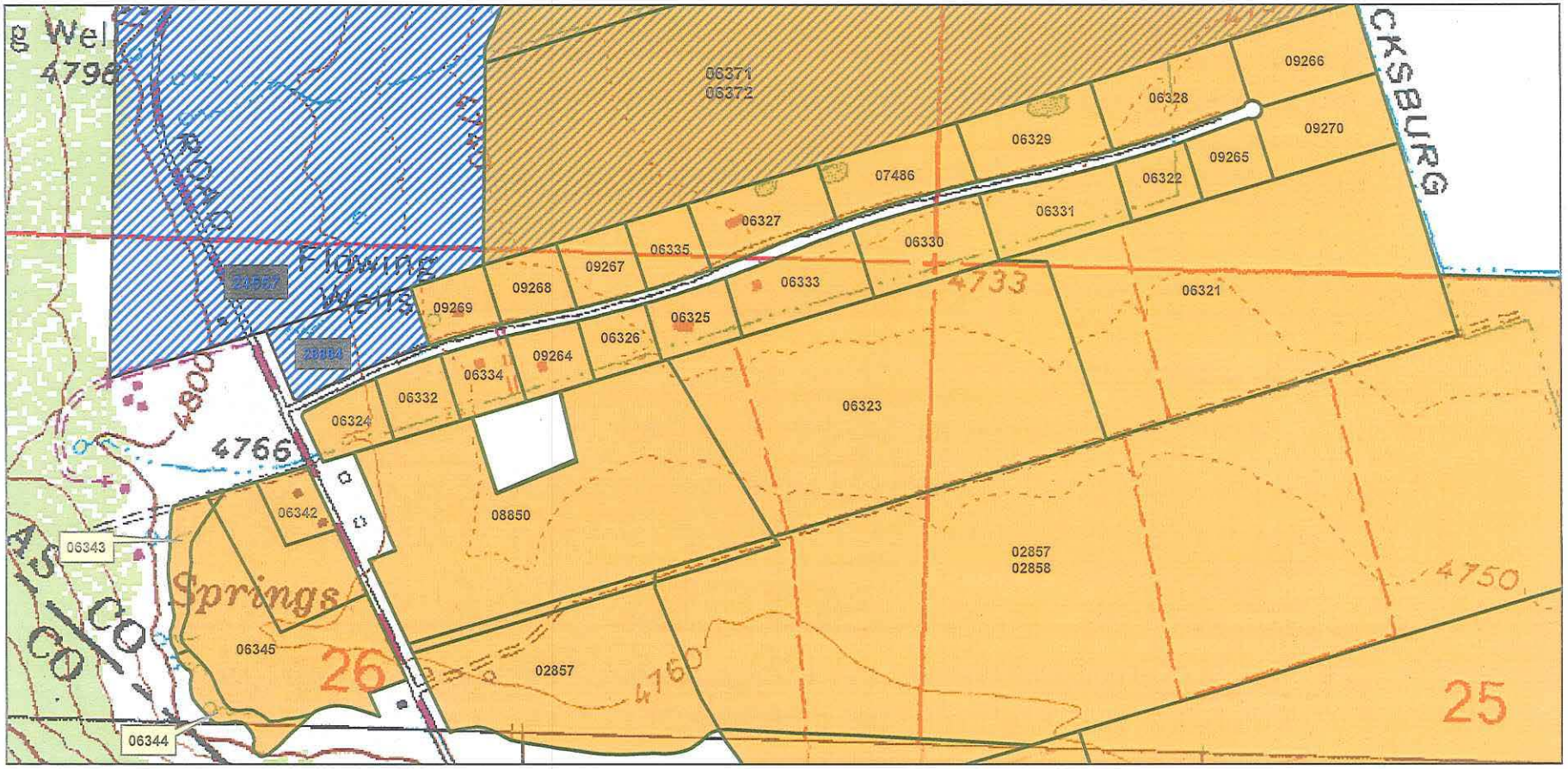


FIGURE 4

HERITAGE RANCH PLACE OF USE



State of Nevada
Division of Water Resources
901 S. Stewart St.
Carson City, Nevada 89701

Map Compiled by: R.A. Cozens
April 2, 2008

0 250 500 1,000 Feet

Legend

Proofs of Appropriation

Permits

211

This map is intended solely for the purpose of illustrating acreage to which water rights were allocated by the Final Order of Determination for the Mott Creek Et Al. Adjudication, Douglas County, Nevada and for no other purpose. This map should not be relied upon as a legal description for any specific Proof of Appropriation or Permit.

NRS 37.010 Public uses for which eminent domain may be exercised.

