CASE NO. 11-16470

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PYRAMID LAKE PAIUTE TRIBE OF INDIANS and UNITED STATES OF AMERICA, Plaintiffs - Appellees, v. NEVADA STATE ENGINEER, et al., Defendants - Appellants.	Nos. 11-16470 11-16475 11-16482 D.C. No. 3:73-cv-00201-LDG District of Nevada, Reno

RESPONDENT-APPELLANT, NEVADA DEPARTMENT OF WILDLIFE'S OPENING BRIEF

Submitted by:

CATHERINE CORTEZ MASTO
Nevada Attorney General
NHU Q. NGUYEN
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89706
Telephone: (775) 684-1232
Facsimile: (775) 684-1103
Attorneys for Respondent-Appellant
Nevada Department of Wildlife

TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION 1

II. ISSUES PRESENTED FOR REVIEW 1

III. STATEMENT OF THE CASE 2

A. Nature of the Case 2

B. Course of Proceedings and Disposition 3

IV. STATEMENT OF FACTS 4

V. SUMMARY OF ARGUMENT 7

VI. Argument 8

A. Standard of Review 8

B. Application of Water to Wetlands is Irrigation 13

1. The Alpine Court's Rational of a Reduced Consumption Use Water Deliver Rate does Not Apply Where the Use if Irrigation 18

C. Water for Wetlands and Wildlife is a Beneficial Use 20

D. The State Engineer's Definition of Irrigation and His Rulings are Consistent with the View of the Alpine Court and Other Jurisdictions 22

1. The Alpine Court Viewed the Application of Water to Wetlands on Irrigation 24

VII. CONCLUSION 26

STATEMENT OF RELATED CASES 27

CERTIFICATE OF COMPLIANCE 28

TABLE OF AUTHORITIES

Cases

Alpine I, 697 F.2d at 863 9

Alpine III, 983 F.2d at 1494 ..... 9, 17

California v. United States, 438 U.S. 645, 98 S. Ct. 2985 (1978) 8

California v. United States, 438 U.S. 645, 98 S. Ct. 2985 (1978), ... 11

City and County of Denver v. Brown, 56 Colo. 216, 231, 138 P. 44, 49-50 (1914). 21

In Re: Water Right Claim No. 1927-2, 524 N.W.2d 855, 858 (S.D. 1994) 21

Jones v. Rosner, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); 13

Koirala v. Thai Airways Intern, Ltd., 126 F.3d 1205, 1210 (9th Cir. 1997) 10

Morris, 107 Nev. at 701, 819 P.2d at 205 13

Morrow v. Farmers' Irr. District, 220 N.W. 680, 682 (Neb. 1928) 22

Port of Seattle, Wash. v. F.E.R.C., 499 F.3d 1016, 1026 (9th Cir. 2007) 11, 18

Pyramid Lake Paiute Tribe v. Washoe County, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996) 13

Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) 12

State Engineer v. Curtis Park, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985)…10, 17

State Employment Security Dept. v. Hilton Hotels Corp., 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). 12

State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991) 12

State v. State Engineer, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) 13

State v. State Engineer, 104 Nev. at 713, 766 P.2d at 266 (1988). 13

Tolbert v. Page, 182 F.3d 677, 681 (9th Cir. 1999) 10

Town of Eureka v. State Engineer, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) 12

Town of Eureka v. State Engineer, 108 Nev. 163, 826 P.2d 948 (1992)..... 13

U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983) 11

United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 879 (D. Nev. 1980).....1

United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 888 (D. Nev. 1980)..... 19

United States v. Alpine Land & Reservoir Co., 503 F. Supp. 877, 893 (D. Nev. 1980).....9

United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983) (Alpine I) 8

United States v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1219 n. 2 (9th Cir. 1989).....1

United States v. Alpine Land & Reservoir Co., 878 F.2d 1217, 1223 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990) (Alpine II).....9

United States v. Alpine Land & Reservoir Co., 919 F. Supp. 1470, 1474 (D. Nev. 1996)..... 12

United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1493 (9th Cir. 1993) (Alpine III).....9

United States v. Alpine Land & Reservoir Co., Case No. D-183-LDG and 28 U.S.C. § 1345 1

