CASE NOS. 11-16470, 11-16475, 11-16482

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PYRAMID LAKE PAIUTE TRIBE and
UNITED STATES OF AMERICA

Plaintiffs and Appellees

vs.

NEVADA STATE ENGINEER, ET AL.

Defendants and Appellants

Appeal From The United States District Court,
District of Nevada, Case No. 3:73-CV-201-LDG

ANSWERING BRIEF

OF PLAINTIFF-APPELLEE PYRAMID LAKE PAIUTE TRIBE

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
Don Springmeyer, Nev. Bar No. 1021
Christopher W. Mixson, Nev. Bar No. 10685
3556 E. Russell Road
Las Vegas, Nevada 89120
Telephone: (702) 341-5200
Facsimile: (702) 341-5300

Attorneys for Plaintiff-Appellee Pyramid Lake Paiute Tribe

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STATEMENT OF JURISDICTION

The Plaintiff-Appellee Pyramid Lake Paiute Tribe ("Tribe") joins in the Statement of Jurisdiction of the Plaintiff-Appellee United States of America ("United States") and joins in the same of the Defendant-Appellant Nevada State Engineer ("State Engineer").

STATEMENT OF THE ISSUES

The *Alpine* Decree requires that when an applicant seeks to transfer a Carson River water right from use for irrigation to "any other use," then the applicant may only transfer the 2.99 acre-feet per acre (af/a[1]) consumptive use portion of the water right, as opposed to the entire water duty of 3.5 or 4.5 af/a. The central issue presented by this appeal is whether the district court correctly ruled, based on its interpretation of its own decree, that the Applicants may not transfer the 0.51 af/a non-consumptive use portions of their water rights from the original use of irrigating farmlands to the proposed use of flooding wetlands for wildlife purposes (wetlands/wildlife) because the proposed transfer involved a change in manner of use according to the provisions of the *Alpine* Decree.

The Defendant-Appellant Nevada Waterfowl Association ("NWA") has also raised the issue of the district court's jurisdiction on the ground that the Tribe lacks standing. In 1972, the United States District Court for the District of Columbia

[1] There are two different abbreviations used: af/y means acre-feet per year (the water right), while af/a means acre-feet per acre (the water duty).

recognized that, in addition to the Tribe's decreed surface water rights in the Truckee River, the Tribe has a protected legal interest in ensuring the maximum possible surface water flows in the Truckee River and into Pyramid Lake. *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252 (D.D.C. 1972). The other issue presented by NWA's appeal is therefore whether the district court correctly concluded that the Tribe has standing to challenge a State Engineer decision that threatens an injury to the Tribe's protected legal interests in the Truckee River pursuant to *Tribe v. Morton*.

STATEMENT OF THE CASE

The district court, when issuing the final decree in *U.S. v. Alpine Land & Reservoir Co.*, Civ. No. D-183 (D. Nev. 1980) (the "*Alpine* Decree"), established the 'full' water duty for certain irrigated lands within the Newlands Reclamation Project at 3.5 af/a based on the purpose of the *Alpine* Decree of securing water for the irrigation of alfalfa. A water duty is "the major conceptual tool for implementing beneficial use" and quantifies "the amount of water an appropriator is entitled to use, including a margin for conveyance loss." *U.S. v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983), cert. denied, 464 U.S. 863 (1983). A portion of this full water duty is the 'consumptive use,' which the Decree court established as 2.99 af/a. Finding of Fact VIII of *Alpine* Decree (JER

510); *U.S. v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877, 885–88 (D. Nev. 1980), subst. affd. 697 F.2d 851 (9th Cir. 1983) ("*Alpine I*").

The net consumptive use is the amount of decreed surface water required to actually grow the vegetative material of the crop, and does not include the amount of water applied to the soil but not taken up by the roots, which non-consumptive amount is added to the consumptive use amount to determine the full water duty. *See e.g. Alpine I*, 503 F. Supp. at 888. In other words, because the Newlands Project was intended to provide water for the growth of alfalfa on Project farmlands, the farmers with bottom-lands were provided an extra 0.51 af/a above the net consumptive use of water for growing alfalfa, to make up for conveyance losses on their farms and because of the arid climate, in order to make full use of the farmlands for growing alfalfa as a cash crop. *Id*.

NWA filed Application 71775 to change 1.88 water-righted acres of Project farmland at the bottom-land duty of 3.5 af/a for use at Carson Lake wetlands. NWA Excerpt of Record 102.[2] NWA filed Application 73574 to change 5.50 water-righted acres of Project farmland at 3.5 af/a to the same wetlands/wildlife use at Carson Lake wetlands. NDOW filed application 73444 to change 74.70

[2] The Appellants each filed separate excerpts of the record. Citations to the excerpts of record filed by NWA will be cited as "ER," citations to the State Engineer's excerpts of record will be cited as "SER," and citations to NDOW's excerpts of record will be cited as "NER." The Tribe and United States filed a Joint Excerpts of Record, which will be cited herein as "JER."

water-righted acres at 0.51 af/a to use at Carson Lake wetlands. NDOW's application seeks to change the remaining non-consumptive portion, 0.51 af/a, of water rights for which the consumptive duty of 2.99 af/a had already been transferred under Permit No. 60771, which was not protested.

NWA's applications state that the water is to be used "as decreed," and NDOW's application states that the water is to be used for "irrigation of wetlands." The element common to these applications is that they seek to obtain and deliver the full 3.5 af/a irrigation water duty to the Carson Lake wetlands, as opposed to only the net consumptive use of 2.99 af/a. While these applications ostensibly seek to change only the place of use of irrigation water rights, the issue presented is that they also in fact seek to change the manner of use of the water rights from their existing irrigation use to the proposed wetlands/wildlife use.

The *Alpine* Decree explicitly and clearly limits a change in manner of use of irrigation water rights to "any other use" to only the net consumptive use of 2.99 af/a. Because these applications seek to change the manner of use of water rights for amounts larger than the 2.99 af/a consumptive use allowed under the applicable federal decree to a use other than irrigation, the district court correctly interpreted the *Alpine* Decree and held that the State Engineer should have denied the applications to the extent they seek to change the non-consumptive use portion of the water right.

STATEMENT OF FACTS

In addition to the following, the Tribe hereby incorporates by reference the Statement of Facts in the Answering Brief of the Plaintiff-Appellee United States.