1. Subject to the provisions of this chapter and the limitations in subsections 2 and 3, the right of eminent domain may be exercised in behalf of the following public uses:

(a) Federal activities. All public purposes authorized by the Government of the United States.

(b) State activities. Public buildings and grounds for the use of the State, the Nevada System of Higher Education and all other public purposes authorized by the Legislature.

(c) County, city, town and school district activities. Public buildings and grounds for the use of any county, incorporated city or town, or school district, reservoirs, water rights, canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city or town, for draining any county, incorporated city or town, for raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels, for roads, streets and alleys, and all other public purposes for the benefit of any county, incorporated city or town, or the inhabitants thereof.

(d) Bridges, toll roads, railroads, street railways and similar uses. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.

(e) Ditches, canals, aqueducts for smelting, domestic uses, irrigation and reclamation. Reservoirs, dams, water gates, canals, ditches, flumes, tunnels, aqueducts and pipes for supplying persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic and other uses, for irrigating purposes, for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.

(f) Byroads. Byroads leading from highways to residences and farms.

(g) Public utilities. Lines for telephone, electric light and electric power and sites for plants for electric light and power.

(h) Sewerage. Sewerage of any city, town, settlement of not less than 10 families or any public building belonging to the State or college or university.

(i) Water for generation and transmission of electricity. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery to generate and transmit electricity for power, light or heat.

(j) Cemeteries, public parks. Cemeteries or public parks.

(k) Pipelines for petroleum products, natural gas. Pipelines for the transportation of crude petroleum, petroleum products or natural gas, whether interstate or intrastate.

(l) Aviation. Airports, facilities for air navigation and aerial rights-of-way.

(m) Monorails. Monorails and any other overhead or underground system used for public transportation.

(n) Video service providers. Video service providers that are authorized pursuant to chapter 711 of NRS to operate a video service network. The exercise of the power of eminent domain may include the right to use the wires, conduits, cables or poles of any public utility if:

(1) It creates no substantial detriment to the service provided by the utility;

(2) It causes no irreparable injury to the utility; and

(3) The Public Utilities Commission of Nevada, after giving notice and affording a hearing to all persons affected by the proposed use of the wires, conduits, cables or poles, has found that it is in the public interest.

(o) Redevelopment. The acquisition of property pursuant to chapter 279 of NRS.

2. Notwithstanding any other provision of law and except as otherwise provided in this subsection, the public uses for which private property may be taken by the exercise of eminent domain do not include the direct or indirect transfer of any interest in the property to another private person or entity. Property taken by the exercise of eminent domain may be transferred to another private person or entity in the following circumstances:

(a) The entity that took the property transfers the property to a private person or entity and the private person or entity uses the property primarily to benefit a public service, including, without limitation, a utility, railroad, public transportation project, pipeline, road, bridge, airport or facility that is owned by a governmental entity.

(b) The entity that took the property leases the property to a private person or entity that occupies an incidental part of an airport or a facility that is owned by a governmental entity and, before leasing the property:

(1) Uses its best efforts to notify the person from whom the property was taken that the property will be leased to a private person or entity that will occupy an incidental part of an airport or facility that is owned by a governmental entity; and

(2) Provides the person from whom the property was taken with an opportunity to bid or propose on any such lease.

(c) The entity that took the property:

(1) Took the property in order to acquire property that was abandoned by the owner, abate an immediate threat to the safety of the public or remediate hazardous waste; and

(2) Grants a right of first refusal to the person from whom the property was taken that allows that person to reacquire the property on the same terms and conditions that are offered to the other private person or entity.

(d) The entity that took the property exchanges it for other property acquired or being acquired by eminent domain or under the threat of eminent domain for roadway or highway purposes, to relocate public or private structures or to avoid payment of excessive compensation or damages.

(e) The person from whom the property is taken consents to the taking.

3. The entity that is taking property by the exercise of eminent domain has the burden of proving that the taking is for a public use.

4. For the purposes of this section, an airport authority or any public airport is not a private person or entity.

[1911 CPA § 664; A 1921, 262; 1937, 351; 1931 NCL § 9153]—(NRS A 1961, 170; 1967, 868, 1228; 1969, 246; 1977, 652; 1983, 2008; 1985, 2080; 1987, 1297; 1993, 361; 1997, 1961, 3365; 1999, 677, 679; 2007, 332, 1375; 2011, 57; 2013, 1957)

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. The State Engineer 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]

ADJUDICATION OF VESTED WATER RIGHTS

NRS 533.090 Determination of relative rights of claimants to water of stream or stream system: Petition; order of State Engineer; determination in order of importance.