United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984)..... 10

Statutes

Nev. R. Stat. 533.370(5) 9

NEV. R. STAT. 533.370(5). 9

NRS 533.270 to 533.445 11

NRS 533.450(9) 9, 17

Other Authorities

Administrative Provisions Par. 7 ..... 9, 17

Irrigation Principles and Practices 14

I. STATEMENT OF JURISDICTION

The United States District Court, District of Nevada (District Court), has continuing jurisdiction of matters arising under *United States v. Alpine Land & Reservoir Co.,* Case No. D-183-LDG and 28 U.S.C. § 1345. *See United States v. Alpine Land & Reservoir Co.,* 503 F. Supp. 877, 879 (D. Nev. 1980); *United States v. Alpine Land & Reservoir Co.,* 878 F.2d 1217, 1219 n. 2 (9th Cir. 1989). On May 11, 2011, the District Court reversed and vacated the State Engineer's Ruling No. 5759, disposing of all claims. Excerpts of Record of the Nevada Waterfowl Association (ER) 1-16. The Nevada Department of Wildlife (NDOW), the Nevada State Engineer (State Engineer), and the Nevada Waterfowl Association (NWA) appealed timely the decision of the District Court on June 10, 2011. ER 17-26. The Ninth Circuit Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291 to review all final decisions of the district courts.

II. ISSUES PRESENTED FOR REVIEW

The only issue for review is whether the district court erred in reversing the State Engineer's findings that applying water to the wetlands for wildlife use is irrigation, and that NDOW was permitted to transfer the full duty of the water rights to the wetlands because there was no change in use.

///

///

III. STATEMENT OF THE CASE

A. Nature of the Case

The underlying dispute is whether NDOW can transfer a water right purchased from an adjacent farm to the Carson Lake and Pasture wetlands to irrigate at the full duty of water of 3.5 acre-feet per acre. The State Engineer found that the application of water to the wetlands is essentially similar to the application of water to the farmlands and granted NDOW's application to change the place of use of the water rights at the full duty of 3.5 acre-feet per acre for irrigation. ER 141-142.

This case presents an appeal of the order of the district court reversing the State Engineer's finding that NDOW's request, to transfer its water rights to the wetlands to irrigate to grow plants for the sustenance of wildlife is irrigation, was supported by substantial evidence. The district court also reversed the finding that NDOW's request, to change the place of use of its water rights to irrigate the wetlands was not a change in the manner of use and that it was permitted to transfer the full duty of 3.50 acre-feet per acre was proper under the *Alpine Decree,* was supported by substantial evidence. ER 1-16. Without expressly disagreeing with the State Engineer's determination that NDOW's application of water to the wetlands is irrigation, the district court ruled that under the *Alpine Decree*, irrigation is the application of water to farmland for pasture or for the production

of valuable crops such cash crops or agricultural crops such as alfalfa. ER 14-15.

B. Course of Proceedings and Disposition

NDOW filed Application 73444 to transfer the remaining 0.51 acre-feet per acre of the original duty of water on November 7, 2005. Excerpts of Records of NDOW (NER) NER 1-3. The Application sought to change the place of use of the remaining 0.51 acre-feet per acre from the Bankhead farm to the Carson Lake and Pasture wetlands. *Id.* The Pyramid Lake Paiute Tribe of Indians (the Tribe) filed a protest to Application 73444 on February 27, 2006. NER 4-5. The Tribe also protested the applications filed by NWA. ER 99-104; 108-109.

On November 14-15, 2006, the State Engineer held a hearing on the Tribe's protests against NDOW's request and NWA's requests for permission to change the place of use of their water rights. On August 14, 2007, the State Engineer issued Ruling 5759, which among other things, found NDOW's application of water to the wetlands is irrigation and granted NDOW's request to transfer the remaining 0.51 acre-feet per acre from 74.70 acres of land for a total of approximately 38.10 acre-feet of water. ER 132-143. The Tribe and the United States appealed to the district court the State Engineer's ruling, and on May 11, 2011, the District Court reversed and vacated the State Engineer's Ruling 5759. ER 1-16; 144-149. On June 10, 2011, NDOW, the State Engineer and NWA filed their respective notices of appeal to this Circuit. ER 19-26. On June 16, 2011, this

Circuit consolidated the appeals of all three parties. Docket No. 5.

IV. STATEMENT OF FACTS

In the late 1980s, NDOW made a decision to apply for transfer of its water rights at the reduced consumptive use rate of 2.99 acre-feet per acre, even though it believed it was permitted to the full irrigation duty of 3.5 acre-feet per acre. NER 6-7. The decision resulted in NDOW filing applications with the State Engineer to deliver water to the Carson Lake and Pasture wetlands at the reduced consumptive use rate of 2.99 acre-feet per acre and reserving its right to seek permission at a later date to deliver the remaining 0.51 acre-feet per acre.

