No. 11-16470, 11-16475, 11-16482

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PYRAMID LAKE PAIUTE TRIBE OF INDIANS and
UNITED STATES OF AMERICA,
Plaintiffs-Appellees,

v.

STATE OF NEVADA, DEPARTMENT OF WILDLIFE and
NEVADA WATERFOWL ASSOCIATION,
Respondents-Appellants,

and

NEVADA STATE ENGINEER,
Defendant-Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANSWERING BRIEF OF THE UNITED STATES

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OPINION BELOW

These consolidated appeals seek review of the May 11, 2011 order of the district court (Honorable Lloyd D. George), which vacated in part Ruling #5759 of the Nevada State Engineer. The order is published as *United States v. Alpine Land*

& Reservoir Co., 788 F. Supp. 2d 1209 (D. Nev. 2011), and is reprinted in the Nevada Waterfowl Association's Excerpts of Record (ER) at 1-16.[1]

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court

The U.S. District Court for the District of Nevada had jurisdiction to review the State Engineer's ruling pursuant to the final decrees in *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), *aff'd as modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983), and *United States v. Orr Water Ditch Co.*, In Equity, Docket No. A-3 (D. Nev. Sept. 4, 1944) *(Orr Ditch* Decree). *See United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1011 (9th Cir. 1999) (Nevada federal district court has exclusive jurisdiction over disputes arising under the *Alpine* and *Orr Ditch* decrees); *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1218 n.2 (9th Cir. 1989). The district court also had jurisdiction under 28 U.S.C. §§ 1331 and 1345.[2]

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[1] The United States identifies the Appellants' Excerpts of Record in the same manner that they do: ER for the Nevada Waterfowl Association's excerpts; SER for the State Engineer's excerpts; and NER for the Nevada Department of Wildlife excerpts. The Joint Excerpts of Record of the United States and the Tribe, filed by the Tribe, are identified as JER.

[2] One of the Appellants, the Nevada Waterfowl Association, contends (Br. 22-28) that the Pyramid Lake Paiute Tribe lacks standing to sue. That is immaterial (continued...)

B. Jurisdiction of this Court

The district court entered a final order as to all parties on May 11, 2011. Clerk's Record (CR) 62. Timely notices of appeal were filed by the Nevada State Engineer (CR 63; 9th Cir. No. 11-16470), the Nevada Department of Wildlife (CR 65; 9th Cir. No. 11-16475), and the Nevada Waterfowl Association (CR 68; 9th Cir. No. 11-16482). *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

The Nevada Division of Wildlife (NDOW) and the Nevada Waterfowl Association (NWA) each filed applications with the Nevada State Engineer to transfer irrigation water rights in the federal Newlands Reclamation Project to wetlands for use as wildlife habitat. These water rights are governed by the federal *Alpine* Decree, which provides that when irrigation water rights are transferred to a different manner of use, only the portion of the per-acre water allocation – called a water duty – that is consumed by the irrigated crops may be transferred. In such a

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[2](...continued)
to the action brought by the United States, which due to administrative oversight filed a timely protest against only one of the three water rights transfer applications at issue in these appeals. In any event, as we demonstrate *infra*, Part I, the district court correctly held that the Tribe has standing based on its allegation that the State Engineer's decision would injure its interests in obtaining water for Pyramid Lake, the principal feature of the Tribe's reservation.

circumstance, the portion of the water duty that is not consumed, because it flows over the land or returns to the water table and river or irrigation system, may not be transferred. The State Engineer concluded, however, that the use of water to maintain wetlands for wildlife purposes constituted an irrigation manner of use and allowed the transfer of the full water duty. The questions on appeal are:

1. Whether the district court correctly held that the Tribe has standing to seek review of the State Engineer's ruling, based on the Tribe's assertion that the relief it seeks would reduce the demand for diversions of Truckee River water into the Newlands Project and increase the Truckee River flows into Pyramid Lake, the central feature of the Tribe's reservation.

2. Whether the district court correctly held that the State Engineer erred in approving a full-duty transfer of water rights because the applicants sought to change the manner of use of the water rights from irrigation to the maintenance of wetlands for wildlife purposes.

STATEMENT OF THE CASE

In this case, the United States and the Tribe, collectively, challenge a ruling of the State Engineer approving three applications to transfer irrigation water rights in the Newlands Project, a federal reclamation project in Nevada. The applications seek to transfer the water rights to an area in the Project called the Carson Lake and

Pasture, in order to restore and maintain its wetlands for use by migratory waterfowl and other wildlife. The part of the Newlands Project where these water rights are located obtains its water primarily from the Carson River, but when Carson River flows are insufficient to satisfy the water rights therein, the Project diverts supplemental water from the Truckee River. The Truckee River is the principal source of water for Pyramid Lake, the central feature of the Tribe's reservation. Historically, the Project's diversion of water from the Truckee River sharply lowered the water level in Pyramid Lake and caused the near-extinction of two species of fish in the lake, which are currently listed and protected under the Endangered Species Act. The challenges to the transfer applications here, if upheld, would have the effect of reducing the demand for diversions from the Truckee River to the Newlands Project and allow for increased flows to Pyramid Lake. The applications here are presented as a test case that will determine whether several thousand acre-feet of water are eligible for transfer.

The challenges to the applications are based on a provision in the *Alpine* Decree, the decree that confirmed the water rights at issue and that governs their management. That provision, Administrative Provision VII, bars the transfer of the non-consumptive use portion of an irrigation water right – the portion that is not absorbed by the plants but that flows across the ground or seeps into the water

table – when an irrigation water right is transferred to another use. The purpose of the provision is to retain within the irrigation system the non-consumptive use portion of the water right, which is available to other irrigators and thus enhances irrigation efficiency.

The State Engineer approved the transfer of the non-consumptive use portion of the water duty based fundamentally on his factual finding that the use of water to maintain wetlands at Carson Lake and Pasture is an irrigation use because the water would be used to grow plants to provide food and habitat for wildlife. The district court vacated that part of the Engineer's ruling, based on the court's conclusions that: (1) the *Alpine* Decree uses the term "irrigation" to refer to the use of water for productive agricultural purposes; (2) the Nevada water code statutorily defines the use of water to maintain wetlands as a "wildlife purpose"; (3) the transfer applicants, the NDOW and the NWA, have the right to administer Carson Lake and Pasture for wildlife purposes only; and (4) all the water applied to the wetlands would be used consumptively, contrary to the purpose of Administrative Provision VII of keeping the non-consumptive use portion within the existing agricultural irrigation system.

The district court thus reversed the State Engineer's approval of the applications to the extent he approved the transfer of the non-consumptive water

duty. The effect of the district court's ruling is to allow the transfer of the water rights at issue at a rate of 2.99 acre-feet per acre, instead of the full duty of 3.5 acre-feet per acre.[3]

STATEMENT OF FACTS

A. The Newlands Project

1. The Project and the Water Right Decrees

The basic facts about the Newlands Project are set forth in multiple opinions of this Court. *See, e.g., United States v. Bell*, 602 F.3d 1074 (9th Cir. 2010); *Alpine Land & Reservoir Co.*, 291 F.3d 1062 (9th Cir. 2002); *United States v. Orr Water Ditch*, 256 F.3d 935 (9th Cir. 2001); *see also Nevada v. United States*, 463 U.S. 110 (1983). The Department of the Interior's Bureau of Reclamation (Reclamation) administers the Project, which diverts water from the Truckee and Carson rivers in Nevada to provide water for irrigation. Since 1926, the Truckee-Carson Irrigation District (TCID) has operated the Newlands Project under contract with the United States. Beneficial rights to the use of Project water are held by individual landowners pursuant to contracts with the Department of the Interior.