1. Upon a petition to the State Engineer, signed by one or more water users of any stream or stream system, requesting the determination of the relative rights of the various claimants to the waters thereof, the State Engineer shall, if upon investigation the State Engineer finds the facts and conditions justify it, enter an order granting the petition and shall make proper arrangements to proceed with such determination.

2. The State Engineer shall, in the absence of such a petition requesting a determination of relative rights, enter an order for the determination of the relative rights to the use of water of any stream selected by the State Engineer, commencing on the streams in the order of their importance for irrigation. As soon as practicable after the order is made and entered, the State Engineer shall proceed with such determination as provided in this chapter.

3. A water user upon or from any stream or body of water shall be held and deemed to be a water user upon the stream system of which such stream or body of water is a part or tributary.

[18:140:1913; 1919 RL p. 3227; NCL § 7905]

NRS 533.095 Notice of entry of order and pendency of proceedings: Preparation; contents; publication.

1. As soon as practicable after the State Engineer shall make and enter the order granting the petition or selecting the streams upon which the determination of rights is to begin, the State Engineer shall prepare a notice setting forth the fact of the entry of the order and of the pendency of the proceedings.

2. The notice shall:

(a) Name a date when the State Engineer or the State Engineer's assistants shall begin the examination.

(b) Set forth that all claimants to rights in the waters of the stream system are required, as provided in this chapter, to make proof of their claims.

3. The notice shall be published for a period of 4 consecutive weeks in one or more newspapers of general circulation within the boundaries of the stream system.

[19:140:1913; 1919 RL p. 3228; NCL § 7906]

NRS 533.100 Investigation of flow of stream and ditches by State Engineer; preparation of surveys and maps.

1. At the time set in the notice, the State Engineer shall begin an investigation of the flow of the stream and of the ditches diverting water, and of the lands irrigated therefrom, and shall gather such other data and information as may be essential to the proper determination of the water rights in the stream.

2. The State Engineer shall:

(a) Reduce his or her observations and measurements to writing.

(b) Execute surveys or cause them to be executed.

(c) Prepare, or cause to be prepared, maps from the observations of such surveys in accordance with such uniform rules and regulations as the State Engineer may adopt.

3. The surveys and maps shall show with substantial accuracy:

(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.

4. The map shall be prepared as the surveys and observations progress, and, when completed, shall be filed and made of record in the office of the State Engineer. Such map for original filing in the Office of the State Engineer shall be on tracing linen on a scale of not less than 1,000 feet to the inch.

[20:140:1913; 1919 RL p. 3228; NCL § 7907]

NRS 533.105 Use of data compiled by United States Geological Survey or other persons; remission of proportionate cost of preparation.

1. If satisfactory data are available from the measurements and areas compiled by the United States Geological Survey or other persons, the State Engineer may dispense with the execution of such surveys and the preparation of such maps and stream measurements, except insofar as is necessary to prepare them to conform with the rules and regulations, as provided in NRS 533.100.

2. If the surveys are executed and maps are prepared and filed with the State Engineer at the instance of the person claiming a right to the use of water, the proportionate cost thereof, as determined by the State Engineer, to be assessed and collected for the adjudication of the relative rights, as provided in this chapter, shall be remitted to the claimant after the completion of the determination; but the map must conform with the rules and regulations of the State Engineer and shall be accepted only after the State Engineer is satisfied that the data shown thereon are substantially correct. Such measurements, maps and determinations shall be exhibited for inspection at the time of taking proofs and during the period during which such proofs and evidence are kept open for inspection in accordance with the provisions of this chapter.

[21:140:1913; 1919 RL p. 3228; NCL § 7908]

NRS 533.110 Notice of commencement of taking of proofs as to rights; time for filing; publication and mailing of notice.

1. Upon the filing of such measurements, maps and determinations, the State Engineer shall prepare a notice setting forth the date when the State Engineer is to commence the taking of proofs as to the rights in and to the waters of the stream system, and the date prior to which the same must be filed. The date set prior to which the proofs must be filed shall not be less than 60 days from the date set for the commencement of the taking of proofs. The notice shall be deemed to be an order of the State Engineer as to its contents. The State Engineer shall cause the notice to be published for a period of 4 consecutive weeks in one or more newspapers of general circulation within the boundaries of the stream system, the date of the last publication of the notice to be not less than 15 days prior to the date fixed for the commencement of the taking of proofs by the State Engineer.