On October 4, 2004, NDOW and the United States entered into a formal agreement for the transfer and management of the Carson Lake and Pasture wetlands (Transfer Agreement). NER 10-14. The Transfer Agreement provided that "[t]he State may seek approval for use of more than 2.99 acre-feet per acre for one or more water rights previously transferred or to be transferred for use on the transferred land." NER 11. To date, the United States is currently in the process of finalizing the transfer of the Carson Lake and Pasture wetlands to the State of Nevada. Until the transfer is complete, however, NDOW and the Bureau of Reclamation have entered into an Interim Management Agreement where the parties agree that NDOW would manage the Carson Lake and Pasture wetlands "for the purpose of conservation, rehabilitation and management of wildlife, its

resources and habitat, and the purpose of operating and maintaining a wildlife management area and public use thereof." NER 15-20. Accordingly, although the transfer of the Carson Lake and Pasture wetlands has not been completed, NDOW has and continues to have total control and management of the wetlands.

Prior to the Transfer Agreement between the United States and the State of Nevada to transfer ownership of the Carson Lake and Pasture wetlands, NDOW had purchased a water right known as Truckee Carson Irrigation District, Serial Number 46 from the Bankhead Farm. NER 21-25. This water right was used for irrigation of 74.70 acres on the Bankhead Farm, which was situated adjacent to the Carson Lake and Pasture wetlands and was the second of the lowest users on the system. *Id.* There are no users downstream from the Bankhead property other than the Carson Lake and Pasture wetlands. NER 8-9.

On November 7, 2005, pursuant to the Agreement the State of Nevada had entered into with the United States to transfer the Carson Lake and Pasture wetlands to the State of Nevada, NDOW filed Application No. 73444. NER 1-3. The Application sought permission from the State Engineer to change the place of use of the 0.51 acre-feet per acre that remained from the previous application to the Carson Lake and Pasture wetlands. *See* id.

On August 14, 2007, after a two-day hearing, the State Engineer approved NDOW's request to transfer the remaining duty of 0.51 acre-feet per acre. In

approving the application, the State Engineer found that the Carson Lake and Pasture wetlands consists of a community pasture area for the use and benefit of livestock owners within the irrigation district and an area of open marsh that provides natural habitat for waterfowl and other wildlife. ER 138. NDOW's use of water at the Carson Lake and Pasture wetlands is to grow vegetation, whether submergent or emergent, and that the distribution and use of water is the same are irrigating traditional crops. ER 139-140. The State Engineer found that irrigation is the taking of water from a source and applying it to soil to grow a plant, and that was the activity at the Carson Lake and Pasture wetlands. ER 141-142. The State Engineer also found that the application was not seeking a change in the manner of use because NDOW's use is irrigation. ER 142.

Also significant is the finding that the original *Alpine* Decree issued by the district court discussed water use at the Carson Lake and Pasture wetlands by noting that the wetlands received water from drainage or seepage and very occasionally from direct flows and that the amount of land actually irrigated varied greatly from year to year, depending on water availability. ER 141. Based upon this discussion, the State Engineer in another ruling (Ruling No. 5078), concluded that the use of water at the wetlands was a form of irrigation. Id.

Based upon these findings, the State Engineer concluded that substantial evidence supports the 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. It is the provision of water for plant growth and thus [NDOW is] not requesting a change in manner of use. ER 142.

V. SUMMARY OF ARGUMENT

The question before the State Engineer was whether the application of water to the wetlands to grow emergent and submergent vegetation for wildlife use is irrigation. ER 136. If the use is irrigation, the entire duty of water may be changed from 2.99 acre-feet per acre to 3.50 acre-feet per acre. *Id.* However, if the proposed use constitutes a change in manner of use, only the lesser amount of 2.99 acre-feet per acre is allowed. The *Alpine Decree* states specifically: "Changes of manner of use applications from use for irrigation to any other use and changes in place of use applications shall be allowed only for the net consumptive use of the water rights as determined by this Decree." Addendum of NWA 27. In accordance with the *Alpine Decree,* the State Engineer concluded that:

> The State Engineer finds 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. It is the provision of water for plant growth and thus the Applicants are not requesting a change in manner of use.

ER 142.

NDOW's use of the water is applying it to the wetlands for wildlife, which is

done in essentially the same manner and method as a farmer applying the water to his farmland to irrigate for alfalfa. Substantial evidence supports the State Engineer's decision approving the remaining 0.51 acre-feet per acre constituting the entire duty of 3.5 acre-feet per acre for irrigation. The district court erred in ignoring the factual findings by the State Engineer, and relying narrowly and simplistically on the *Alpine* Decree. This Circuit should reverse the district court because it erred in not deferring to the findings and conclusions of the State Engineer.

VI. ARGUMENT

A. Standard of Review

Nevada law controls changes in water rights subject to the decrees, both before the State Engineer and this Circuit. "The Supreme Court has held, in *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985 (1978) that state law will control the distribution of water rights to the extent there is no preempting federal directive." *United States v. Alpine Land & Reservoir Co*., 697 F.2d 851, 858 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983) (Alpine I).