A. Pyramid Lake and the Newlands Project.

In 1859, the Secretary of the Interior set aside approximately 500,000 acres of land in western Nevada as a reservation for the Tribe. The reservation, which includes the entire Pyramid Lake and the lower reaches of the Truckee River, was confirmed by an 1874 Executive Order issued by President Grant. Pyramid Lake, whose main source of water is the Truckee River, is "widely considered the most beautiful desert lake in North America." *Nevada v. U.S.*, 463 U.S. 100, 114 (1983) (quoting S. Wheeler, *The Desert Lake* at 90–92 (1967)). Members of the Tribe have lived near Pyramid Lake and fished its waters for their sustenance and livelihood since time immemorial.

Congress enacted the Reclamation Act in 1902. Shortly thereafter, the Secretary of the Interior withdrew 232,800 acres of land in western Nevada for the federal government's first reclamation project, which subsequently became known as the Newlands Reclamation Project. This project was designed to convert the desert into farmland by taking waters from both the Carson and Truckee Rivers. The Newlands Project is divided into two divisions: the Truckee Division and the Carson Division. Water rights in the Truckee Division receive only Truckee River

water, which is diverted at Derby Dam into the Truckee Canal. Carson Division water rights are satisfied directly from the Carson River and from Lahontan Reservoir, which is on the Carson River but is also supplemented with Truckee River water via the 32 mile long Truckee Canal. *Nevada v. U.S.*, 463 at 115–16.

The Truckee River originates at the outlet on the California side of Lake Tahoe in the Sierra Nevada mountains and flows north and then east into Nevada, making another northward turn after making its way through the Reno/Sparks metropolitan area and eventually terminating in Pyramid Lake, which has no outlet. Decreases in the stream flow of the Truckee River prior to reaching this terminus adversely affect the Tribe, the Pyramid Lake Reservation and Pyramid Lake, and its threatened and endangered species. *See e.g. Tribe v. Morton*, 354 F.Supp. at 255 ("any water diverted from the Truckee [River] at Derby Dam for the [Newlands Project] is thereby prevented in substantial measure from flowing further north into Pyramid Lake. The Lake is a unique natural resource of almost incomparable beauty.").

One of the main variables affecting the amount of Truckee River water that is diverted away from the Truckee River and Pyramid Lake to the Newlands Project is the demand for water for the Carson Division of the Newlands Project. The lower the demand for the Carson Division, the lower the amount of diversions of Truckee River water to Lahontan Reservoir via the Truckee Canal, and therefore

the greater the flow in the lower Truckee River and into Pyramid Lake. In other words, there is a direct and causal relationship between the demand for water to satisfy Newlands Project water deliveries and the amount of water removed from the Truckee River and Pyramid Lake via the Truckee Canal.

The historical record amply supports the Tribe's concerns about Project demand. As a result of diversions from the Truckee River, including diversions used to supplement Carson Division waters stored in Lahontan Reservoir, the water level of Pyramid Lake dropped more than seventy (70) feet between 1906 and 1972. *Tribe v. Morton*, 354 F.Supp. at 255. This devastation of Pyramid Lake led to the extinction of the original strain of Lahontan cutthroat trout in Pyramid Lake, and to the near extinction of the cui-ui. These species are currently listed and protected under the Endangered Species Act, 16 U.S.C. §§ 1531–45. *See* 32 Fed. Reg. 4001 (March 11, 1967) (listing cui-ui as endangered); Endangered and Threatened Wildlife, 40 Fed. Reg. 29863, 29864 (July 16, 1975) (codified at 50 C.F.R. pt. 17) (listing Lahontan cutthroat trout as threatened).

To protect its precious resources, the Tribe, therefore, has insisted that Nevada law and the terms of the river decrees be strictly followed to minimize diversions of Truckee River water to the Newlands Project to only those amounts actually allowed by law. The Tribe has protested many applications seeking to change the manner or place of use of Newlands Project water rights contrary to law

that would detrimentally affect Pyramid Lake, the Tribe's surface water rights on the Truckee River as decreed in the *Orr Ditch* Decree, and the endangered cui-ui and threatened Lahontan cutthroat trout. *See e.g. U.S. v. Alpine Land & Reservoir Co.*, 291 F.3d 1062 (9th Cir. 2002) ("*Alpine V*"); *U.S. v. Alpine Land & Reservoir Co.*, 340 F.3d 903 (9th Cir. 2003) ("*Alpine VI*").

The Tribe has a significant interest in reducing the demand for water in the Carson Division by ensuring that the State Engineer does not grant Newlands Project change applications in contravention of controlling statutes and federal decrees. Ruling 5759, by granting the Applicants' water rights for the full 3.5 af/a water duty, instead of the consumptive use amount of 2.99 af/a, would result in a higher water demand in the Newlands Project that would be inconsistent with the *Alpine* Decree's provisions, which in turn would cause unnecessary diversions of Truckee River water away from Pyramid Lake and its endangered and threatened fish. *See e.g. Tribe v. Morton*, 354 F.Supp. at 254–55; *Truckee-Carson Irrigation Dist. v. Secretary of Interior*, 742 F.2d 527, 529–30 (9th Cir. 1984); *U.S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1219–21 (9th Cir. 1989) ("*Alpine II*"); *U.S. v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 208, 214 (9th Cir. 1989); *see also* Sections 209(b) and 209(j)(1) of Title II of Public Law 101-618, the Truckee-Carson-Pyramid Lake Water Rights Settlement Act (Settlement Act), 104 Stat. 3289, 3294, 3317 and 3319, (JER 530, 553, 555) (prohibiting increased diversions

of Truckee River water to the Newlands Project and directing the Secretary of the Interior to implement the Settlement Act in a manner that is fully consistent with the decision in *Tribe v. Morton*).

B. The Water Right Transfer Applications.

NWA and NDOW filed applications with the Nevada State Engineer ostensibly to "change the places of use" of Newlands Project irrigation water rights appurtenant to farmland located within the Carson Division of the Newlands Project. Each of these three applications actually seeks to also change the *manner* of use of the water from irrigation of Newlands Project farmlands to wetlands/wildlife uses in Carson Lake wetlands.

All of the water rights for the Newlands Project were awarded to the United States in the *Alpine* and *Orr Ditch* Decrees. The United States then conveyed water rights for specific farmlands within the Newlands Project to individual landowners, including the predecessors-in-interest to NWA and NDOW. *See Nevada v. U.S.*, 463 U.S. at 116–18, 122–26, 126 n. 9; *Alpine I*, 503 F.Supp. at 879–81. NWA and NDOW have now acquired these irrigation water rights and seek to change them from irrigation to wetlands/wildlife uses at Carson Lake.