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[3] Additional details pertaining to the course of proceedings below are sufficiently set forth in the Appellants' opening briefs. They are also briefly addressed below in the discussion of the State Engineer's ruling and the district court's decision. *See infra*, pp. 16-22.

The Newlands Project diverts water from the Truckee River into the Truckee Canal, which transports Truckee River water to Lahontan Reservoir on the Carson River where the water can be stored. (Water from the Truckee Canal itself is used to irrigate lands in the "Truckee Division" of the Project.) The combined waters of the Truckee and Carson in Lahontan Reservoir provide water for irrigation in the "Carson Division" of the Project. *See Orr Water Ditch*, 256 F.3d at 938.

Water rights at the Newlands Project are governed by two federal court decrees. Water rights in both the Truckee and Carson divisions are governed by the *Orr Ditch* Decree, which awarded the United States the right to divert a specified amount of water from the Truckee River for irrigation of lands in the Project and for storage in Lahontan Reservoir, with a priority date of July 2, 1902. *See United States v. Orr Water Ditch Co.*, In Equity, Docket No. A3 (D. Nev. Sept. 4, 1944). Water rights in the Carson Division are also governed by the *Alpine* Decree, which awarded the United States the right to divert and store the entire flow of the Carson River as it reaches Lahontan Dam, also with a priority date of July 2, 1902. *See Alpine Land*, 503 F. Supp. 877. The *Alpine* Decree also confirmed other water rights to the Carson River, upstream of Lahontan Reservoir and the Project.

2. The Truckee River and Pyramid Lake

The Truckee River terminates in and is the main source of water for Pyramid Lake. Pyramid Lake is "widely considered the most beautiful desert lake in North America." *Nevada*, 463 U.S. at 115. It is the central feature of the Pyramid Lake Paiute Tribe Reservation and it provides habitat for two species of fish listed under the Endangered Species Act, the Lahontan cutthroat trout and the cui-ui. The Newlands Project's diversions of water from the Truckee River adversely affected the size and ecology of the lake and are largely responsible for the threats to the lake's fish. *See id.* at 119 n.7.

The United States is required by court order and by statute to ensure that water diversions from the Truckee River to the Newlands Project are limited to those waters necessary to serve valid water rights of Project water users. *See* Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, Title II, Pub. L. No. 101-618, §§ 202, 209, 104 Stat. 3294, 3317 (Nov. 16, 1990) (Settlement Act); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973). Consistent with this obligation, Interior Department regulations set forth operating criteria and procedures (OCAP) for the Project in order to "maximize the use of Carson River waters to meet water requirements on the Newlands Project and conserve Truckee flows so as to make as much water

available to Pyramid Lake as possible." *Churchill County v. Norton*, 276 F.3d 1060, 1067 (9th Cir. 2001) (internal quotations and citation omitted).

3. Lahontan Valley Wetlands

The transfer applications at issue in these appeals propose to transfer water rights from irrigated crop land in the Carson Division of the Project to wetlands that support migratory waterfowl, shore birds, and other wildlife in an area called the "Carson Lake and Pasture." The Carson Lake and Pasture is part of a larger area generally referred to as the Lahontan Valley wetlands, which lie at the former terminus of the Carson River. The Lahontan Valley wetlands include the Stillwater National Wildlife Refuge, the Stillwater Wildlife Management Area, wetlands on the Fallon Paiute-Shoshone Indian Reservation on the eastern side of the valley, and the Carson Lake and Pasture wetlands on the valley's southern side. The Carson Lake and Pasture and the Stillwater National Wildlife Refuge are on lands owned by the United States. *See* Truckee-Carson Pyramid Lake Settlement Act, P.L. 101-618, Title II (Nov. 16, 1990).

Prior to the construction of the Newlands Project, an estimated 150,000 acres of wetland habitat lay at the end of the Carson River. JER 14. The Project, however, altered the natural hydrologic regime in the Lahontan Valley wetlands by impounding in Lahontan Reservoir the large springtime flows of water that had

created and fed those wetlands. After the Project's construction, the only water that reached the wetlands was water not consumed by Project water users. This included water delivered to but not used by crops, seepage from irrigation canals, return flows (referred to collectively as drain water), and spills from Lahontan Reservoir. JER 15-16. As operations of the Project changed over time, the volume of drain water flowing into the Lahontan Valley wetlands declined, causing a reduction in the wetland habitat and associated migratory bird and wildlife populations. Nevertheless, the wetlands provide important migration and breeding habitat in the winter for numerous species of migratory birds, including waterfowl and shore birds. JER 17-23.

4. Carson Lake and Pasture

The Carson Lake and Pasture comprises some 22,000 acres that include a mix of irrigated pasture, submerged wetlands and lake area, and other areas subject to inundation. JER 499, 503. The wetlands portion of the area includes an open marsh with areas of standing water no more than two feet deep, and generally less than 18 inches deep. JER 327-328.

Until 1980, TCID managed the entire area, which is owned by the United States, as a community pasture with livestock grazing as the dominant use. JER 27-30. In that year, TCID and the NDOW entered into an agreement with a private

foundation that provided for an active program to restore and maintain the lake and wetland portion of the area. The foundation agreed to fund improvements to the area's water management and distribution infrastructure; TCID agreed that half of the water entering the area would be allocated for the maintenance of wildlife marsh areas, with the other half allocated to livestock grazing; and the NDOW agreed to actively manage the area for wildlife use. JER 8-12.

Today, the NDOW manages the wetlands portion of Carson Lake and Pasture under a management agreement with Reclamation. The agreement gives the NDOW "[t]he right to develop, manage, and administer such lands for the purposes of conservation, rehabilitation and management of wildlife, its resources and habitat, and the purposes of operating and maintaining a wildlife management area and public use thereof." JER 27. The ultimate plan is to transfer ownership of the area from the United States to the State, and an agreement to make that transfer is in place. Under the transfer agreement, the NDOW will manage Carson Lake and Pasture in a manner consistent with, among other things, the U.S. Fish and Wildlife Service's management of the Stillwater National Wildlife Refuge. JER 1-4.

5. Transfers of Water Rights to the Lahontan Valley Wetlands and the *Alpine* Decree

In 1990, Congress authorized the Secretary of the Interior, in conjunction with the State of Nevada and other parties, to acquire water rights for the Lahontan Valley wetlands. Settlement Act, P.L. 101-618, Title II, § 206(a). Pursuant to that authority, the U.S. Fish and Wildlife Service has acquired water rights from willing sellers, mainly in the Carson Division of the Newlands Project, and has applied to the State Engineer to transfer the eligible portion of those water rights to wetlands at Stillwater National Wildlife Refuge or to wetlands on the Fallon Paiute-Shoshone Indian Reservation. *See United States v. Alpine Land & Reservoir Co./Churchill County v. Ricci*, 341 F.3d 1172, 1175-77 (9th Cir. 2003).

The United States' applications to transfer Project irrigation water rights to the Lahontan Valley wetlands have sought to transfer the consumptive use portion of the irrigation water duty (2.99 acre-feet per acre).[4] *Id.* at 1178; JER 500-501. As the *Alpine* Decree recognizes, the irrigation water duty on the Project consists of both a consumptive use portion – the part taken up by the crop through a process known as evapotranspiration – and a non-consumptive use portion – the portion that

[4] The United States has reserved the right to transfer the non-consumptive use portion, in the event it is determined in federal court that the *Alpine* Decree allows for such transfer.

flows across the land or that seeps down through the soil below the roots to the water table. JER 512 (*Alpine* Decree, Findings of Fact VIII). The *Alpine* Decree sets the "net consumptive use"[5] for irrigation of lands within the Newlands Project at 2.99 acre-feet per acre per year, which is based on the amount of water required to grow alfalfa. *Id.* The non-consumptive use portion varies depending on factors such as the type of soil and slope. The water duty for the water rights in the bottomlands at issue in these appeals is 3.5 acre-feet per acre per year, with a non-consumptive use portion of .51 acre-feet per acre.[6] *Id.*

The distinction between the consumptive and non-consumptive portion of the water duty is important because the *Alpine* Decree, in Administrative Provision VII, provides that "[c]hange of manner of use applications from use for irrigation to any

[5] "Net consumptive use" refers to the consumptive use of water by a crop decreased by the estimated contribution by rainfall toward the production of irrigated crops. *See Alpine Land*, 503 F. Supp. at 888. For ease of reading, we refer herein simply to the "consumptive use" portion of the water duty, except when applying the specific terminology of the *Alpine* Decree.