2. At or near the time of the first publication of the notice, the State Engineer shall send by registered or certified mail to each person, or deliver to each person, in person, hereinafter designated as claimant, claiming rights in or to the waters of the stream system, insofar as such claimants can be reasonably ascertained, a notice equivalent in terms to the published notice setting forth the date when the State Engineer will commence the taking of proofs, and the date prior to which proofs must be filed with the State Engineer. The notice must be mailed at least 30 days prior to the date fixed for the commencement of the taking of proofs.

[22:140:1913; 1919 RL p. 3229; NCL § 7909]—(NRS A 1967, 188)

NRS 533.115 Blank forms enclosed with notice; contents of statement. The State Engineer shall, in addition, enclose with the notice to be mailed as provided in NRS 533.110, blank forms upon which the claimant shall present in writing all particulars necessary for the determination of the claimant's right in or to the waters of the stream system, the statement to include the following:

1. The name and post office address of the claimant.
2. The nature of the right or use on which the claim for appropriation is based.
3. The time of the initiation of such right and a description of works of diversion and distribution.
4. The date of beginning of construction.
5. The date when completed.
6. The dates of beginning and completion of enlargements.
7. The dimensions of the ditch as originally constructed and as enlarged.
8. The date when water was first used for irrigation or other beneficial purposes and, if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the dates of reclamation, and the area and location of the lands which are intended to be irrigated.
9. The character of the soil and the kind of crops cultivated, the number of acre-feet of water per annum required to irrigate the land, and such other facts as will show the extent and nature of the right and a compliance with the law in acquiring the same, as may be required by the State Engineer.

[23:140:1913; 1919 RL p. 3229; NCL § 7910]

NRS 533.120 Statements to be certified under oath; no fee for administering or furnishing blank form.

1. Each claimant shall be required to certify to his or her statement under oath. The State Engineer and the State Engineer's assistants authorized to take proofs are hereby authorized to administer such oaths.
2. Oaths shall be administered and blank forms furnished by the State Engineer and the State Engineer's assistants without charge.

[24:140:1913; 1919 RL p. 3230; NCL § 7911]

NRS 533.125 Commencement of taking of proofs; extension of time; determination of rights if claimant neglects or refuses to make proof.

1. The State Engineer shall commence the taking of proofs on the date fixed and named in the notice provided for in NRS 533.110 for the commencement of the taking of proofs. The State Engineer shall proceed therewith during the period fixed by the State Engineer and named in the notice, after which no proofs shall be received by or filed by the State Engineer. The State Engineer may, in his or her discretion, for cause shown, extend the time in which proofs may be filed.
2. Upon neglect or refusal of any person to make proof of his or her claim or rights in or to the waters of such stream system, as required by this chapter, prior to the expiration of the period fixed by the State Engineer during which proofs may be filed, the State Engineer shall determine the right of such person from such evidence as the State Engineer may obtain or may have on file in the Office of the State Engineer in the way of maps, plats, surveys and transcripts, and exceptions to such determination may be filed in court, as provided in this chapter.

[25:140:1913; A 1915, 378; 1919 RL p. 3230; NCL § 7912]

NRS 533.130 Petition to intervene may be filed by interested person not served; contents.

1. Any person interested in the water of any stream upon whom no service of notice shall have been had of the pendency of proceedings for the determination of the relative rights to the use of water of such stream system, and who shall have no actual knowledge or notice of the pendency of the proceedings, may, at any time prior to the expiration of 6 months after the entry of the determinations of the State Engineer, file a petition to intervene in the proceedings.
2. Such petition shall be under oath and shall contain, among other things:
   (a) All matters required by this chapter of claimants who have been duly served with notice of the proceedings; and
   (b) A statement that the intervener had no actual knowledge of notice of the pendency of the proceedings.
3. Upon the filing of the petition in intervention granted by the State Engineer, the petitioner shall be allowed to intervene upon such terms as may be equitable, and thereafter shall have all rights vouchsafed by this chapter to claimants who have been duly served.

[26:140:1913; 1919 RL p. 3230; NCL § 7913]

NRS 533.135 Fees of State Engineer; disposition.

1. At the time of submission of proofs of appropriation, where the necessary maps are prepared by the State Engineer, the fee collected from any claimants must be the actual cost of the survey and the preparation of maps.
2. The State Engineer shall collect a fee of $60 for a proof of water used for watering livestock or wildlife purposes. The State Engineer shall collect a fee of $120 for any other character of claim to water.
3. All fees collected as provided in this section must be accounted for in detail and deposited with the State Treasurer into the Water Distribution Revolving Account created pursuant to NRS 532.210.