NDOW's Application No. 73444 seeks to change 0.51 af/a for 74.70 acres of farmland irrigation water rights to Carson Lake wetlands. App. 73444 (SER 43–45). The State Engineer previously granted NDOW's prior application to change

the place of use of the consumptive use portion (2.99 af/a) of those 74.70 acres under Application and Permit No. 60771. The Tribe did not protest Application No. 60771 because it requested transfer of only the 2.99 af/a consumptive use portion of the irrigation water right from farmland to wetlands, which was proper under the *Alpine* Decree. However, NDOW's current application (No. 73444) proposes to transfer the remaining 0.51 af/a, which NDOW describes as "the remainder duty not transferred under permit 60771." *Id*. The total amount of water sought for transfer under Application No. 73444 is 38.10 af/y (74.70 acres x 0.51 af/a). *Id*.

NWA's Application Nos. 71775 and 73574 seek to change the water rights for 1.88 and 5.50 acres, respectively, of farmland in the Newlands Project at the full irrigation water duty of 3.5 af/a, as opposed to the appropriate change of only the consumptive use of 2.99 af/a. App. Nos. 71775, 73574 (ER 102, 105). NWA's two applications total 25.83 af/y, and state that the water is to be used "as decreed," and that the water is to be used for "irrigation of wetlands." *Id*. A transmittal letter accompanying Application 71775 from the NWA's general counsel to the State Engineer made clear that this Application sought to transfer the full 3.5 af/a water duty to Carson Lake. Letter from James Giudici to Nevada State Engineer (Oct. 15, 2004) (JER 495).

These Applications are proposed by the Applicants as "test cases," and the final determination regarding whether the wetlands use proposed at Carson Lake is a manner of use "other than irrigation" for purposes of the proper transfer duty according to the *Alpine* Decree will have lasting effects for future planned transfers of Decreed water rights for wetlands use at Carson Lake. *See e.g.* State Engineer Hrg. Transc. at 29 (JER 132) (discussion by attorney for NWA that "this is a test case. There's no doubt about it. Nevada Waterfowl was created to litigate this issue and there are many, many applications that have been filed at 2.99 [af/a] that have reserved .51 acre feet, and certainly the results of this decision in this case will control how all of those applications are addressed, how that reserve .51 water is addressed.").

C. Course of Proceedings

Upon receiving notice of the subject applications, the Tribe timely protested all three on the grounds, among others, that: 1) the applications are defective because they do not request a change in manner of use from irrigation to recreation, wildlife, and/or wetlands uses; 2) under Administrative Provision VII of the Alpine Decree, the change in manner of use from irrigation "to any other use" is limited to the net consumptive use of 2.99 af/a, as opposed to the 3.5 af/a sought in the applications; 3) Application 73444 requests changing the non-consumptive use portion of the water duty not previously transferred under Permit 60771, which

is prohibited by Administrative Provision VII of the Alpine Decree; and 4) approval of more than the consumptive use portion of 2.99 af/a would increase diversions of Truckee River water to the Newlands Project, which would be inconsistent with the Truckee-Carson-Pyramid Lake Water Rights Settlement Act, PL 101-618. Application 71775 was also protested by the United States Department of the Interior, Bureau of Reclamation (BOR) on similar grounds. *See* Ruling 5759 at 3–4 (JER 95–96).

On November 14 and 15, 2006, an administrative hearing was held before the State Engineer on the subject applications, during which fact and expert witnesses testified for both the protestants and the applicants. On August 14, 2007, the State Engineer issued Ruling 5759, which denied all protests and approved the applications to transfer the full water duty of 3.5 af/a to Carson Lake wetlands. The State Engineer's ruling relied largely on his erroneous legal conclusion that the proposed use is for 'irrigation' of wetlands as that term is used in both the *Alpine* Decree and Nevada law, and accordingly involves no change in the manner of use. Ruling 5759 at 11 (JER 103).

The Tribe and United States timely filed for judicial review of Ruling 5759 in the *Alpine* Decree Court, the district court below. On appeal in the district court, that court vacated, in part, Ruling 5759 because the it concluded that, under the *Alpine* Decree, irrigation involved the growing of crops, primarily alfalfa, for

agricultural purposes. Accordingly, the district court held that the State Engineer erroneously found that the use of water at the wetlands was "irrigation," and therefore erroneously granted the transfer of the entire 3.5 af/a water duty as opposed to the correct transfer of only the consumptive use portion of 2.99 af/a. ER 15–16. The State Engineer, NWA and NDOW timely appealed to this Court (ER 19–26), and this Court subsequently consolidated all three appeals herein.

SUMMARY OF THE ARGUMENT

All three of the subject applications sought to transfer the full Newlands Project irrigation water duty of 3.50 af/a established under the *Alpine* Decree to a non-irrigation manner of use, which change of use only qualifies for a transfer of the net consumptive use water duty of 2.99 af/a. Administrative Provision VII of the *Alpine* Decree clearly and simply states: "[c]hange 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 rights as determined by the decree*." JER 517–18 (emphasis added). The net consumptive use of the water rights at issue, as stated above, is 2.99 af/a.

The *Alpine* Decree establishes a single water duty for a single purpose: 3.5 af/a for bottom-lands, which is the net consumptive use of 2.99 af/a for irrigation of farmlands for the agricultural production of crops and an additional 0.51 non-consumptive use component to account for on-farm losses and return flows to the

Newlands Project system. When transferring a decreed water right from that initial manner of use for irrigation of crops on farmlands to any other use, the *Alpine* Decree limits the transfer to only the net consumptive use of 2.99 af/a. The district court correctly held that the definition of "irrigation" for purposes of the *Alpine* Decree, and informed by Nevada water law, means only the agricultural irrigation of crops on farmland, and does not mean the use of water for wetlands purposes.

The Applicants' proposed use of the water is indisputably for wetlands/wildlife purposes, which, under Nevada law, is a different use than the existing irrigation purpose as intended in the *Alpine* Decree. "Wildlife purposes" is specifically defined by the Nevada water code in NRS 533.023 to include "the establishment and maintenance of wetlands . . . and other wildlife habitats." Because Nevada statute provides a specific definition of wildlife purposes which explicitly includes the "establishment and maintenance of wetlands," there is no doubt that the Applicants' proposed use of the water for wetlands habitat at Carson Lake is a wildlife purpose, not an irrigation purpose.