[6] Water duties for benchlands in the Project (versus the Project bottomlands at issue here) are 4.5 acre-feet per acre per year, with a non-consumptive use portion of 1.51 acre-feet per acre. Water duties for irrigation of lands upstream of Lahontan and outside the Project range from 4.5 to 9.0 acre-feet per acre, with a consumptive use of 2.5 acre-feet per acre, so that the non-consumptive use ranges from 2.0 to 6.5 acre-feet per acre. *Alpine Land*, 503 F. Supp. at 890-891.

other use shall be allowed *only for the net consumptive use* of the water right as determined by this decree." JER 50-51, 517-51 (emphasis added).

B. The Transfer Applications and State Engineer Ruling #5759

The three applications addressed in Ruling #5759 are Application 71775, filed in 2004 by the NDOW, and Applications 73444 and 73574, filed in 2005 by the NWA. The NWA applications both seek to transfer the full water duty of 3.5 acre-feet per acre on a combined total of 7.38 acres, for a total of 25.83 acre-feet of water annually. The NDOW application seeks to transfer the non-consumptive use portion (.51 acre-feet per acre) of water rights on 74.70 acres, water rights for which the NDOW previously transferred the consumptive use portion (2.99 acre-feet per acre) to Carson Lake and Pasture, for a total of 38.10 acre-feet of water annually. ER 135.

The Tribe protested all three applications. ER 99-100, 108-109. The United States protested only Application 71775 by the NDOW. ER 101. The United States failed to file timely protests of the NWA applications due only to administrative oversight. The only basis for the protests that remains at issue here is that the applications involve a change in the manner of use of the water rights and thus, under Administrative Provision VII of the *Alpine* Decree, only the consumptive use portion may be transferred. That would reduce the amount of water that could be

transferred in the NWA applications to 2.99 acre-feet per acre and require denial in its entirety of the NDOW application, which sought to transfer only the non-consumptive portion of .51 acre-feet per acre.

In Ruling #5759, the State Engineer denied the protests. *See* ER 132-143. The Engineer found that "substantial evidence was provided to support a determination that the use of water for the provision of food and habitat for migratory wildlife is a beneficial use of water that can be described as irrigation." ER 142. For that conclusion, the Engineer relied primarily on witnesses for the NDOW and the NWA who testified that the water was distributed through conveyance structures to the wetlands in a controlled manner to provide food for wildlife. ER 137-140.

The Engineer concluded that the proposed transfers would not violate the *Alpine* Decree. He based that conclusion on one sentence in the district court opinion issued contemporaneously with the entry of the decree that described "Carson Pasture" as "actually irrigated." ER 141. The Engineer also concluded that the transfers would not violate state law. The Engineer found inapplicable a provision of the Nevada water code, N.R.S. § 533.023, which defines "wildlife purposes" to include "the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." The Engineer reasoned that "just because a definition exists which provides that the maintenance

of wetlands can fall under the definition of wildlife purposes does not preclude that lands irrigated for wildlife purposes could not fall under the definition of irrigation." *Id.* The Engineer recognized that another provision in the Nevada water code, N.R.S. § 533.030, which provides that recreation is a beneficial use of water, could encompass wildlife. ER 140. But he concluded that "just because bird watching and hunting take place [at Carson Lake and Pasture] does not mean it is not irrigation." *Id.* The State Engineer thus granted the applications. ER 143.

C. District Court Proceedings

The district court vacated the State Engineer's ruling to the extent that it concluded that the change applications did not propose a change in the manner of use of the water rights awarded under the *Alpine* Decree.

1. The Tribe's Standing to Sue

The district court first addressed its jurisdiction to hear the Tribe's petition for review of the Engineer's ruling. The district court's concern over its jurisdiction arose from two decisions of this Court, issued in 2010, which addressed the Tribe's standing to invoke the jurisdiction of the *Alpine* and *Orr Ditch* decree courts to obtain review of the State Engineer's approval of certain groundwater appropriations in the Truckee River basin. 788 F. Supp. 2d at 1210 (ER 2). This Court recognized that the *Alpine* and *Orr Ditch* courts, as federal district courts,

have authority to review decisions of the State Engineer only as they pertain to rights confirmed in the decrees. Although groundwater rights are not encompassed within the decrees, the Court concluded that the Tribe had standing to bring suit because it had plausibly alleged that the State Engineer's approval of the groundwater appropriations would adversely affect the Tribe's rights confirmed under the *Orr Ditch* Decree. *See United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010); *United States v. Alpine Land & Reservoir Co.*, 385 Fed. Appx. 770 (9th Cir. 2010).

In this case, the Tribe does not contend that its decreed rights (which are agricultural irrigation rights on the reservation) would be affected by the State Engineer's decision. The district court determined, however, that this case is distinguishable from the circumstances in this Court's 2010 decisions because, here, the water rights proposed for transfer, which are the subject of the State Engineer's decision, *are* decreed water rights. 788 F. Supp. 2d at 1218 (ER 6). The court thus held that the Tribe established its standing to sue based on its allegation that the State Engineer's approval of the transfer of the full water duty for those decreed

rights would adversely affect the lower Truckee River and Pyramid Lake. 788 F. Supp. 2d at 1214 (ER 8).[7]

2. The Merits

Turning to the merits, the district court examined "whether the proposed use of the water" in the transfer applications "is an irrigation use under the *Alpine* Decree." 788 F. Supp. 2d at 1215 (ER 10). The court found the Engineer gave "scant consideration to any aspect of the final *Alpine* Decree," having referenced only the district court decision accompanying the decree, which described Carson Pasture as "actually irrigated." *Id.* at 1216 (ER 10). The court rejected the Engineer's reliance on this language, finding that – contrary to the Engineer's ruling – the language "tends to suggest that the proposed use in the present matter is *not* irrigation" because "[u]nlike the present matter, the irrigation underlying the *Alpine* Decree's observation was agricultural." *Id.* (ER 11)

Undertaking its own analysis of the *Alpine* Decree, the district court found that the decree "references irrigation extensively," and that all such references in the

[7] The court concluded that it had jurisdiction over the United States' petition based on the government's statutory and regulatory obligations to restrict the diversion of its decreed Truckee River water rights for the Newlands Project to only the amount permitted by the *Alpine* and *Orr Ditch* decrees. *Id.* The United States' standing is self-evident and is not challenged in these appeals.

decree and the accompanying district court opinion pertain to the use of water for productive agriculture purposes on farmland and pasture. *Id.* at 1216-1217 (ER 11-13). These include: (1) references to the water duty as "the amount required to properly irrigate the farmlands"; (2) identification of lands within the Project that were susceptible to irrigation as "cultivable lands" and "pasture"; (3) description of irrigation as necessary "to make these lands productive," or for "crop productivity," or "for the production of valuable crops"; and (4) numerous references to historic irrigation practices. *Id.* The court concluded that "[t]aken as a whole, the *Alpine Decree's* references to irrigation establish that the only irrigation use contemplated by the *Decree* was for agriculture, whether for productively growing valuable cash crops or for pasture lands." *Id.* at 1217 (ER 13).