State law controls both procedural and substantive issues. "The Alpine decision necessarily contemplated that state law would control both the process and the substance of a proposed transfer of water rights." *United States v. Alpine Land & Reservoir Co*., 878 F.2d 1217, 1223 (9th Cir. 1989), cert. denied, 498 U.S.

817 (1990) (Alpine II). As a consequence, "all Nevada change applications will be directed to the State Engineer and will be governed by Nevada law." *United States v. Alpine Land & Reservoir Co*., 503 F. Supp. 877, 893 (D. Nev. 1980), substantially aff'd., *United States v. Alpine Land & Reservoir Co*., 697 F.2d 851, 858 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983). "We agree with the district judge that the notice and protest procedures of Nevada law are adequate to allow exploration of these issues, when they arise, before the state engineer." *Alpine I*, 697 F.2d at 863.

Nev. R. Stat. 533.370(5) provides the criteria for addressing applications to transfer water rights that have already been appropriated such as the application filed by NDOW. *United States v. Alpine Land & Reservoir Co*., 983 F.2d 1487, 1493 (9th Cir. 1993) (Alpine III). That section states that where a proposed change, "conflicts with existing rights . . . or threatens to prove detrimental to the public interest, the State Engineer shall reject the application and refuse to issue the requested permit." NEV. R. STAT. 533.370(5).

The *Alpine* Decree and Nevada law provide, "that the decision of the Engineer 'shall be prima facie correct, and the burden of proof shall be upon the party challenging the Engineer's decisions.' *Alpine Decree*, Administrative Provisions Par. 7; *see also* NRS 533.450(9) (same)." *Alpine III*, 983 F.2d at 1494. The function of the district court is to review the evidence on which the State

Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the court is bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985).

This Circuit has developed a formulation for review of mixed questions of law and fact. *Tolbert v. Page,* 182 F.3d 677, 681 (9th Cir. 1999) ("whether a prima facie case determination is reviewed de novo or deferentially depends upon what are essentially practical considerations"). The court must determine whether the questions of fact or the questions of law predominate. *Koirala v. Thai Airways Intern, Ltd.,* 126 F.3d 1205, 1210 (9th Cir. 1997).

Review "may be subject either to clear error or de novo review, depending upon 'the concerns of judicial administration.'" *Id.*, quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984). As the legal question is clear in this case, the factual question dominates. If the application seeks to change the manner of use from irrigation to another use such as municipal or industrial uses, only 2.99 acre-feet per acre, the consumptive use, of the 3.5 acre-feet duty of water may be transferred under the Decree. *Alpine Decree* at 161-162, Paragraph VII. However, if the use proposed is irrigation, then the State Engineer was correct in approving NDOW's application to transfer the remaining duty of 0.51 acre-feet per acre. The factual determination of whether NDOW was using water in a manner akin to irrigation is central. "District courts [or in his case, the State Engineer as

trier of fact] are inherently better positioned to make such judgments because of their superior vantage point to the evidence." *Id.*

The correct standard of review is deference to the determination of the State Engineer over questions of fact. If the State Engineer's decision is supported by substantial evidence, that decision should be affirmed by the district court. "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [the trier of fact's] findings." *Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1026 (9th Cir. 2007) (citations omitted). "The [United States] Supreme Court has held, in *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985 (1978), that state law will control the distribution of water rights to the extent that there is no preempting federal directive." *U.S. v. Alpine Land & Reservoir Co.,* 697 F.2d 851, 858 (9th Cir. 1983).

An appeal from a decision of the State Engineer is in the nature of an appeal. Nev. R. Stat. 533.450(1) states in pertinent part:

> Any person feeling himself aggrieved by any order or decision of the State Engineer, acting in person or through his assistants or the water commissioner, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to NRS 533.270 to 533.445, inclusive, may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal.

The Nevada State Supreme Court has interpreted these provisions to mean that a petitioner does not have a right to de novo review or to offer additional evidence at the district court. *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979); *see also Town of Eureka v. State Engineer*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992); *United States v. Alpine Land & Reservoir Co.,* 919 F. Supp. 1470, 1474 (D. Nev. 1996).

The Nevada State Supreme Court has explained the court's function in reviewing a decision of the State Engineer by stating that, "neither the district court nor this court will substitute its judgment for that of the State Engineer: we will not pass upon the credibility of the witnesses nor reweigh the evidence, but limit ourselves to a determination of whether substantial evidence in the record supports the State Engineer's decision." *State Engineer v. Morris*, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991). The Nevada Supreme Court has likewise defined substantial evidence as that which a "reasonable mind might accept as adequate to support a conclusion." *State Employment Security Dept. v. Hilton Hotels Corp*., 102 Nev. 606, 608, 729 P.2d 497, 498 (1986).