After considering the language of the *Alpine* Decree, including its purpose, the district court determined that the definition of "irrigation" under the *Alpine* Decree is confined to the agricultural use of water on farmlands for the agricultural purposes of growing cash crops, namely alfalfa:

> Taken 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. While the word "irrigation" can be defined as any application of a liquid, the *Alpine Decree* considered and referred to irrigation use in the context of agriculture, and specifically to grow cash crops and pasture. The decree court itself recognized that one of its central tasks was to establish a water duty to irrigate farmlands.

U.S. v. Alpine Land & Reservoir Co., 788 F. Supp. 2d 1209, 1217 (D. Nev. 2011).

It is therefore clear that the district court, which is responsible for the ongoing administration of the *Alpine* Decree and thus the primary authority concerning its interpretation and application, correctly rejected and vacated the State Engineer's erroneous decision, and held that the subject applications were a change of the manner of use of the water rights from irrigation of Newlands Project farmlands to the maintenance of the Carson Lake wetlands for wildlife purposes. The district court correctly held that only the net consumptive use of 2.99 af/a is eligible for use at the wetlands, and that the State Engineer erred by allowing the transfer of the additional 0.51 af/a non-consumptive use portion of the water rights.

To the extent that NDOW, NWA, and even the State Engineer, wish to rewrite the explicit requirement of the *Alpine* Decree—which clearly states that irrigation water rights can be changed to other beneficial uses such as the establishment and maintenance of wetlands and other wildlife habitat only for the net consumptive use portion of the water right and not for the full irrigation water duty—they should petition the *Alpine* Decree Court, under its continuing and

exclusive jurisdiction to effectuate and manage the *Alpine* Decree, to reopen and amend the Decree to consider allowing such full-duty water rights changes of manners of use for uses other than irrigation. Such proceedings should involve the participation of all interested parties and the full airing of all interests and views.

By contrast, what those parties seek to do in this appeal is a back-door subversion and amendment of the *Alpine* Decree by proposing to call an apple (wetlands/wildlife) a pumpkin (irrigation use).

Finally, the Tribe clearly had standing to protest the applications and to seek judicial review of Ruling 5759 in the district court. Despite NWA's arguments to the contrary, the Tribe has a protected legal interest in maximizing all potential surface water flows in the Truckee River for purposes of the Tribe's fisheries and historic way of life. The district court correctly recognized that the water rights changes granted in Ruling 5759 could affect the Tribe's protected legal interest in the Truckee River, giving rise to the Tribe's standing and the district court's jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

This case involves primarily questions of federal and state law. Any relevant questions of fact are settled because all parties agree that the proposed use of the water rights at issue is to establish and maintain wetlands at Carson Lake.

The question on appeal is legal: did the district court correctly determine that wetlands use is not 'irrigation' as that term was used and intended in the *Alpine* Decree?

Here, because the facts are clear and the dispute is legal, the Court may review the district court's legal conclusion that the applications proposed a change in manner of use under the *de novo* standard of review. *U.S. v. Orr Water Ditch Co.*, 914 F.2d 1302, 1307 (9th Cir. 1990) (this Court reviews interpretations of the *Alpine* and *Orr Ditch* decrees *de novo*); *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (9th Cir. 2001) (this Court reviews the district court's conclusions of law *de novo*). Thus, while this Court's review is *de novo*, it "will give deference to the district court's interpretation based on the court's extensive oversight of the decree from the commencement of the litigation to the current appeal." *Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 855 (9th Cir. 2007) (internal quotations removed).

Although this Court considers the State Engineer's interpretations of Nevada statutes "persuasive," they are not controlling. *U.S. v. Truckee-Carson Irrigation Dist.*, 492 F.3d 902, 905 (9th Cir. 2005) (internal quotations omitted). The Ninth Circuit has reversed the State Engineer's rulings on multiple occasions since the entry of the final *Alpine* Decree in 1980. *See e.g. Alpine II*, 878 F.2d 1217; *U.S. v. Alpine Land & Reservoir Co.*, 983 F.2d 1487 (9th Cir. 1992) (*Alpine III*); *Alpine V*,

291 F.3d 1062; *Alpine VI*, 340 F.3d 903. Therefore, it is clear that while some deference is owed to the State Engineer's rulings, that deference is not unlimited and courts have not hesitated to reverse the State Engineer's rulings when they fail to apply the proper law.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE USE OF WATER FOR WETLANDS AND WILDLIFE IS A DIFFERENT MANNER OF USE THAN USE OF WATER FOR IRRIGATION OF CROPLAND.

The district court correctly overruled the State Engineer's decision to grant the Applicants' request for full transfer of Newlands Project irrigation water rights to the Carson Lake wetlands under the guise of irrigation as the manner of use. The district court's interpretation of the *Alpine* Decree is both intuitively correct and comports with the correct reading of the *Alpine* Decree and Nevada law.

Those Nevada laws make a clear and sharp distinction between the manner of use of water for irrigation of farmland soils to raise crops on the one hand, and for flooding or adding additional water for the maintenance of wetlands for wildlife and recreation on the other. The Respondents' tortured alternative readings of these relevant provisions of law were correctly rejected by the district court, and should similarly be rejected by this Court.

The State Engineer argues that the district court's overly "formalistic" approach and interpretation of the *Alpine* Decree and Nevada law ignores the reality that Nevada is the driest state in the nation that should favor a flexible

approach to water rights. SE Opening Brief at 5, 10. Similarly, NDOW alleges that the district court erred in "relying narrowly and simplistically" on the language of the *Alpine* Decree when interpreting what the *Alpine* Decree court intended when it limited the water duty for water rights transfers for uses "other than irrigation." NDOW Open Brief at 8. The NWA attacks the district court's decision from the other flank, arguing not that the district court rigidly applied the formal language of the *Alpine* Decree, but instead that the court "rewrote" the Decree to hold that by irrigation it means only agricultural irrigation of cash crops and/or pasture. NWA Open Brief at 18.

In fact, the district court committed none of those errors; it acted wisely and properly in interpreting the clear language of its own decree.

A. Nevada Law is Clear that Use of Water for the Maintenance of Wetlands for Wildlife is a Different Legally Defined Use than Use of Water for Irrigation of Cropland.

The district court correctly determined that the law of the State of Nevada does not consider the use of water for wetlands/wildlife purposes to be the same manner of use as the use of water for irrigation purposes. This correct interpretation of Nevada law is relevant to the district court's, and this Court's, interpretation of the *Alpine* Decree because "changes to water use [are to] be made in the manner provided by law [which] requires us to apply [n]ot only state water law substance . . . but procedure as well." *U.S. v. Orr Water Ditch Co.*, 391 F.3d

1077, 1081 (9th Cir. 2004) (quoting *U.S. v. Orr Water Ditch Co.*, 914 F.2d 1302, 1307 (9th Cir. 1990)).