The court also reasoned that the *Alpine* Decree did not rest on "fine distinctions" but rather on "practical considerations." *Id.* The court concluded that, under this "practical and common-sense approach," the "best description of the proposed use of the water is established by the State Engineer's finding 'that the NDOW has the right to develop, manage and administer the Carson Lake and Pasture area for the purposes of conservation, rehabilitation and management of wildlife, its resources, and habitat.'" *Id.* at 1218 (ER 14) (quoting Ruling #5759 at 5

(ER 136)). The court concluded: "This proposed use of the water is for wildlife purposes."*Id.*

The court also found that this result was compelled by Nevada's water code, which statutorily defines "wildlife purposes" to include "the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." Nev. Rev. Stat. § 533.023. The court concluded that "[a] straight-forward reading of this statute," when combined with the Engineer's findings about the NDOW's use of Carson Lake and Pasture "permits only the conclusion that NDOW must use the water for wildlife purposes, including the maintenance of wetlands, rather than for irrigation." *Id.*

In sum, the court held that, as used in the *Alpine* Decree, irrigation "refers to the application of water to farmland for pasture or for the production of valuable crops." *Id.* It further concluded that, as established by Nevada's statute, "the watering of wildlife and establishment of wetlands and other wildlife habitats is a wildlife purpose." *Id.* (ER 15). The court thus held that "the applicants' proposed use of water is for wildlife purposes," and that the applicants could transfer only the consumptive use portion of the water duty of 2.99 acre-feet per acre. *Id.*

The court then held, in the alternative, that even if the proposed use should be described as irrigation, the *Alpine* Decree still would permit only the transfer of the

consumptive use portion of the water duty. The court explained that the purpose of allowing transfer of only the consumptive use amount was so that "'water that has been allowed in the duties for purposes of irrigation coverage could not then be changed to a consumptive use and disappear from the return flows to other water right lands or the river.'" *Id.* (quoting *Alpine Land*, 503 F. Supp. at 890). The court found that "all water applied [to the Carson Lake and Pasture wetlands] will be used consumptively" and concluded that "[s]uch a change from non-consumptive irrigation use to consumptive irrigation use violates the *Alpine Decree*." *Id.*

The court thus vacated Ruling #5759 to the extent it held that the applications did not propose a change in the manner of use of the decreed water rights. The court reversed the grant of Application Nos. 71755 and 73574 to the extent it approved the transfer of the non-consumptive use water duty of 0.51 acre-feet per acre. The court reversed in its entirety the grant of Application No. 73444, which requested to transfer only the non-consumptive use water duty. *Id.* at 1219 (ER 15-16).

STANDARD OF REVIEW

It is typically said that decisions of the State Engineer are prima facie correct, and the burden of proof is on the party challenging the decision. Nev. Rev. Stat. § 533.450(10); Administrative Provision VII, Final Decree, *United States v. Alpine Land & Reservoir Co.*, D-183-BRT (D. Nev. 1980) (JER 50-51, 517-518). And this

Court upholds the Engineer's findings of fact if they are supported by substantial evidence. *United States v. Alpine Land & Reservoir Co*, 340 F.3d 903, 922 (9th Cir. 2003). This case, however, turns on questions of federal and state law. This Court reviews interpretations of the federal *Alpine* and *Orr Ditch* decrees de novo. *United States v. Orr Water Ditch Co.*, 914 F.2d 1302, 1307 (9th Cir. 1990). This Court reviews the district court's conclusions of law de novo. *Orr Water Ditch*, 256 F.3d at 945. And although this Court considers the State Engineer's interpretations of Nevada statutes "persuasive," they are not controlling. *United States v. Truckee-Carson Irrigation District*, 429 F.3d 902, 905 (9th Cir. 2005) (internal quotations omitted).

SUMMARY OF THE ARGUMENT

This is a test case that will determine whether several thousand acre-feet of non-consumptive use water used for agricultural irrigation in the Carson Division of the Newlands Project may be removed from that irrigation system and transferred for use in maintaining wetlands in the Carson Lake and Pasture. The district court correctly held that Administrative Provision VII of the *Alpine* Decree, which prohibits the transfer of the non-consumptive use portion of the irrigation water duty to any other manner of use, bars such transfers because the water proposed for transfer will be used for wildlife purposes, which is a different manner of use than

irrigation.

1. The district court correctly held that the Pyramid Lake Paiute Tribe has standing to seek review of the State Engineer's ruling in the federal *Alpine* Decree Court. The Tribe and the United States protested the applications based on their view that approval of the transfer of the non-consumptive use portion of the water rights in question would allow the applicants to receive water to which they are not entitled under the *Alpine* Decree and Nevada law, to the detriment of the lower Truckee River and Pyramid Lake. If the Engineer's approval of the transfer of the non-consumptive use portion of the water duty is reversed, the non-consumptive use portion of the water duties will remain available to serve the agricultural irrigation needs of the Project, which should reduce the need for supplemental diversions of water from the Truckee River. The Tribe has thus alleged an injury caused by the Engineer's ruling that will be redressed by the ruling's reversal. As such, it has met the requirements for standing.

2. The district court correctly held that Administrative Provision VII of the *Alpine* Decree bars the transfer of the non-consumptive use portion of the irrigation water duty in these applications. The court correctly based that holding on its finding that, under the *Alpine* Decree and Nevada law, the use of water to

maintain wetlands at the Carson Lake and Pasture is a change in the manner of use of the irrigation water right to use for wildlife purposes.

The language of the *Alpine* Decree compels such a finding because the decree uses the term "irrigation" repeatedly, and solely, in reference to farmland and pasture, and to productive agriculture. The district court decision issued contemporaneously with the *Alpine* Decree likewise uses the term "irrigation" to refer to the use of water for productive agricultural purposes. And the purpose of Administrative Provision VII, which is to retain the non-consumptive use water in the irrigation return flows that supply water to other irrigators, would be subverted by interpreting it to allow the transfer of the non-consumptive use portion of the water duty to Carson Lake and Pasture. That is because the Carson Lake and Pasture is not located within that irrigation regime, and because the district court found that the wetlands in the Carson Lake and Pasture make consumptive use of all the water delivered to them.

Nevada law also compels the conclusion that the use of water to maintain wetlands at Carson Lake and Pasture is not an irrigation manner of use. By statute, the Nevada water code contains a specific definition of the use of water for "wildlife purposes," which includes the use of water for the "maintenance of wetlands." The water code distinguishes water rights used for "wildlife purposes"

from water rights used for other purposes. For example, it specifically provides for the payment of lower application fees for water rights used for wildlife purposes. It also allows agricultural water rights to be temporarily used for wildlife purposes only after necessary approvals are obtained from the State Engineer.

Accordingly, under the *Alpine* Decree and Nevada law, the use of water to maintain wetlands at the Carson Lake and Pasture is not an irrigation manner of use. Administrative Provision VII of the decree thus bars the transfer to the Carson Lake and Pasture wetlands of the non-consumptive use portion of the irrigation water duty. The district court's decision reversing the State Engineer's grant of the transfer applications in this regard should be affirmed.

ARGUMENT

I. The Tribe had standing to petition for review of the State Engineer's ruling.

The district court correctly held that the Tribe has standing to invoke the *Alpine* Decree Court's jurisdiction to review the State Engineer's ruling. Notably, only the NWA, and not the State Engineer, appeals this ruling, and its arguments lack merit. Moreover, while the Tribe's standing is relevant to the challenge to the NWA's two applications, which the United States did not protest due to administrative oversight, jurisdiction plainly exists with respect to the NDOW

application which the United States *did* protest. Thus this Court may proceed to consider the district court's substantive ruling in this test case regardless of whether the Tribe has standing.