While the district court is free to decide purely legal issues or questions without deference to an agency determination, the agency's conclusions of law, which will necessarily be closely related to the agency's view of the facts, are entitled to deference and will not be disturbed if they are supported by substantial

evidence. *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986); *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992). The State Engineer's interpretation of his statutory authority is persuasive, even if not controlling. *Morris*, 107 Nev. at 701, 819 P.2d at 205 (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)). Additionally, any review of the State Engineer's interpretation of his legal authority must be made with the thought that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action." *Pyramid Lake Paiute Tribe v. Washoe County*, 112 Nev. 743, 747, 918 P.2d 697, 700 (1996), citing State v. State Engineer, 104 Nev. at 713, 766 P.2d at 266 (1988). Accordingly, the proper standard of review is the deferential standard of review because factual determinations dominate over legal determinations.

B. NDOW's Use of Water at the Wetlands to Grow Plants on Meadows and Marshes is Irrigation

The Division of Water Resources Water Words Dictionary defines "irrigation" as:

> (1) The controlled application of water for agricultural purposes through man-made systems to supply water requirements not satisfied by rainfall; applying water to soil when rainfall is insufficient to maintain desirable soil moisture for plant growth. (2) The application of water to soil for crop production or for turf, shrubbery, or wildlife food and habitat.

ER 82. The textbook, *Irrigation Principles and Practices*, also defines irrigation as, "the application of water to soil for the purpose of supplying the moisture essential for plant growth." ER 79. NDOW's use of water at the Carson Lake and Pasture wetlands is consistent with both of these definitions.

At the hearing before the State Engineer, there was substantial evidence to support NDOW's assertion that use of water at the Carson Lake and Pasture wetlands is irrigation. Mr. Norman Saake, a former waterfowl and wetland biologist for the Nevada Department of Wildlife with 40 years of experience managing water at the Carson Lake and Pasture wetlands, testified regarding how water is managed at the wetlands to grow vegetation. NER 29-30. Specifically, he testified that the water is used to irrigate submergent vegetation, phytoplankton, and emergent vegetation. SER 11-12. This includes such plants as sago pondweed, widgeon grass, alkali bulrush, salt grass, hard stem bulrush, red goosefoot, smart weeds, and water grass millets. SER 18. Areas of open water also produce dense stands of submergent vegetation. NER 31. These plants would not continue to grow without irrigation such as that described by NDOW in Application 73444. NER 32. NDOW's request for the delivery of water to irrigate the wetlands crops is in the same manner as a farmer would request delivery of water to irrigate his agricultural crops. Specifically, Mr. Saake testified that: "I developed models that allowed me to estimate how much water was going to be

needed to meet evaporation rates based on the time of year so that we could irrigate the plants and keep the plants growing." SER 15-16. Mr. Saake testified that the use of water "at Carson Lake by NDOW is for the irrigation of the crop that we're attempting to grow." SER 16.

Moreover, "Purchased water is water that basically puts [NDOW] in the same realm as farmers surrounding the area so that we can at least call for our percentage of water and provide some wetlands even during more extreme droughts." NER 33. The water used to irrigate the Carson Lake and Pasture wetlands produces a variety of plants for the benefit of wildlife in the area. The plants grown for wildlife include: "Sago pond weed, widgeon grass alkali bulrush, saltgrass, hard stem bulrush, red goosefoot, smart weeds, water grass millets and on top of that we attempt to provide a large population of aquatic invertebrates." SER 18. This variety of plants grown on the wetlands is akin to the variety of crops a farmer would grow in his fields.

Doug Hunt, Deputy Director of the Nevada Department of Wildlife, also testified that the Carson Lake and Pasture wetlands is managed to maximize the habitat available for wildlife. NER 34. Specifically, Mr. Hunt testified that NDOW manages habitat for wildlife on the Carson Lake and Pasture wetlands primarily through the manipulation of water, which is similar to how a farmer would manipulate water to irrigate a variety of crops on his farmland. NER 35.

Elmer Bull, a Wildlife Staff Specialist for the Nevada Department of Wildlife, who supervises the management of the Carson Lake and Pasture wetlands, as well as nine other wildlife management areas throughout the state, also testified as an expert in wetlands management. SER 25-26. He testified specifically as to the manner in which the wetlands are irrigated by directing water through a series of ditches, canals, and water control structures in an effort to maintain as high a quality habitat as possible. SER 29-32. Water rights owned by the State of Nevada are called for at the Carson Lake and Pasture wetlands from Truckee Carson Irrigation District in the same manner as farmer would call for water to irrigate his farmland. SER 33. The water is used to produce both submergent and emergent vegetation for the feeding of wildlife, even when it may not appear from the surface of the water. SER 33; NER 35-36. The primary purpose of irrigating is to produce quality habitat. NER 36-37. Mr. Bull testified further: "Well, it's the application of water to land in an effort to produce a product and in that sense I believe it's irrigation." NER 38.