1. Nevada has long recognized the difference between using water for irrigation of cropland and using water for wetlands and/or wildlife purposes.

The beneficial use of water for the agricultural purpose of irrigating crops has long been recognized in Nevada. *See e.g. Prosole v. Steamboat Canal Co.*, 37 Nev. 154, 159–62, 140 P. 720, 722–23 (1914) (defining the agricultural purpose of reclamation and irrigation as "economic application of . . . water to the soil, with the end in view that the latter may perform its highest function in producing sustenance for humanity"). Providing water for wildlife came much later, and was originally encompassed within the meaning of "recreation" as used in NRS 533.030(2), enacted in 1969. *State v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988). In that landmark decision, the Nevada Supreme Court held that the use of water for wildlife purposes is a beneficial use under Nevada law:

> Wildlife watering is encompassed in the NRS 533.030(2) definition of recreation as a beneficial use of water. Nevada law recognizes the recreational value of wildlife, NRS 501.100(2), n4 and the need to provide wildlife with water. *See* NRS 501.181(3)(c), n5; 533.367. Sport hunting, a common use of wildlife, is a form of recreation. The legislative history of NRS 533.030(2) indicates that the legislature intended the provision to include wildlife watering under the rubric of recreation as a beneficial use of water. See Minutes, Comm. on Federal, State and Local Governments, 55th Legislative Sess. (March 7, 1969) ("the bill . . . would include fishing and wildlife"). It follows that providing water to wildlife is a beneficial use of water.

> n4 NRS 501.100(2) provides: "The preservation, protection, management and restoration of wildlife within the state contribute immeasurably to the aesthetic, recreational and economic aspects of these natural resources."
>
> n5 NRS 501.181(3)(c) specifies that establishing policies pertaining to the acquisition of water rights for the management, propagation, protection and restoration of wildlife is included among the duties of the Nevada Board of Wildlife Commissioners.

Id., 104 Nev. at 717, 766 P.2d at 268 (emphasis added, footnote omitted).

One year after the decision in *State v. Morros*, the Nevada Legislature enacted NRS 533.023, which states: "[a]s used in this chapter, 'wildlife purposes' includes the *watering of wildlife* and *the establishment and maintenance of wetlands*, fisheries and other wildlife habitats." (Emphasis added). The use of water for the establishment and maintenance of wetlands—the precise use contemplated by the applications at issue here—is statutorily defined as a wildlife purpose under NRS 533.023. Yet, in Ruling 5759 the State Engineer granted the applications for only a change in the place of use, and erroneously determined there was not a change in manner of use from irrigation to wetlands/wildlife. The district court correctly overruled the State Engineer on that exact point to find that the wetlands use proposed in the applications is a "wildlife purpose" as defined in NRS 533.023, and not irrigation.

The State Engineer argues that NRS 533.023 is not relevant here because it does not define 'irrigation.' SE Open Brief at 17–19. But that is certainly not

surprising, because that particular statute is dedicated to defining 'wildlife purposes,' *as a separate and distinct manner of use* of water from other proper beneficial uses, such as irrigation. In short, wildlife purposes are specifically defined by Nevada statute to include precisely what is now at issue, "the *establishment and maintenance of wetlands* . . . and other wildlife habitats." NRS 533.023 (emphasis added). By definition, that is not the same use as irrigation.

The NWA argues that NRS 533.023 does not inform the meaning of the term "irrigation" for these purposes because it was enacted after the entry of the *Alpine* Decree. NWA Open Brief at 51; *see also* SE Open Brief at 25. But the district court, when exercising its continuing jurisdiction to administer and enforce the *Alpine* Decree, applies Nevada water law (to the extent it is not inconsistent with the Decree), which is found primarily in Chapter 533 of the Nev. Rev. Statutes. *See Alpine I*, 503 F. Supp. at 893; *U.S. v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081–82 (9th Cir. 2004), as amended by 400 F.3d 1117 (9th Cir. 2005). NWA cites no authority to support the argument that the district court may only apply the Nevada water code frozen in place as it existed in 1980 when the court issued the *Alpine* Decree.

Wetlands/wildlife use of water under NRS 533.023 is a separate and distinct manner of use from irrigation use under NRS 533.435(1). *See e.g.* Final Order, *U.S. v. Alpine*, 788 F.Supp.2d at 1218 ("A straight-forward reading of [NRS

533.023] and of the State Engineer's finding regarding the right of NDOW to develop and manage the Carson Lake and Pasture permits only the conclusion that the NDOW must use the water for wildlife purposes, including the maintenance of wetlands, rather than for the irrigation of farmlands."). Under Nevada law, the proposed change of an irrigation water right to the maintenance of wetlands could not more clearly be a change in the manner of use within the meaning of Administrative Provision VII of the *Alpine* Decree. Consequently, the district court correctly held that the change in manner of use to wetlands/wildlife is limited to the net consumptive use portion of the water right as determined by the *Alpine* Decree, which in this case is 2.99 af/a.

It is difficult to imagine a more straight-forward, clear-cut, and obvious answer to a legal question. Under Nevada law, the watering of wildlife and the maintenance of wetlands are defined and classified as wildlife purposes, not irrigation. But for the strained sophistry of the Respondents, this should be the end of the story.

2. The Applicants Clearly Propose to Use the Water for the Maintenance of Wetlands for Wildlife Purposes and Not for Irrigation of Farmlands.

There is only one relevant and essential fact required to resolve the issue presented in this appeal. The factual question is whether the proposed manner of use of the water rights sought to be transferred under the applications of NDOW

and NWA is for the establishment and maintenance of wetlands for wildlife habitat. If the answer to that question is yes, then as surely as water flows downhill, under Administrative Provision VII of the *Alpine* Decree, the applications are for a use "other than irrigation," and therefore are allowed to transfer only the net consumptive use, in this case, 2.99 af/a.