[27:140:1913; A 1921, 171; NCL § 7914]—(NRS A 1957, 529; 1975, 713; 1981, 1837; 1985, 720; 1989, 1733; 2013, 1234)

NRS 533.140 Preparation and printing of abstract of proofs; preliminary order of determination; notice of availability of evidence and proofs for inspection; service of notice and preliminary order; State Engineer to be present during period that evidence and proofs are available for inspection.

1. As soon as practicable after the expiration of the period fixed in which proofs may be filed, the State Engineer shall assemble all proofs which have been filed with the State Engineer, and prepare, certify and have printed an abstract of all such proofs. The State Engineer shall also prepare from the proofs and evidence taken or given before the State Engineer, or obtained by the State Engineer, a preliminary order of determination establishing the several rights of claimants to the waters of the stream.
2. When the abstract of proofs and the preliminary order of determination is completed, the State Engineer shall then prepare a notice fixing and setting a time and place when and where the evidence taken by or filed with the State Engineer and the proofs of claims must be open to the inspection of all interested persons, the period of inspection to be not less than 20 days. The notice shall be deemed an order of the State Engineer as to the matters contained therein.
3. A copy of the notice, together with a printed copy of the preliminary order of determination and a printed copy of the abstract of proofs, must be delivered by the State Engineer, or sent by registered or certified mail, at least 30 days before the first day of such period of inspection, to each person who has appeared and filed proof, as provided in this section.
4. The State Engineer shall be present at the time and place designated in the notice and allow, during that period, any persons interested to inspect such evidence and proof as have been filed with or taken by the State Engineer in accordance with this chapter.

[28:140:1913; A 1921, 171; NCL § 7915]—(NRS A 1967, 189; 1969, 1527; 1973, 1478; 1985, 467; 1993, 1700; 1997, 21; 2005, 1092)

NRS 533.145 Objections to preliminary order of determination; form and contents of objection.

1. Any person claiming any interest in the stream system involved in the determination of relative rights to the use of water, whether claiming under vested right or under permit from the State Engineer, may object to any finding, part or portion of the preliminary order of determination made by the State Engineer by filing objections with the State Engineer within 30 days after the evidence and proofs, as provided in NRS 533.140, shall have been opened to public inspection, or within such further time as for good cause shown may be allowed by the State Engineer upon application.
2. Such objections shall be verified by the affidavit of the objector, or the objector's agent or attorney, and shall state with reasonable certainty the grounds of objection.

[29:140:1913; A 1921, 171; NCL § 7916]

NRS 533.150 Hearings of objections to preliminary order of determination: Contents and service of notice; procedure; witnesses; evidence.

1. The State Engineer shall fix a time and place for the hearing of objections, which date must not be less than 30 days nor more than 60 days after the date the notice is served on the persons who are, or may be, affected thereby. The notice may be sent by registered or certified mail to the persons to be affected by the objections, and the receipt therefor constitutes legal and valid proof of service. The notice may also be served by the State Engineer, or by any person, appointed by the State Engineer, qualified and competent to serve a summons in civil actions. Return thereof must be made in the same manner as in civil actions in the district courts of this state.
2. The State Engineer may adjourn hearings from time to time upon reasonable notice to all parties interested. Depositions may be taken by any person authorized to administer oaths and designated by the State Engineer or the parties in interest, and oral testimony may be introduced in all hearings.
3. Witnesses are entitled to receive fees as in civil cases, to be paid by the party calling those witnesses.
4. The evidence in the proceedings must be confined to the subjects enumerated in the objections and the preliminary order of determination. All testimony taken at the hearings must be reported and transcribed in its entirety.

[30:140:1913; A 1915, 378; 1921, 171; NCL § 7917]—(NRS A 1967, 189; 1981, 88; 1989, 406)

NRS 533.155 Daily deposit by each party. The State Engineer shall require daily from each party while engaged in taking evidence on objections a deposit sufficient to pay the cost of reporting and transcribing testimony and to pay any necessary transportation and subsistence expenses of the reporter.

[32:140:1913; A 1921, 171; NCL § 7919]—(NRS A 1957, 530)

NRS 533.160 Entry of order of determination after hearing of objections to preliminary order; legal effect of order; certification, printing and service of order.

1. As soon as practicable after the hearing of objections to the preliminary order of determination, the State Engineer shall make and cause to be entered of record in the Office of the State Engineer an order of determination, defining the

several rights to the waters of the stream or stream system. The order of determination, when filed with the clerk of the district court as provided in NRS 533.165, has the legal effect of a complaint in a civil action.

2. The order of determination must be certified by the State Engineer, who shall have printed as many copies of the order of determination as required. A copy of the order of determination must be sent by registered or certified mail or delivered in person to each person who has filed proof of claim and to each person who has become interested through intervention or through filing of objections under the provisions of NRS 533.130 or 533.145.