Based upon the expert testimony, the State Engineer correctly found the evidence to substantially support NDOW's assertion that it uses the water to irrigate the Carson Lake and Pasture wetlands to produce a crop sufficient for the wildlife that use the area for feeding and shelter. This finding is reasonable and substantially supported by the record.

There is nothing in the record to contradict NDOW's assertion that the water used for the wetlands is not in the same manner as a farmer would use on his crops. There is also no testimony to contradict that the method in which NDOW calls for delivery of water and its use of water on the wetlands is essentially identical to the method in which a farmer would call for delivery of water and his use of the water on the farmlands. The district court erred when it completely ignored these factual findings, and then cursorily concluded that "the irrigation underlying the *Alpine Decree's* observation was agriculture" and therefore the irrigation of wetlands is restricted to the consumptive use duty of 2.99. ER 11-12.

This error is significant because it contradicts established law under the *Alpine* Decree and Nevada law. "[T]he decision of the Engineer 'shall be prima facie correct, and the burden of proof shall be upon the party challenging the Engineer's decisions.' *Alpine Decree*, Administrative Provisions Par. 7; *see also* NRS 533.450(9) (same)." *Alpine III*, 983 F.2d at 1494. The district court was required to review the evidence on which the State Engineer based his decision to ascertain whether the evidence supports the decision, and if so, the district court was bound to sustain the State Engineer's decision. *State Engineer v. Curtis Park*, 101 Nev. 30, 32, 692 P.2d 495, 497 (1985). The district court, however, did not review the evidence as it was required to do and cursorily relied upon the language of the *Alpine Decree* to overrule the State Engineer's ruling.

This error is reversible because the district court did not utilize the correct standard of review. The correct standard of review is deference to the determination of the State Engineer over questions of fact. If the State Engineer's decision is supported by substantial evidence, that decision should be affirmed by the district court. "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [the trier of fact's] findings." *Port of Seattle, Wash. v. F.E.R.C.*, 499 F.3d 1016, 1026 (9th Cir. 2007) (citations omitted). There was no evidence to contradict NDOW's assertion that its use of water was irrigation akin to agricultural irrigation. The district court committed reversible error when it did not defer to the State Engineer's findings of fact and substituted its own with a simplistic reliance on only the language of the *Alpine Decree.*

1. The *Alpine* Court's Rational of a Reduced Consumption Use Water Deliver Rate Does Not Apply Where the Use is Irrigation

The *Alpine* court defines water duty as "the amount of water required to properly irrigate the farmlands." *United States v. Alpine Land & Reservoir Co*., 503 F. Supp. 877, 888 (D. Nev. 1980). After testimony by competing experts, the court found the water duty for proper irrigation of farmlands in the Lahontan Valley to be 3.5 acre-feet per acre. *Id*. However, because the water duty "differs

depending on physical conditions" of the farmlands, the *Alpine* court also considered competing expert testimony on how much water is "actually consumed" by the crops on the farmlands. *Id*. The *Alpine* court found the consumptive use of irrigation water to be 2.99 acre-feet per acre. *Id*.

The rationale is that although it takes 3.5 acre-feet per acre to "properly irrigate" farmlands, the amount of water that is "actually consumed" by the crops on the farmlands is only 2.99 acre-feet per acre. The remaining 0.51 acre-feet per acre of water are either returned to the flow of the water for other water right lands to use or to the river. *Id*. at 888, 893. The *Alpine* court thus held that when the use of water is changed from irrigation to any other purpose, the water user is limited to the consumptive use amount of 2.99 acre-feet per acre of water. *Id*. at 893. This is to ensure the 0.51 acre-feet per acre of water that is not used by plants on farmlands remain in the water system and not "disappear from the return flows to other water right lands or the river." *Id*.

Following the *Alpine* court's rationale, the State Engineer correctly determined that NDOW should be permitted to move the remaining 0.51 acre-feet per acre of its water rights to the wetlands. Because NDOW's use of water on the wetlands is essentially identical to that of a farmer's use of water on his farmlands, the *Alpine* court's safeguard of ensuring return flow of water by limiting the consumptive use duty to 2.99 does not apply. Instead of applying water to

farmlands to grow crops such as alfalfa for cows, NDOW is applying water to the wetlands to grow vegetation for wildlife. The remaining 0.51 acre-feet of water that is not consumed by the vegetation in the wetlands are returned to the water system and do not "disappear from the return flows to other water right lands or the river."

C. Water for Wetlands and Wildlife is a Beneficial Use

The district court ruled that wetlands and wildlife use are a specific category of use that excludes all other categories, such as irrigation. Water used for wildlife purposes varies significantly depending on the circumstances. The Tribe has water for an in-stream use in propagating fish for Pyramid Lake. NDOW also has water rights that are for in-stream use for wildlife. However, the use of the water under Application 73444 is fundamentally different than the water used at fisheries; the water used at the Carson Lake and Pasture wetlands is to irrigate the vegetation for wildlife use.