There is, in fact, no doubt whatsoever that the proposed manner of use of the water rights sought to be transferred by NDOW and NWA is for the maintenance of the Carson Lake wetlands for the watering of wildlife. That fact is undisputed as shown by the following evidence before the State Engineer and in this record:

a) NWA's mission is "to protect, restore and enhance Nevada's wetlands and the wildlife dependent on them" and that "[a]s part of its efforts to save the Lahontan Valley wetlands, NWA has filed two separate applications with the State Engineer to transfer certain water rights to Carson Lake and Pasture." *See e.g.* Response of NWA to Motion of Tribe to Declare Wetlands Transfer Duty, Case No. 3:73-CV-00183-LDG, In Equity D-183-LDG (Doc. No. 1874) at 4, 5, respectively (Sep. 11, 2006) (included in Addendum following brief).

b) The May 7, 1998, Affidavit of Pamela B. Wilcox, Nevada's Administrator of State Lands, states: "I have personal knowledge of the State's purchase of water rights in the Lahontan Valley for the purpose of restoring and preserving wildlife at the Carson Lake and Pasture. . . ." JER 496–97.

c) The January 25, 1999, letter from Peter Morros, Director of the Nevada Department of Conservation and Natural Resources, to Nevada Senator Harry Reid, states: "The State has set up a water acquisition program for the Lahontan Valley wetlands and has transferred the water to Carson Lake in anticipation of the transfer of Carson Lake to the State [and has] provided $5 million for acquisition of water rights 'for the protection of habitats of fish and game'. . . ." JER 44.

d) The October 29, 2003, letter from the Governor of Nevada to the Secretary of the Interior, states: "the State has obtained bonding authority from our

citizens in 1990, specifically authorizing the purchase of water rights for the Lahontan Valley wetlands. To date, the State has purchased over 8,000 acre feet of water from willing sellers within the Newlands Project. . . ." JER 24.

e) Under Section 206(e) of the Settlement Act, and Section 3 of the October 28, 2004 Agreement for the Transfer and Management of Carson Lake and Pasture between the U.S. Department of the Interior and the State of Nevada, the State of Nevada is required to manage Carson Lake and Pasture "as a State wildlife management area [or state wildlife refuge] in a manner consistent with applicable international agreements of the United States and designation of the area as a component of the Western Hemisphere Shorebird Reserve Network." 104 Stat. at 3311; JER 547, JER 03, respectively.

Further, the testimony of several of the Applicants' witnesses at the administrative hearing before the State Engineer regarding the subject applications confirms beyond any doubt that the intended use of the transferred water rights is not for irrigating the soil of farmlands to grow crops, but is rather for the management and maintenance of wetlands for wildlife uses. The following testimony adduced at the State Engineer administrative hearing on the subject applications demonstrates that point:

1) Testimony of James Giudici, former board member and current general counsel of NWA, that pursuant to the Settlement Act, "the State is supposed to get Carson Lake and Pasture to become *a state wildlife management area*." JER 191 (emphasis added).

2) Testimony of Sean Wallace, President of NWA, that the mission of NWA has nothing to do with irrigation, but rather is for protecting wildlife habitat. JER 206.

3) Testimony of Tina Nappe, Coordinator of the Lahontan Valley Wetlands Coalition, that the importance of the Carson Lake arises from its importance to the endangered white pelicans who feed on the fish in the lake. JER 211.

4) Testimony of Chuck Binder, an expert on hydrology and water modeling, who admitted that the proposed use of Application 60771, NDOW's prior application for the consumptive use water duty of 2.99 af/a, is "for maintenance of wetlands for recreation and wildlife/storage." JER 304.

5) Testimony of Chuck Binder that there is no evidence that any of the lands in question are planted in alfalfa, grains or any other crop. JER 308.

6) Testimony of Norman Saake, former NDOW waterfowl and wetlands biologist: "Well, Carson Lake is such a unique wetlands habitat that we figured we had to have some involvement in protecting the wildlife interests that were associated with Carson Lake. . . ." JER 318–19.

7) Testimony of Norman Saake that "with more water we're able to provide habitat for more nesting birds." JER 341.

8) Testimony of Norman Saake that the current uses of Carson Lake and Pasture include public hunting, public bird watching, public education, field trips for students, support of wildlife through wetlands and landing areas for geese and ducks. JER 348–49.

9) Testimony of Norman Saake that "my perspective is that the most important thing that ties everything together [at Carson Lake] is the water and the type of habitat that exists at Carson Lake. The wildlife results because they have this flat topography and we can apply water to it. If we took those two out of the factor wildlife would not be there." JER 350–51.

10) Testimony of Doug Hunt, Deputy Director, NDOW, that "[t]he Department manages the area how we would any of our wildlife areas, which is to maximize the habitat available for wildlife and provide for recreational opportunities to the public." JER 361–62. And that he is not aware of any plans to change the name of the Nevada Division of Wildlife to the "Department of Irrigation." *Id*.

11) Testimony of Elmer Bull, wildlife staff specialist, NDOW, that NDOW's role in management of Carson Lake is "[e]ssentially to manage the wildlife habitat that exists on the Carson Lake and Pasture area, together with some of the facilities, road maintenance, boat ramp maintenance, maintenance of wildlife observation towers that have been constructed and of course the habitat." JER 368.

12) Testimony of Elmer Bull that the "primary purpose" of moving water around at Carson Lake "is to produce quality wildlife habitat." JER 377.

13) Testimony of Elmer Bull that "[t]he availability of more water would increase our options on what we could do as far as trying to manage quality habitat." JER 382.

14) Testimony of William Molini, former NDOW Director, that Carson Lake is "recognized internationally of significant importance to shore birds." JER 395.

15) Testimony of William Molini that NDOW's "interests in representing the wildlife department was certainly wildlife and wetlands." JER 397.

16) Testimony of William Molini that the purpose of the activity undertaken by NDOW at Carson Lake and Pasture is "to produce, have productive and abundant fish and wildlife resources. . . ." JER 410.

As shown by these excerpts, the overwhelming weight of the evidence proves that the actual purpose of the proposed transfer of water rights to Carson Lake is for the maintenance and enlargement of the wetlands found there for wildlife purposes, and not for irrigation of the soils of farmlands for the production of crops. The Applicants' positions, and State Engineer's Ruling 5759, are unavailing attempts to circumvent the plain language of the *Alpine* Decree. The district court correctly determined as much, holding:

> As established by [NRS] § 533.023, the watering of wildlife and the establishment of wetlands and other wildlife habitats is a wildlife purpose. The applicants' proposed use of the water is for wildlife purposes. Accordingly, the Court must reverse Ruling #5759.

Final Order, *U.S. v. Alpine*, 788 F.Supp.2d at 1218.

B. The *Alpine* Decree Provides that the Use of Water for Irrigation is Limited to the Production of Valuable Crops and Pasture, Not the Maintenance of Wetlands.