[33:140:1913; A 1915, 378; 1921, 171; NCL § 7920]—(NRS A 1967, 190; 1969, 1527; 1973, 1478; 1985, 467; 1993, 1701; 1997, 22; 2005, 1093)

NRS 533.165 Certified copy of order of determination to be filed with county clerk of county where stream system located; procedure when stream system in two or more judicial districts; order setting time for hearing; service and publication of order.

1. As soon as practicable thereafter, a certified copy of the order of determination, together with the original evidence and transcript of testimony filed with, or taken before, the State Engineer, duly certified by the State Engineer, shall be filed with the clerk of the county, as ex officio clerk of the district court, in which the stream system is situated, or, if in more than one county but all within one judicial district, then with the clerk of the county wherein reside the largest number of parties in interest.

2. If such stream system shall be in two or more judicial districts, then the State Engineer shall notify the district judge of each of such judicial districts of his or her intent to file such order of determination, whereupon, within 10 days after receipt of such notice, such judges shall confer and agree where the court proceedings under this chapter shall be held and upon the judge who shall preside, and on notification thereof the State Engineer shall file the order of determination, evidence and transcripts with the clerk of the court so designated.

3. If such district judges fail to notify the State Engineer of their agreement, as provided in subsection 2, within 5 days after the expiration of such 10 days, then the State Engineer may file such order of determination, evidence and transcript with the clerk of any county the State Engineer may elect, and the district judge of such county shall have jurisdiction over the proceedings in relation thereto.

4. If the judge so selected and acting shall retire from office, or be removed from office or be disqualified, for any cause, then the judge of the district court having jurisdiction of the proceedings shall act as the judge on the matter or shall select the judge to preside in such matter.

5. In all instances a certified copy of the order of determination shall be filed with the county clerk of each county in which such stream system, or any part thereof, is situated.

6. Upon the filing of the certified copy of the order, evidence and transcript with the clerk of the court in which the proceedings are to be had, the State Engineer shall procure an order from the court setting the time for hearing. The clerk of such court shall immediately furnish the State Engineer with a certified copy thereof. The State Engineer immediately thereupon shall mail a copy of such certified order of the court, by registered or certified mail, addressed to each party in interest at the party's last known place of residence, and shall cause the same to be published at least once a week for 4 consecutive weeks in some newspaper of general circulation published in each county in which such stream system or any part thereof is located. The State Engineer shall file with the clerk of the court proof of such service by registered or certified mail and by publication. Such service by registered or certified mail and by publication shall be deemed full and sufficient notice to all parties in interest of the date and purpose of such hearing.

[34:140:1913; A 1915, 378; 1931, 148; 1931 NCL § 7921]—(NRS A 1967, 190)

NRS 533.170 Exceptions to order of determination: Filing and service; pleadings; findings of fact, judgment and decree; service of findings of fact and cost bill.

1. At least 5 days prior to the date set for hearing, all parties in interest who are aggrieved or dissatisfied with the order of determination of the State Engineer shall file with the clerk of the court notice of exceptions to the order of determination of the State Engineer. The notice shall state briefly the exceptions taken and the prayer for relief. A copy thereof shall be served upon or transmitted to the State Engineer by registered or certified mail.

2. The order of determination by the State Engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and there shall be no other pleadings in the cause.

3. If no exceptions shall have been filed with the clerk of the court as provided in subsection 1, then on the day set for hearing the court may take further testimony if deemed proper, and shall then enter its findings of fact and judgment and decree.

4. On the day set for hearing, all parties in interest who have filed notices of exceptions, as provided in subsection 1, shall appear in person or by counsel, and the court shall hear the same or set the time for hearing, until such exceptions are disposed of.

5. All proceedings thereunder, including the taking of testimony, shall be as nearly as may be in accordance with the Nevada Rules of Civil Procedure; but the provisions of the Nevada Rules of Civil Procedure and NRS 18.110 shall not apply respecting the service of proposed findings of fact and decree or service and filing of a cost bill, and service shall be made in the following manner. All claimants who have filed exceptions or objections to the final order of determination shall be served with a copy of the proposed findings of fact and decree by serving the attorney who appeared for such claimants in the proceedings. All claimants or water users who have not filed exceptions or objections to the final order of determination shall be served with a copy of the proposed findings of fact and decree by serving a copy thereof on the Attorney General. Such service, in each instance, shall be made at least 30 days before the findings of fact and decree shall be signed by the court, and the court shall not sign any findings of fact therein prior to the expiration of such 30 days. The cost bill shall be prepared and filed with the clerk of the court wherein the proceedings are pending, and it shall not be necessary to serve any of the exceptors, claimants or appropriators or their attorneys with a copy of the cost bill.