"[T]he irreducible constitutional minimum of [Article III] standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also DBSI/TRI IV Ltd. Partnership v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006). The plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. There must be a "causal connection between the injury and the conduct complained of," such that the injury is fairly traceable to the action challenged. *Id.* And it must be "likely, as opposed to merely speculative," that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotations omitted).

The Tribe satisfies the requirements for standing here. The State Engineer's ruling causes a concrete, particularized, and imminent injury to the Tribe. By allowing the transfer of the full irrigation water duty of 3.5 acre-feet per acre, the ruling maintains a higher level of demand for water in the Carson Division of the Project than would exist if only the consumptive use portion of the water right of 2.99 acre-feet per acre were transferred. That higher level of demand has the corresponding effect of requiring the diversion of more water from the Truckee

River into the Project than would be required if the .51 acre-feet per acre non-consumptive use portion of the water right was not transferred. The higher levels of flows into the Project result in lower flows to Pyramid Lake, causing the Tribe injury. The district court's vacatur of that portion of Ruling #5759 redresses that injury by allowing only the transfer of the 2.99 acre-feet per acre, reducing the need for Truckee River flows. And while the amount of water in question in the applications addressed in this particular case is small, the district court's decision sets a standard for future similar transfers that could involve a significant amount of water. NWA specifically stated that its applications were brought as a "test case," and declared that more than 4,800 additional acre-feet of water, constituting the non-consumptive use portion of prior water rights transfers, could be transferred to Lahontan Valley wetlands if the State Engineer approved the transfer of the full water duty. JER 132, 275.

The NWA contends (Br. 24-25, 26-27) that the State Engineer's decision does not prevent a reduction in the demand for water within the Newlands Project. The NWA argues that even if the per acre duty allowed under the *Alpine* Decree is reduced from 3.5 acre-feet to 2.99 acre-feet, the duty under the *Orr Ditch* Decree remains at the full water duty level of 3.5 acre-feet per acre, so that the .51 acre-feet per acre water duty will have to be satisfied by the Truckee River water. This

argument is confounding. Under the district court's decision, the transfer applicants may receive only 2.99 acre-feet per acre of water for the wetlands in the Carson Lake and Pasture, with the balance remaining in the irrigation system. If the NWA is arguing that it may nevertheless receive 3.5 acre-feet per acre under the *Orr Ditch* Decree, that argument – which goes to the merits of the district court's decision – is waived because it was not made before the State Engineer or the district court.[8] *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) (argument made for the first time on appeal is waived).

To the extent the NWA is suggesting that all of the .51 acre-feet per acre of non-consumptive use water duty may be needed to serve the remaining agricultural irrigation needs in the Project, that argument fails. It may be that there is not a one-to-one correlation between the .51 acre-feet per acre reduction in the transferred rights water duties and the reduction in diversions required from the Truckee River. But if the State Engineer's ruling is upheld, the NWA and NDOW plan to transfer thousands of acre-feet of non-consumptive use water to Carson Lake and Pasture. The NWA cites no authority for the proposition that maintaining demand in the Carson Division of the Project for this significant amount of water, while removing

[8] Moreover, such an argument would be contrary to the principle established in both decrees and in the Newlands Project OCAP that the Truckee River is only a supplemental source of supply to the Carson Division of the Project.

it from the agricultural irrigation system, will not cause the demand for Truckee River water to remain higher than it would if transfer of only the consumptive use portion is allowed. In fact, such a contention is contradicted by the State Engineer's brief (p. 26), which argues that allowing the transfer of only the consumptive use amount of 2.99 acre-feet per acre would yield a "windfall" to the Tribe.

Finally, the transfer of the non-consumptive use portion of the water duty to the Carson Lake and Pasture requires delivery of that water to the downstream end of, and last user in, the irrigation system, thus *removing* water from the return flows that support other irrigators and potentially *increasing* the demand for Truckee River water. The district court, in fact, found as a factual matter that the water proposed for application to wetlands at Carson Lake and Pasture will all be used consumptively. *See* 788 F. Supp. 2d at 1218 (ER 15). The NWA does not contend that this finding is clearly erroneous. The Tribe, therefore, has met its burden to demonstrate an injury from the State Engineer's decision sufficient to establish its standing in this case.

II. The district court correctly held that when irrigation water rights under the *Alpine* Decree are transferred for the maintenance of wetlands for wildlife, only the net consumptive use amount may be transferred.

As the district court correctly held, the language of the *Alpine* Decree, the district court opinion accompanying the decree, and the purpose of Administrative

Provision VII in the decree all compel the conclusion that the decree allows the transfer of the full irrigation water duty only when the water will continue to be put to productive agricultural use, for growing crops or for pasture. In addition, Nevada law defines the maintenance of wetlands to be a wildlife purpose, not irrigation. Thus, the proposed use of the irrigation water rights that the applicants seek to transfer here – to maintain wetlands at Carson Lake and Pasture for wildlife purposes – constitutes a change in the manner of use of the irrigation water rights. Accordingly, as the district court correctly held, the *Alpine* Decree bars the transfer of the .51 acre-feet per acre non-consumptive use portion of the water duty.

A. Under the *Alpine* Decree, the use of water to maintain wetlands for wildlife is not an irrigation use.

As the district court correctly held, Administrative Provision VII of the *Alpine* Decree contemplates that any use other than continued use for agricultural irrigation constitutes a "change in the manner of use" for which only the net consumptive use portion of the water right may be transferred. This conclusion is compelled by the plain language of the decree, the district court's opinion accompanying the decree, and the purpose of the administrative provision.

1. The *Alpine* Decree's Administrative Provision VII

This case turns on the meaning of Administrative Provision VII of the *Alpine* Decree. That provision requires that applications for changes in the place of diversion, place of use, or manner of use of decreed water rights shall be directed to the Nevada State Engineer, with appeals of the Engineer's decision being heard by the *Alpine* Decree court. As relevant here, the provision declares: "Change of manner of use applications from use for irrigation to any other use shall be allowed only for the net consumptive use of the water right as determined by this Decree."[9] JER 50-51, 517-518.

The purpose of the provision was explained by the decree court in its reported decision issued at the time the *Alpine* Decree was entered. By permitting only the consumptive use portion of the water duty to transfer, "[w]ater that has been allowed in the duties for purposes of irrigation coverage could not then be changed to a consumptive use and disappear from the return flows to other water right lands or the river." *Alpine Land,* 503 F. Supp. at 893. As the court recognized,

[9] This language is from the *Alpine* Decree as clarified and amended by the district court's order of September 29, 1986, which corrected an error in the original language. The original language also limited the amount of water that could be transferred for change of *place* of use applications but, as the decree court noted in correcting the decree, this language did not express the intention of the court as explained in its opinion. *See* JER 50-51.

maintaining return flows was important because "[t]he evidence showed that large portions of the Alpine County and Carson Valley lands are irrigated by so-called return flows." *Id.* As the court explained, "[t]his practice occurs because water is diverted into large ditches or canals and the water is run over the second appropriator's land and so on until eventually the water returns to the river or to another diversion canal." *Id.* at 891-892.

The court found that it was "much more efficient" to irrigate by the return flow method rather than by individual direct diversions. *Id.* at 892. Indeed, while the court noted that some of the Carson River irrigation water duties upstream of Lahontan Reservoir were quite high, up to 9.0 acre-feet per acre, it reasoned that other water users would not be injured because the consumptive use was only 2.5 acre-feet per acre, such that "the water not consumed all flows either back into the river or onto the water rights lands of another appropriator." *Id.* at 890, 891. Although the decree provided the irrigators a right to individual direct diversions, the court found that "[t]he return flow method should be encouraged as it appears to be a more economical, practical method of water distribution than hundreds of small direct diversion ditches." *Id.* at 892.