1. The Intent of the Alpine Decree Was to Quantify and Confer Water Rights for Irrigation of Alfalfa on Newlands Project Farmland, not for the Maintenance of Wetlands for Wildlife.

It is clear from both the text of the *Alpine* Decree and the Decree court's accompanying opinion in *Alpine I* that water rights decreed for irrigation are for the production of valuable crops on farmland, or, as described in *Prosole*, "providing sustenance for humanity," and not for the maintenance of wetlands for wildlife:

> Without the application of water, the lands described above are dry and arid and *irrigation is necessary for the production of valuable crops thereon*. The 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*.

Alpine Decree, Administrative Provision I, JER 513 (emphasis added).

In its original opinion explaining the *Alpine* Decree, the Decree court refers to the use of water for irrigating "project farmlands," "to grow crops on those fields," and to "farmland [water] duties." *See generally Alpine I*, 503 F.Supp. at 885 (referring to "the duty for the privately owned Project farmlands," "water duties for project farmlands," "alleged limitations on the farmland duties resulting from contractual agreements," and "us[ing] the water to grow crops on those fields"), 886 (referring to "Project farmlands"), 887 (referring to the "specific

water duty for both the Newlands Project farmlands and the upper Carson farmlands" and to "alfalfa [as] by far the dominant crop grown on the lands in question"), 888 (referring to "alfalfa [as] the crop historically grown on the lands in question," to "grow[ing] alfalfa on all the Project farmlands," and to "water duty [being] the amount of water required to properly irrigate the farmlands").

In *Alpine I*, it is clear that the established water duty was meant to serve irrigation of farmlands, specifically irrigation of alfalfa, as that was and is the dominant crop grown on Newlands Project farms. *See e.g. Alpine I*, 503 F.Supp. at 885 (the factual matters necessary for determination of Newlands Project farmland water duties "concern what is *the proper amount of water reasonably necessary to grow alfalfa on the Project farms*.") (emphasis added); at 887 ("One of the central tasks in [the *Alpine* Decree] is to establish a clear and specific water duty for both the Newlands Project farmlands and the upper Carson farmlands."); at 887 ("Alfalfa is by far the dominant crop grown on the lands in question. . ."); and at 888 ("In this case, alfalfa is the crop historically grown on the lands in question and under Nevada law and the Reclamation Act, the water duty for these lands is that amount of water reasonably necessary to grow alfalfa."); *see also* Nevada Division of Water Planning, Water Words Dictionary at 8–9 (JER 522–23) (explaining in definition of '*Alpine* Decree' that the "annual net consumptive use [for Newlands Project irrigation rights] was *based on the water duty of alfalfa* as it

is a dominant and the highest water-using crop grown in Nevada.") (emphasis added).

Here, the NWA and NDOW requested to change their water rights from the irrigation of Newlands Project farmlands to the establishment and maintenance of wetlands at the Carson Lake for wildlife purposes. By arguing that they are not changing the manner of use of the water rights, they are effectively arguing that their proposed use is just like the traditional and intended use of Newlands Project water rights for growing alfalfa and other cultivated crops on Project farmlands. *See e.g.* NDOW Open Brief at 15 ("The variety of plants grown on the wetlands is akin to the variety of crops a farmer would grow in his fields."). Ignoring the obvious differences between these two distinct uses defies common sense, and common usage, and the clear import of the *Alpine* Decree and *Alpine I*.

The district court correctly refused to pay lip service to this line of double-speak:

> At a practical and common-sense level, the best description of the proposed use of the water [at Carson Lake] 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, and that the Carson Lake and Pasture area is to be managed as a State Wildlife Management Area. Management of the area contemplates the transfer of water to the area for wetlands protection." The NWA has an agreement with NDOW that allows the NWA's water rights to be used in the management of the Carson Lake and Pasture. This proposed use of the water is for wildlife purposes.

Final Order, *U.S. v.* Alpine, 788 F.Supp.2d at 1218. The district court therefore held that the use of water proposed at the Carson Lake is not irrigation as that term is used in the *Alpine* Decree and Nevada law, and therefore refused to uphold the State Engineer's contrary conclusion of law. *Id*. ("As connoted in the *Alpine Decree*, irrigation use refers to the application of water to farmland for pasture or for the production of valuable crops (that is, cash crops or agricultural crops such as alfalfa). [***] The applicants' proposed use of the water is for wildlife purposes. Accordingly , the Court must reverse Ruling # 5759.").

2. Congress Recognized the Distinction Between Water Use for Irrigation and Water Use for Wetlands and Wildlife.

Congress recognized the distinction between the use of Newlands Project water for the purpose of maintaining wetlands for wildlife, as opposed to irrigating farmlands, in the Settlement Act. 104 Stat. at 3294–3324 (JER 530–560). Sections 206(a)(1) and 206(b)(2) of that statute authorize and direct the Secretary of the Interior to acquire water and water rights to sustain primary wetland habitat in Lahontan Valley for the maintenance and restoration of natural biological diversity and for the conservation and management of fish and wildlife. 104 Stat. at 3308–09 (JER 544–45); *see also Churchill County v. Norton*, 276 F.3d 1060, 1064–65, 1067–68, 1070, 1073 and 1077–82 (9th Cir. 2001), amended and rehearing denied, 282 F.3d 1056 (9th Cir. 2002), cert. denied, 537 U.S. 822 (2002)

(upholding the government's environmental compliance for its water rights acquisition program for the Lahontan Valley wetlands).

In furtherance of these objectives, Section 209(a)(1) of the Settlement Act provides for the expansion of the authorized uses of Project water rights from "the existing irrigation purpose" to the "additional purposes" of, *inter alia*, fish and wildlife and recreation. 104 Stat. at 3317 (JER 553) (emphasis added); *see also* Report of the Senate Committee on Indian Affairs on the Settlement Act, Sen. Rept. No. 101-555 (101st Cong., 2d Sess.) (Oct. 21, 1990) at 31 (JER 82) ("Section 209(a) authorizes the Secretary to continue to operate the Project for its traditional irrigation purpose and a variety of contemporary purposes, including municipal and industrial, *fish and wildlife*, recreation, and any purpose recognized as a beneficial use under the law of the State of Nevada") (emphasis added). Congress also directed the Secretary to manage existing Newlands Project reservoirs "for the purpose of fish and wildlife . . . insofar as is consistent with project irrigation purposes." Section 209(i), 104 Stat. at 3319 (JER 555).