Mr. Saake testified that the name Carson Lake and Pasture is not really descriptive of the actual makeup of the area. NER 39. He testified that the manner of use for water in the Carson Lake and Pasture wetlands was distinct:

> The distribution system and the diking system out there can be entirely flooded in which virtually none of the water in all of Carson Lake of over two feet deep and the majority of it is well less than 18 inches deep. . . .a dike that is no taller than the desk you're sitting at, a dike of that height alone could impound water in one unit in

> excess of 3,000 acres. Conversely on the other side of the dike could contain another lake or body of water also of that size, almost that size, in which virtually none of the water or most of the water will be 18 inches or less because that is what we desire.

Id. This testimony shows that use of the water on the Carson Lake and Pasture wetlands is distinctly different than the in stream uses of the Tribe and can only be accurately designated as irrigation.

Other jurisdictions have also defined irrigation as the application of water to wetlands. In South Dakota, the state supreme court held a beneficial use existed even though crops are not harvested by human beings, but by migratory birds and wildlife. *In Re: Water Right Claim No. 1927-2*, 524 N.W.2d 855, 858 (S.D. 1994). The South Dakota Supreme Court did not perceive a difference between irrigating land to raise cash crops and irrigating land to feed wildlife; irrigation is simply the application of water for any plant growth. *Id*. at 859.

The Colorado Supreme Court also defined irrigation as "the application of water for the purpose of nourishing plants." *City and County of Denver v. Brown*, 56 Colo. 216, 231, 138 P. 44, 49-50 (1914). The Colorado Supreme Court held that the application of water to grow trees on streets and to irrigate trees, shrubs, grasses, and other plant life in a park constitutes irrigation as if the water was used to grow crops upon farms. *Id*. Both uses have the same purpose of nourishing useful plant life and thus neither one is superior to the other or entitled to

preference of more water. *Id*.

Finally, the Nebraska Supreme Court also held that irrigation in agriculture is defined as the "supplying of water by canals, ditches, etc.; the operation of causing water to flow over land for nourishing plants." *Morrow v. Farmers' Irr. District*, 220 N.W. 680, 682 (Neb. 1928). These state supreme court cases holding that irrigation is the use of water to grow plans are in line with the *Alpine* court.

D. The State Engineer's Definition of Irrigation and His Rulings are Consistent with the Alpine Decree and Other States' Rulings

As stated above, the State Engineer defines "irrigation" as "the application of water to soil for crop production or for turf, shrubbery, or wildlife food and habitat." ER 82. In a previous ruling, on October 18, 2000, the State Engineer applied this definition by approving the applications of the U.S. Fish and Wildlife Service (USFWS) and the Bureau of Indian Affairs (BIA) to move water to the Stillwater National Wildlife Refuge (Stillwater), a wetlands area. ER 32-71.

The applications were somewhat similar to NDOW's Application in that USFWS and BIA requested to change the place of use of water to Stillwater for "the maintenance of wetlands for recreation and wildlife/storage with the existing manner of use being identified as being 'as decreed.'" ER 32-40. The protestants there made the same argument as the Tribe against NDOW, which is, that moving water to the wetlands is a change in manner of use because it is not irrigation. ER 45.

The State Engineer was not persuaded by the argument of the protestants and noted that "[j]ust because a definition exists which provides that the maintenance of wetlands can fall under the definition of wildlife purposes does not mean that lands irrigated for wildlife purposes could not fall under the definition of irrigation." ER 49. The State Engineer further stated that "[w]hether one is flooding land to irrigate alfalfa for cows and horses or flooding land to grow forage for wildlife, both uses are for the irrigation of land to grow a 'crop' for some purpose and there is probably no real difference in the consumptive use of the water." ER 51. In rejecting the protestants' argument and finding the applications to be not defective, the State Engineer stated that:

> [I]n light of the Alpine Court's description of the use of water on the Carson Lake Pasture . . . as a form of irrigation, and the fact that the use is for the plant growth of meadows and marshes, the use is similar enough to the irrigation of crops that these application are not requesting a change in manner of use.

ER 51, 68.

In yet another previous ruling, on September 26, 2001, the State Engineer reiterated that the definition of "irrigation" encompasses applying water to wetlands for wildlife and emphasized his findings and conclusions in Ruling 4979. NER 54-57. Again, in rejecting the protestants' arguments that using water for the wetlands was a change in manner of use because it is not irrigation, the State Engineer approved three applications filed by USFWS, albeit at the 2.99 acre-feet

consumptive use duty because USFWS, similar to NDOW, had reserved the right to move the remaining 0.51 acre-feet at a later time. The State Engineer found that "in light of the Alpine Court's description of the use of water on the Carson Lake Pasture and Stillwater areas as a form of meadows and marshes, the use is similar enough to the irrigation of crops that these applications are not requesting a change in manner of use." NER 56-57.