[35:140:1913; A 1915, 378; 1921, 171; 1927, 334; NCL § 7922]—(NRS A 1969, 95)

NRS 533.175 Employment of experts by court. For further information on any subject in controversy the court may employ one or more qualified persons to investigate and report thereon, under oath, subject to examination by any party in interest as to his or her competency to give expert testimony thereon.
[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]

NRS 533.180 Court may refer case to State Engineer for further evidence. The court may, if necessary, refer the case or any part thereof for such further evidence to be taken by the State Engineer as it may direct, and may require a further determination by the State Engineer, subject to the court's instructions.
[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]

NRS 533.185 Entry of judicial decree; delivery and filing of final judgment. After the hearing the court shall enter a decree affirming or modifying the order of the State Engineer. Within 30 days after the entry of final judgment by the district court, or if an appeal is taken, within 30 days after the entry of the final judgment by the appellate court or within 30 days after the entry of the final judgment after remand, the clerk of the court issuing the final judgment shall:
1. Deliver to the State Engineer a certified copy of the final judgment; and
2. Cause a certified copy of the final judgment to be filed in the office of the county recorder in each county in which the water adjudicated is applied to beneficial use and in each county in which the water adjudicated is diverted from its natural source.
[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]—(NRS A 1995, 436)

NRS 533.190 Costs: Assessment by court; entry of charges on assessment roll; collection and disposition of money.
1. At any time in the course of the hearings, the court may, in its discretion, by order assess and adjudge against any party such costs as it deems just and equitable or may so assess the costs in proportion to the amount of water right standing allotted at that time, or the court may assess and adjudge such costs and expenses in its final judgment upon the signing, entry and filing of its formal findings of fact, conclusions of law and decree adjudicating the water rights against any party as it deems just and equitable, or may so assess the costs in proportion to the amount of water right allotted and decreed in the final judgment.
2. After the making, entry and filing by the court of the first findings of fact, conclusions of law and decree made, entered and filed by the court in any such water adjudication as distinguished from the first proposed findings of fact, conclusions of law and decree, the court shall assess all costs and expenses against the loser or losers, in any and all subsequent proceedings in any such water adjudication.
3. If costs are assessed or allowed as provided for in this section and in NRS 533.170 and allotted, the State Engineer, within 60 days after such filing and entry, as above described, shall certify to the boards of county commissioners of the respective counties wherein the stream system is situate either the amount of acreage set forth in the order of determination to which water has been allotted, or the respective water rights against which such costs have been assessed by the court, and the charges against each water user in accordance with the court's judgment and allocation of costs. Upon receipt of the certificate from the State Engineer by the board of county commissioners, the board of county commissioners shall certify the respective charges contained therein to the county assessor of the county in which the land or property served is situated. The county assessor shall enter the amount of the charge on the assessment roll against the claimant's property or acreage served.
4. The proper officer of the county shall collect the assessment as other assessments are levied and collected, and the assessment is a lien upon the property so served and must be collected in the same manner as other assessments are collected, but such costs must be collected in equal installments over 2 fiscal years.
5. When the assessments are collected, the person collecting the assessments shall transmit the money collected to the State Treasurer at the time that person transmits other assessments collected by him or her as provided by law, and the State Treasurer shall deposit the money in the Adjudication Emergency Account provided for in NRS 532.200, out of which costs and expenses must be paid in the manner provided by law.
[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]—(NRS A 1991, 1783; 1995, 220)

NRS 533.195 Powers of successor judge; inapplicability of NRS 3.180.
1. Whenever a judge before whom a proceeding for the adjudication of a stream system is pending and not yet completed shall cease to be such judge from any cause whatsoever, his or her successor, to whom such proceeding may be assigned or a part of whose duty it becomes to preside in such proceeding, may do all things in and about such adjudication that may be necessary and proper, and may hear and decide all matters in connection therewith or relating thereto and make all orders, decisions, findings of fact, conclusions of law, judgments, decrees, and do all things necessary to complete the adjudication of such stream system to the full extent and the same as though he or she had been the presiding judge in such proceeding from the commencement thereof.
2. NRS 3.180 shall not apply to such stream system adjudication proceedings.
[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]

NRS 533.200 Appeal from decree to Supreme Court: Procedure; service of notice of appeal. [Effective through December 31, 2014, and after that date unless the provisions of Senate Joint Resolution No. 14 (2011) are approved and ratified by the voters at the 2014 General Election.] Appeals from such decree may be taken to the Supreme Court by the State Engineer or any party in interest in the same manner and with the same effect as in civil cases, except as to the following matters. Notice of appeal shall be served upon the attorneys of record for claimants who have filed exceptions or objections to the final order of determination of the State Engineer as provided in NRS 533.170, and all claimants or water users who have not filed exceptions or objections to the final order of determination or appeared in the

cause by an attorney shall be served with a copy of notice of appeal by the service of a copy thereof on the Attorney General as their process agent.