As the district court recognized, the interpretation and application of the text and purpose of Administrative Provision VII of the *Alpine* Decree are essential to

the resolution of the question in these appeals: whether the non-consumptive use portion of the 3.5 acre-feet per acre irrigation water duty may be transferred to Carson Lake and Pasture to maintain wetlands for wildlife. As demonstrated below, it may not.

2. References to "irrigation" in the *Alpine* Decree are to use of water for agricultural production in the form of crops or pasture.

As the district court recognized, the *Alpine* Decree includes extensive references to irrigation, all of which refer to irrigation of productive agricultural lands. The court's opinion thoroughly identifies and discusses these references, *see* 788 F. Supp. 2d at 1216-1217 (ER 11-13), which are summarized here.

– *Finding of Fact IV:* The factual findings describe the "lands of the Newlands Project irrigated or susceptible of irrigation by the waters of the Carson River and its tributaries" as "80,000 acres of *cultivable lands*, 50,000 acres of *pasture lands*," and 7,500 acres of land in the Truckee Division of the Project. JER 510 (emphasis added). "Cultivable lands" and "pasture lands" are productive agricultural lands.

– *Finding of Fact VIII:* In defining the water duties for the various types of lands in the Carson River watershed, the decree finds that, "to make these lands *productive*, irrigation thereof is necessary," and that "the various areas require, for

proper irrigation *and crop productivity*, varying quantities of water per acre." JER 512 (emphasis added). This provision, which describes irrigation as being for crop productivity, goes on to identify "the net consumptive use of surface water for irrigation" on those lands, plainly contemplating that the question of net consumptive use pertains to productive agricultural lands.

– *Administrative Provision I:* Again addressing the water duties, the decree declares that "[w]ithout the application of water, the lands described above are dry and arid and irrigation is necessary for the *production of valuable crops* thereon." JER 513 (emphasis added). It provides that "[t]he respective amounts of water stated above to have been appropriated for or used on these lands are, in each instance, the maximum amount necessary and sufficient for the *reasonable and economical irrigation of crops* thereon." *Id.* (emphasis added). Thus, the water duties and net consumptive use amounts are based on production of crops for their economic value.

– *Administrative Provision II*: The only other uses to which the parties "who have appropriated water for irrigation" are entitled to use their water is "for livestock and domestic purposes." JER 513. This provision thus limits the use of irrigation water rights for ancillary, *non-irrigation* purposes to the watering livestock and domestic household use, and provides for no other irrigation use.

Thus, throughout the *Alpine* Decree, "irrigation" is used to refer to cultivable lands and pasture lands, irrigated for the purpose of growing valuable crops in an economical fashion. The only other uses to which irrigation water may be put under the Decree are for livestock watering and domestic use, which are indisputably ancillary, non-irrigation uses. By its terms, the decree provides water for irrigation of crops and pasture, and nothing more. Nothing in the decree supports the State Engineer's suggestion that "irrigation" under the decree may be described as a subcategory of other uses such as golf courses or parks in municipal areas, *see* Ruling #5759 at 10 (ER 141), or, as the Engineer would have it, maintaining wetlands to support waterfowl and other wildlife. Thus, under the plain language of the *Alpine* Decree, providing water for the wetlands in the Carson Lake and Pasture is not an irrigation use.

3. The district court's opinion accompanying the *Alpine* Decree further demonstrates that the decree limits "irrigation" to productive agricultural uses.

The district court opinion accompanying the *Alpine* Decree discusses irrigation in the same terms as the decree itself. The opinion notes that "[o]ne of the central tasks in this case is to establish a clear and specific water duty for both the Newlands Project *farmlands* and the upper Carson *farmlands*." *Alpine Land*, 503 F. Supp. at 887 (emphasis added). The opinion explains that the water duty is based on

the amount of water needed to grow alfalfa, which was "by far the dominant *crop* grown on the lands in question" and was "one of the few *cash crops* the Carson River *farmlands* can support." *Id.* (emphasis added). And in setting the water duty, the court conducted an extensive examination of historic agricultural irrigation practices. *Id.* at 891-892. Thus the decree court's opinion confirms that the *Alpine* Decree's use of the term "irrigation" refers to the use of water for productive, agricultural purposes.

As the district court correctly recognized, the State Engineer's ruling fails entirely to address the language of the *Alpine* Decree, and ignores most of the decree court's accompanying decision. 788 F. Supp. 2d at 1215-1216 (noting that the decision "gives scant consideration to any aspect of the final *Alpine* Decree" referencing it "only once in his decision"). Rather, the Engineer relied solely on one reference in that opinion, which referred to Carson Pasture as "actually irrigable." *Alpine Land*, 503 F. Supp. at 882. Indeed that is the only part of the opinion on which the Engineer continues to rely. *See* SE Br. at 4.

As the district court here concluded, that reliance is misplaced. First, the decree court used the phrase "actually irrigated" only in passing, and in discussing an issue irrelevant here: whether the United States had failed to beneficially use water rights it had acquired from other holders and thus had lost those rights. The

court was concerned only with *whether* the United States had used those water rights on the lands it owned "in the Carson Pasture area and Stillwater area," not *how* it had used those water rights. *Alpine Land*, 503 F. Supp. at 882. Nothing in the discussion is relevant to the issue of the consumptive use portion of the water duty, transfer applications, or return flows. Thus, even if the decree court's opinion appeared to apply the phrase "actually irrigated" to the wetlands portion of Carson Lake and Pasture, that reference would not override the plain language of the decree itself, which addresses irrigation as being for productive agricultural purposes only.

But, in fact, the decree court's opinion referred to the lands it characterized as "actually irrigated" solely as "pasture lands." *Id.* The court noted, for example, that the parties had stipulated that there was an irrigation right for "Carson *Pasture* and other *pasture* lands" within the Project. *Id.* (emphasis added). Indeed, neither the opinion nor the stipulation ever refer to Carson *Lake* and Pasture, but only to Carson *Pasture*, appearing to omit the wetlands area from the discussion entirely. *Id.* These references to the use of the Project's drain water at the historic end of the Carson River as "pasture" are consistent with the fact that, at the time the *Alpine* Decree was entered, TCID managed the lands in Carson Lake and Pasture for livestock grazing only. It was only subsequently that TCID agreed with the NDOW to provide water for the wetlands. JER 8-12. Thus, the district court correctly

rejected the State Engineer's conclusion that the decree court's reference to the Carson Pasture as "actually irrigated" demonstrated the court's understanding that the use of water to maintain wetlands for wildlife is an irrigation manner of use.

4. Reading the term "irrigation" in Administrative Provision VII to refer to the use of water to grow crops and pasture is consistent with the purpose of the provision.

The purpose of the limitation on the transfer of the full water duty to a non-irrigation use is to disallow a change to a consumptive use, in which case the non-consumptive use portion would "disappear from the return flows to other water right lands or the river." *Alpine Land*, 503 F. Supp. at 893. As the district court correctly recognized, this purpose is fulfilled by disallowing the full-duty transfer here. After considering the findings of the State Engineer, the district court found that "all water applied will be used consumptively." 788 F. Supp. 2d at 1218 (ER 15). The district court thus held that, even if the underlying use of the consumptive use water duty is considered to be for irrigation, the *Alpine* Decree still precludes its transfer.