Thus, since the year 2000, based upon the *Alpine Decree* and Nevada Water Law, the State Engineer has consistently ruled that irrigation includes the application of water to the wetlands for plant growth of meadows and marshes. This ruling is also consistent with the state supreme courts of South Dakota, Colorado and Nebraska. There is nothing in the record to contradict the State Engineer's finding that the application of water to the wetlands for plant growth of meadows and marshes is irrigation.

1. The *Alpine* Court Viewed the Application of Water to Wetlands on Irrigation

Even though the *Alpine* court was not asked to answer the question confronting the State Engineer in Ruling No. 5759, the *Alpine* Court on its own volition recognized that water used for the wetlands was irrigation. In adjudicating water rights in the Lahontan Valley area, the *Alpine* court stated:

> The United States owns lands within the Newlands Project. Referred to in this case generally as the Carson Pasture area and the Stillwater area, these lands comprise

> some 17,000 to 20,000 acres. Testimony indicated that these areas receive water largely from drainage or seepage from Project farms and very occasionally from direct flows. The amount of land actually *irrigated* varies greatly from year to year depending on the available water.

Id. at 882 (emphasis added).

The district court erred in concluding that the State Engineer gave "scant consideration to any aspect of the Alpine Decree." ER 10. In fact, since the year 2000, the State Engineer, and in three different rulings (ER 32-74; 132-143; NER 40-75), the State Engineer gave considerable consideration to the Alpine Decree. In the October 18, 2000, Ruling No. 4979, the State Engineer noted that "the Alpine Decree was issued in 1980, but the authorization to expand the purposes of the Newlands Reclamation Project to include wildlife purposes and wetlands did not come until 1990." ER 46. The State Engineer, noted however that, "[i]n the original Alpine Decree, issued by the Federal District Court which adjudicated the waters of the Carson River . . . [and] at the time . . . it appears that the decree Court and the parties believed that the use of water on the Carson Pasture and Stillwater areas was a form of irrigation." ER 48. In the two subsequent rulings, the State Engineer again noted these same considerations, and concluded that applying water to the wetlands to irrigate plants for wildlife is irrigation. NER 40-75; ER 132-143.

///

VII. CONCLUSION

The State Engineer correctly concluded that NDOW's application of water to the Carson Lake and Pasture wetlands for plant growth to benefit wildlife is irrigation. This conclusion was supported by substantial evidence. The district court erred in not deferring to the State Engineer's findings, and relied unreasonably on the narrow language of the Alpine Decree. NDOW respectfully requests this Circuit reverse the district court's ruling.

DATED this 20th day of March 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Nhu Q. Nguyen
NHU Q. NGUYEN
Senior Deputy Attorney General
Nevada State Bar #7844
100 North Carson Street
Carson City, Nevada 89701
Tele: (775) 684-1232
Attorneys for Respondent – Appellant

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Respondent – Appellant hereby certifies that she is not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with FED. R. APP. P 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

DATED this 20th day of March 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Nhu Q. Nguyen
NHU Q. NGUYEN,
Senior Deputy Attorney General
Nevada State Bar #7844
100 North Carson Street
Carson City, Nevada 89701
Tele: (775) 684-1232
Attorneys for Respondent – Appellant
Nevada Department of Wildlife

CERTIFICATE OF SERVICE

I, Rosiland M. Hooper, certify that I am an employee of the Nevada Attorney General's Office and that on this 20th day of 2012, I electronically filed the foregoing **RESPONDENT-APPELLANT, NEVADA DEPARTMENT OF WILDLIFE'S OPENING BRIEF**, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will in turn electronically notify the participants in this case.

Don Springmeyer, Esq.
dspringmeyer@wrslawyers.com
Stephanie Zehren-Thomas, Esq.
Email: szehren@h-zlaw.com
Attorneys for PLPT

Katherine J. Barton, Esq.
Email: Katherine.barton@usdoj.gov
Stephen M. Macfarlane, Esq.
Email: Stephen.Macfarlane@usdoj.gov
Attorneys for United States of America

Bryan L. Stockton
Senior Deputy Attorney General (11-16470)
Email: bstockton@ag.nv.gov
Attorneys for Nevada State Engineer

Paul G. Taggart, Esq. (11-16482)
Email: paul@legaltnt.com
Attorneys for Nevada Waterfowl Association

/s/ Rosiland M. Hooper
Rosiland M. Hooper, Legal Secretary II
Office of the Nevada Attorney General