[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]

NRS 533.200 Appeal from decree to appellate court: Procedure; service of notice of appeal. [Effective January 1, 2015, if the provisions of Senate Joint Resolution No. 14 (2011) are approved and ratified by the voters at the 2014 General Election.] Appeals from such decree may be taken to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution by the State Engineer or any party in interest in the same manner and with the same effect as in civil cases, except as to the following matters. Notice of appeal shall be served upon the attorneys of record for claimants who have filed exceptions or objections to the final order of determination of the State Engineer as provided in NRS 533.170, and all claimants or water users who have not filed exceptions or objections to the final order of determination or appeared in the cause by an attorney shall be served with a copy of notice of appeal by the service of a copy thereof on the Attorney General as their process agent.

[Part 36:140:1913; A 1915, 378; 1931, 413; 1937, 327; 1931 NCL § 7923]—(NRS A 2013, 1786, effective January 1, 2015, if the provisions of Senate Joint Resolution No. 14 (2011) are approved and ratified by the voters at the 2014 General Election)

NRS 533.463 Unlawful diversion and waste of water during irrigating season; 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.

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

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

[1:48:1889; C § 430; RL § 4721; NCL § 8006] + [2:48:1889; C § 431; RL § 4722; NCL § 8007]—(NRS A 1967, 609; 1983, 352)—(Substituted in revision for NRS 533.530)

NRS 536.060 Construction of ditch or flume: Execution and recording of certificate; commencement and completion of work.

1. Any person or persons desiring to construct and maintain a ditch or flume within any one or more of the counties of this state shall make, sign and acknowledge, before a person entitled to take acknowledgments of deeds, a certificate, specifying:

(a) The name by which the ditch or flume shall be known; and

(b) The names of the places which shall constitute the termini of such ditch or flume.

2. Such certificate shall be accompanied with a plat of the proposed ditch or flume, and shall be recorded in the office of the county recorder of the county or counties within or through which such ditch or flume is proposed to be located. The record of such certificate and plat shall give constructive notice to all persons of the matters therein contained.

3. The work of constructing such ditch or flume shall be commenced within 30 days of the time of making the certificate above mentioned, and shall be continued with all reasonable dispatch until completed.

[1:100:1866; B § 3852; BH § 362; C § 425; RL § 4710; NCL § 7997]

NRS 536.070 Examination and survey of private land; condemnation; appeal from findings of appraiser.

1. Any person or persons proposing to construct a ditch or flume under the provisions of NRS 536.060 to 536.090, inclusive, shall have the right to enter upon private lands for the purpose of examining and surveying the same.

2. Where such lands cannot be obtained by the consent of the owner or owners thereof, so much of the same as may be necessary for the construction of the ditch or flume may be appropriated by such person or persons after making compensation therefor, as follows. Such person or persons shall select one appraiser, and the owner or owners shall select one, and the two so selected shall select a third. In case the owner or owners shall from any cause fail, for the period of 5 days, to select an appraiser as herein provided, then the appraiser selected by the person or persons proposing to construct the ditch or flume shall select a second appraiser, and the two so selected shall select a third. In either case the three selected shall, within 5 days after their selection, meet and appraise the lands sought to be appropriated, after having been first duly sworn by a person entitled to administer oaths, to make a true appraisement thereof, according to the best of their knowledge and ability.

3. If such person or persons shall tender to such owner or owners the appraised value of such land, they shall be entitled to proceed in the construction of the ditch or flume over the lands so appraised, notwithstanding such tender may be refused; but such tender shall always be kept good by such person or persons.

4. An appeal may be taken by either party from the findings of the appraisers to the district court of the county within which the lands so appraised shall be situated, at any time within 10 days after such appraisement.

[2:100:1866; A 1869, 129; B § 3853; BH § 363; C § 426; RL § 4711; NCL § 7998]

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Woodburn and Wedge and that on the 12th day of May, 2015, I electronically filed the foregoing with the Clerk of the Court using the Supreme Court of Nevada Electronic Filing system, which will send notification of such filing to the following attorneys of record via their email addresses:

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