The Appellants do not challenge the district court's finding that the use of the water rights for wetlands is 100 percent consumptive. That is not surprising. No water duty for the use of water to maintain Lahontan Valley wetlands has been established, and there is no basis in the record on which to find that there could be a

non-consumptive component of such use of water in the wetlands. Moreover, because the Carson Lake and Pasture is at the historic terminus of the Carson River, there are no other irrigators who could rely on or benefit from any return flow. Rather, the transfer of full water duties from upstream irrigated lands in the Carson Division to Carson Lake and Pasture strips the agricultural irrigation system along the Carson of any return flows previously associated with those water rights as exercised at their prior places of use. That is exactly the type of transfer that Administrative Provision VII of the *Alpine* Decree was intended to address.[10]

In sum, the district court correctly held that Administrative Provision VII bars the transfer of the non-consumptive use portion of the water rights at issue here, based on the plain language of the *Alpine* Decree, its construction by the decree court's accompanying opinion, and the purpose of the limitation on the transfer of such portion of irrigation water rights under the decree.

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[10] The record does not contain evidence on the effect on return flows of transfer of the full water duty in these particular applications. Return flows may play a less important role in the irrigation of bottomlands below Lahontan Dam than in the upstream lands. Interpretation of the *Alpine* Decree, however, must consider the purpose of Administrative Provision VII with respect to Carson River water rights as a whole, not just with respect to the particular transfers at issue here. This is particularly true here as the current applications are a "test case" for potentially thousands more acre-feet of transfers from irrigation to wetlands.

5. The State Engineer's arguments that Nevada's transfer application statute or a factual analysis of the manner of use of the water control the decision here are wrong.

The State Engineer contends that the district court's interpretation of the *Alpine* Decree is wrong in two basic respects. The Engineer argues (Br. 23-25) that the *Alpine* Decree must be interpreted consistently with the Nevada statute governing approval of change applications, N.R.S. § 533.370(2), and that the applications here must be granted in full because the United States and the Tribe do not contend that the applications violate the standards of that statute. The Engineer further argues (Br. 22) that the question of whether the use of water proposed in the NDOW and NWA applications constitutes irrigation "is a question of how that water was and actually will be used" – *i.e.*, a factual question. Both of these arguments are wrong.

The *Alpine* Decree requires that change applications be submitted to the State Engineer, and the Nevada change application statute clearly applies to the review of such applications. But the decree itself also contains specific requirements pertaining to change applications and those, of course, apply as well, even if they impose limitations or requirements not extant in Nevada law. That includes the provision at issue here, which allows only the net consumptive use portion of an

irrigation water right to be transferred to another use. That provision imposes an express, federal law limitation on the Engineer's authority.

The State Engineer contends, however (Br. 25), that the district court's interpretation of the *Alpine* Decree must be rejected because it leads to a result in conflict with Nevada law. The Engineer argues that, under Nevada law, a change application cannot be denied unless it conflicts with existing water rights or threatens to prove detrimental to the public interest, and that the *Alpine* Decree cannot yield a different result. This proposition is absurd on its face; the fact that the *Alpine* Decree includes a provision that does not exist in state law affirmatively demonstrates that the decree does not provide that only state law controls. The State Engineer's reliance on *California v. United States*, 438 U.S. 645 (1978), is unavailing. That case construes a provision of the Reclamation Act of 1902, 43 U.S.C. § 383, which provides that the Act shall not be construed to conflict with state law on appropriated water rights, and requires the Secretary of the Interior in implementing the Act to proceed in conformity with such laws, to the extent not inconsistent with congressional directives. But this is not a case about construction of the Reclamation Act or actions of the Secretary of the Interior. It is about the construction of a validly entered and final federal court decree.

Administrative Provision VII is intended to protect return flows as a source of water for irrigation that constitutes an "economical, practical method of water distribution." *Alpine Land*, 503 F. Supp. at 892. The removal of return flows from the Carson Division of the Project cannot harm existing water rights – one of the standards under state law – because reductions in the availability of Carson River water to satisfy Project irrigation rights in the Carson Division are to be made up for by the diversion of additional supplemental water from the Truckee River.[11] Thus, the *Alpine* Decree specifically protects an interest that is not protected under state law. The State Engineer cites no authority for the proposition that a federal court water rights decree cannot contain provisions imposing limitations that do not exist in state law, or that state law may nullify a valid provision of a federal court decree, and there is none.

The State Engineer, and the other Appellants, argue at length that the question of whether the proposed use of water at the Carson Lake and Pasture is an irrigation manner of use under the *Alpine* Decree is a factual question on which the State Engineer's ruling was supported by substantial evidence. This is just another

[11] The United States and the Tribe did not argue that the water rights transfers would be detrimental to the public interest – the other basis for denial of a transfer application under state law – in recognition of the fact that both Pyramid Lake and the Lahontan Valley wetlands are resources of public importance that have competing needs for water.

attempt to circumvent the district court's patently correct conclusion that the language and purpose of the *Alpine* Decree compel the disapproval of the transfer of the non-consumptive use portion of the irrigation water duty at issue here. The decree uses the term irrigation to refer to the use of water for the productive growth of crops or pasture, and its purpose is to retain the non-consumptive use portion of the water duty in the irrigation system return flows. None of the Appellants presents a meaningful argument to the contrary. Thus the district court correctly held the *Alpine* Decree did not allow the transfer of the non-consumptive use portion of the water duty as proposed in the applications at issue here.

B. Under Nevada law, the use of water to maintain wetlands for wildlife is not an irrigation use.

At the time the decree was entered in 1980, the Nevada water code did not define "irrigation" (and it still does not); nor did it expressly define a category of use that included the use of water to maintain wetlands for wildlife. Thus, Nevada law sheds no light on what constitutes "irrigation use" within the meaning of the *Alpine* Decree. But assuming that Nevada law is relevant to interpretation of the *Alpine* Decree, it supports the district court's interpretation.

The question of whether the use of water for wildlife was a beneficial use under Nevada law arose in 1988 in *State v. Morros*, 766 P.2d 263 (D. Nev. 1988).

In that case, the Bureau of Land Management of the Department of the Interior sought to appropriate water for various purposes, including wildlife watering. The Nevada Supreme Court held that "[w]ildlife watering is encompassed in the N.R.S. § 533.030(2) definition of recreation as a beneficial use of water." *Morros*, 766 P.2d at 716. The Court reasoned that Nevada law recognized the recreational value of wildlife and the need to provide wildlife with water, and that sport hunting – a common use of wildlife – is a form of recreation. *Id.* The Court further noted that the legislative history of N.R.S. § 533.030(2) indicated that "the legislature intended the provision to include wildlife watering under the rubric of recreation as a beneficial use of water." *Id.* The Court thus concluded that "providing water to wildlife is a beneficial use of water." *Id.* at 717.

Shortly after the decision in *Morros*, the state legislature amended the portion of the state code pertaining to appropriated water rights to include and define "wildlife purposes" as a beneficial use of water. *See* N.R.S. § 533.023. The statute defines "wildlife purposes" to "include[] the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats." *Id.* The legislature ultimately omitted a portion of the bill that would have expressly included "wildlife purposes" as a distinct beneficial use of water within N.R.S. § 533.030. The legislature determined that such addition was unnecessary because

the use of water for wildlife was encompassed within the use of water for recreation, which was already expressly included in the code. JER 33-42.

At the same time, the legislature added to the state water code a companion provision establishing a schedule of fees to be charged by the State Engineer for issuing and recording permits to appropriate water and transfer water rights. *See* N.R.S. § 533.135. That provision states: "The State Engineer shall collect a fee of $50 for a proof of water used for watering livestock or wildlife purposes. The State Engineer shall collect a fee of $100 for any other character of claim to water." By distinguishing "water used * * * for wildlife purposes" from "any other character of claim to water," this provision confirms that the use of water for wildlife, including for maintenance of wetlands, is a distinct beneficial use under State law.

In addition, in 2007, the state legislature enacted N.R.S. § 533.0243, which declares that "it is the policy of this State to allow *the temporary conversion of agricultural water rights for wildlife purposes* or to improve the quality or flow of water." N.R.S. § 533.0243(1) (emphasis added). This provision sets the terms by which such a temporary conversion may occur, requiring the user to obtain any necessary permits or approvals required by statute or by the State Engineer and limiting such conversion to three years, subject to extension on the further approval of the State Engineer. N.R.S. § 533.0243(2). This provision thus expressly

distinguishes water use for "wildlife purposes" – which by definition includes the use of water to maintain wetlands – from water used for agricultural irrigation.

The State Engineer contends (Br. 17-22) that *Morros* and the statutory provisions pertaining to "wildlife purposes" are irrelevant here. As a threshold matter, the State Engineer argues (Br. 19) that since neither existed at the time the *Alpine* Decree was entered, they are irrelevant to interpreting the term "irrigation" in the decree. The United States agrees that the language and intent of the *Alpine* Decree control here, and that the subsequently developed Nevada law regarding the use of water for wildlife is not relevant in discerning that meaning. Yet the Engineer makes this argument in a section entitled "Nevada Water Law Governs Changes in Place or Manner of Use." To the extent that Nevada law may be relevant here, it compels the conclusion that the use of water to maintain wetlands is a use distinct and different from agricultural irrigation.

The Engineer contends (Br. 19-21) that the Nevada Supreme Court's decision in *Morros* is irrelevant because the wildlife use at issue there was to provide drinking water for animals, not water to maintain wetlands. But the court made no such distinction. Rather, the court reasoned that since wildlife was used in recreation, including sport hunting, the use of water for wildlife was included within the provision of the water code recognizing the use of water for recreation as

a beneficial use. That rationale applies equally to the use of water at Carson Lake and Pasture, which is used to maintain wetlands for wildlife that supports recreational activities such as bird watching and sport hunting.

The Engineer argues (Br. 18) that the statutory definition of "wildlife purposes" pertains only to the payment of fees that are primarily concerned with wildlife watering (*i.e.*, drinking water for wildlife), not the maintenance of wetlands. The witness on whose testimony the Engineer relies for this assertion of statutory intent actually stated that the statute "was important probably in terms of in situ uses, *maybe wetlands*, but more with instream flows and so on." SER 34. Thus the witness himself recognized that wetlands may have been an important concern in the provision's enactment. In any event, the statutory definition expressly includes the "maintenance of wetlands." N.R.S. § 533.023. Any theory the Engineer has about what the legislature's primary intent was cannot override the plain language of the statute. *See Szydel v. Markman*, 117 P.3d 200, 202 (Nev. 2005) ("When the language of a statute is clear on its face, this court will deduce the legislative intent from the words used.").

The Engineer additionally suggests that, because the definition is used only with respect to fees, it does not apply in the context of change of use applications. The definition, however, is *not* just relevant to fees. It also pertains, as noted above,

to the authorization for temporary conversions of agricultural rights to wildlife purposes. Such conversions may proceed only if the relevant entity "first applies for and receives from the State Engineer any necessary permits or approvals required." N.R.S. § 533.0243(2)(a). Thus, the water code specifically provides that the definition of "wildlife purposes" *does* apply to permit applications submitted to the State Engineer.

Moreover, the Engineer's argument yields a perverse result. The Engineer provides no reason why, under Nevada law, the use of water to maintain wetlands should be considered a "wildlife purpose" for the purposes of paying a lower fee under the water code but should be considered an irrigation use for the purposes of determining whether the full water duty amount can transfer under the terms of the federal *Alpine* Decree. No principled reason exists.

Finally, the State Engineer attempts to justify his position by relying on South Dakota law. He relies on a case concluding that, under that South Dakota law, the use of water to maintain wetlands for wildlife could be viewed as a beneficial use. *See In re Water Right Claim No. 1927-2*, 524 N.W.2d 855 (S.D. 1994). The South Dakota Supreme Court, however, relied on a state regulation that

defined "irrigation" as "providing moisture for *any* 'plant growth.'"[12] *Id.* at 859 (quoting ARSD 74:02:01:01(4) (emphasis in court opinion); *see also id.* at 860. Nevada has no such corresponding statute or regulation; rather, Nevada law provides that the maintenance of wetlands is a "wildlife purpose." And it is Nevada law, not South Dakota law, that is relevant here.[13]

The NWA adds one final argument not made by the State Engineer. It argues (Br. 52) that, even if the maintenance of wetlands does not constitute irrigation under the *Alpine* Decree, this Court should remand to the State Engineer for a

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[12] The Engineer points to the definition of "irrigation" in the Division of Water Planning's "Water Words Dictionary." That definition includes "[t]he application of water to soil for crop production or for turf, shrubbery, or wildlife food and habitat." ER 82. That definition does not by its terms include the maintenance of wetlands; "wildlife food and habitat" may be found on uplands, and since the phrase is accompanied by other upland uses – "crop production" and "turf, shrubbery" – the most natural reading is that it refers to food and habitat found on uplands. *United States v. Kimsey*, 668 F.3d 691, 701 (9th Cir. 2002) (applying doctrine of *noscitur a sociis*, a rule of statutory interpretation providing that words grouped in a list should be given related meaning). In any event, the definition has no legal effect and we are unable to find any Nevada case that relies on the Water Words Dictionary as a basis for decision (or for any other purpose).

[13] The NDOW's reliance (Br. 21-22) on the Nebraska case of *Morrow v. Farmers' Irrigation District*, 220 N.W. 680, 682 (Neb. 1928), and the Colorado case of *City and County of Denver v. Brown*, 138 P. 44 (Colo. 1914), is equally unavailing. While both cases apply a definition of irrigation as supplying water to nourish plants, neither addresses whether such definition would extend to maintaining wetlands for wildlife. And, of course, neither is relevant to determining Nevada law on the question.

determination of the amount of water that would be used on non-wetlands.[14] No such remand is required or appropriate. First, the NWA did not argue in the district court that any portion of the water rights it proposed to transfer is for irrigation of crops or pasture; thus this argument is waived. *See Hillis*, 626 F.3d at 1019.

In any event, the record clearly establishes that the NWA and NDOW seek to transfer water to Carson Lake and Pasture for the purpose of establishing and maintaining wetlands for wildlife. Witnesses for the applicants repeatedly testified that the water sought to be transferred would be managed at Carson Lake for wetlands habitat. JER 362-363, 373, 377, 389. Under management agreements with Reclamation and the transfer agreement with the Secretary of the Interior, the management of wetlands for wildlife, with associated recreational uses, is the only activity that the NDOW is authorized to undertake at Carson Lake and Pasture. *Id.*; *see also* JER 1-7, 27-32. NDOW witnesses testified that the agency does not seek to apply water directly to the approximately 9,000 acres of pasture, does not manage the livestock grazing program, and does not own livestock that graze at Carson Lake and Pasture. *Id.* Accordingly, water rights transfers by the NDOW and the

[14] The NDOW also requests a remand on the question of the effect of the full water duty transfer on Truckee River diversions. That question is not relevant to the interpretation of Administrative Provision VII in the *Alpine* Decree. The stated purpose of that provision is to protect return flows, not to limit the need for Truckee River diversions.

NWA to the Carson Lake and Pasture are, necessarily, for wildlife purposes, and the *Alpine* Decree's limitation on the transfer of the non-consumptive use portion of the water duty applies.

CONCLUSION

For the forgoing reasons, the district court's order should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that there are no related cases pending in this Court.

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CERTIFICATE PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief for the United States is proportionally spaced, has a typeface of 14 points or more and contains 12,060 words.

July 16, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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