Therefore, in the Settlement Act, Congress carefully distinguished between the "existing" (or traditional) irrigation purpose of Project water and the "additional" and "contemporary" uses for fish, wildlife and recreation. Further, Congress clearly "expanded" the authorized uses of Newlands Project water rights to include the maintenance and preservation of wetlands for wildlife, in addition to

the "existing" (or traditional) purpose of irrigating alfalfa on Project farmlands. This expansion of allowable uses of Project water is compatible with and reinforces the district court's holding that the proposed use of the Project water rights by the Applicants for wetlands/wildlife purposes is a use "other than irrigation." Under the *Alpine* Decree, therefore, the transfer of these water rights from irrigation to wetlands maintenance is limited to the net consumptive use water duty of 2.99 af/a.

C. The State of Nevada Recognized that the Manner of Use of Water Proposed for the Lahontan Valley Wetlands Would Be Wetlands/Wildlife and Not Irrigation.

The program to acquire agricultural water rights for wetlands/wildlife purposes at the Lahontan Valley wetlands was initiated by then-Nevada Senator Chic Hecht in 1988. By letter dated July 5, 1988, Senator Hecht asked then-Governor Bryan to provide information requested by the Senate Appropriations Committee pertaining to Senator Hecht's proposed amendment to obtain federal funds to purchase water rights for the Stillwater National Wildlife Refuge. JER 493–94. The first question posed by Senator Hecht was: "What procedure would be followed by the State of Nevada if the federal government were to purchase agricultural water from willing sellers and use it for recreation or wildlife, or both, at Stillwater?" *Id*.

By letter dated July 7, 1988, then-Nevada State Engineer Peter Morros responded to Senator Hecht's July 5, 1988, letter. JER 48–49. The letter states:

> Acquisition of existing agricultural water rights from willing sellers *and the change of point of diversion, manner or place of use* of those water rights will be required to follow the same statutory procedure as any other appropriator…. *Recreation and wildlife have long been recognized as beneficial uses* by the State Engineer.

Id. (emphasis added). Thus, when the issue of acquiring decreed water rights for wetlands first arose in 1988, it was understood by Senator Hecht (its Senate sponsor), the Senate Appropriations Committee, and the State of Nevada that the manner of use of agricultural water rights acquired for the Stillwater wetlands under the wetlands acquisition program would be changed to recreation or wildlife. The agricultural water rights acquired for the Carson Lake wetlands, like those acquired for the Stillwater wetlands, which were recognized at the time to be for wetlands/wildlife and recreation, are clearly for the identical purposes of wetlands/wildlife and, therefore, are only eligible for the 2.99 af/a consumptive use duty portion of the irrigation water right.

D. The Laws of Other States are Inapposite in this Context.

The Respondents, particularly NWA and the State Engineer, make much of the fact that other states in other contexts have defined the term 'irrigation' more broadly than the irrigation of crops on farmland. NWA Open Brief at 36–38; State Engineer Open Brief at 15–17. While providing interesting and colorful

commentary, these other states' decisions are irrelevant because, as shown above, Nevada law—which is special in character—and the *Alpine* Decree are clear that irrigation and wildlife purposes are separate and distinct uses of water.

The case most heavily relied upon by NWA comes from the distant mid-western state of South Dakota. NWA Open Brief at 37–38; *see also* SE Open Brief at 15 (each citing *In Re Water Rights Claim No. 1927-2*, 524 N.W. 2d 855 (S.D. 1994)). NWA cites *Water Rights Claim No. 1927-2* for the notion that "a beneficial use from irrigation is not limited to raising traditional cash crops." *Water Rights Claim No. 1927-2* at 858–59. This case, however, is limited to South Dakota law, and carries no legal weight in Nevada, particularly in a case such as this where the question is not whether wetlands/wildlife is a *proper* beneficial use of water, but whether wetlands/wildlife *is the same beneficial use* as irrigation. A decision by the South Dakota Supreme Court is simply neither useful nor binding in the Ninth Circuit, including the District of Nevada, especially when the task at hand is to interpret the district court's own decree and to apply clear Nevada law.

Water Rights Claim No. 1927-2 also has no persuasive value because it comes from a state with a different water code than Nevada and deals with a water source for which there is apparently no federal decree and thus none of the limiting provisions found in the *Alpine* Decree. While the court in *Water Rights Claim No. 1927-2* cited a definition of the term 'irrigation' as simply "providing moisture for

any plant growth," that definition comes not from South Dakota's statutes, but from that state's administrative code. 524 N.W. 2d at 859 (citing South Dakota Administrative Code 74:02:01:01).

The South Dakota court discounted the weight of its state's own definition by concluding that "the use of water for aquatic plant growth for wildlife propagation is a beneficial use *whether or not it constitutes 'irrigation.'* " *Id*. (emphasis added). In other words, that court did not rely on the definition of irrigation under South Dakota law, because its main task was deciding whether the wildlife purpose of water was a beneficial use, regardless of whether it fit within the state's administrative definition of the term 'irrigation.' *See id*. at 858–59. Here, all parties agree that wetlands/wildlife is a beneficial use of Decreed water, the question is whether it is the *same as* irrigation such that it is entitled to use the entire water duty.

Like the NWA, the State Engineer also relies on *Water Rights Claim No. 1927-2*, but for reasons that are even harder to fathom. While the State Engineer pays lip service to the principle that "[t]he terms of the *Alpine* Decree must be interpreted consistently with Nevada law" (SE Open Brief at 23), the State Engineer nonetheless ignores that very principle when it comes to the central issue in this appeal—whether the application of water to wetlands at the Carson Lake constitutes a change in manner of use. On that issue, the State Engineer relies on

cases from South Dakota, Colorado, California and Nebraska (SE Open Brief at 15–17), while dismissing the application of the Nevada Legislature's own pronouncement on the issue in NRS 533.023 (*id*. at 17–18).

The State Engineer's reliance on *City and County of Denver v. Brown*, 138 P. 44 (Colo. 1914), is misplaced because in that case the Colorado Supreme Court held that using water to irrigate crops on farms was not "superior" or "entitled to preference over" the use of water to grow trees and fill lakes and reservoirs in the City of Denver. SE Open Brief at 16 (quoting *Denver v. Brown* at 49–50). While that may be true in Colorado, for purposes of a federally decreed water right in Nevada, the *Alpine* Decree is very clear that irrigation of alfalfa on Newlands Project farms is entitled to a larger water duty than any "other use," so the holding of *Denver v. Brown* (and the question of which use is "superior") is simply irrelevant to the question before this Court.

Similarly, the State Engineer misconstrues the holding of *Charnock v. Higuerra*, 44 P. 171 (Cal. 1896), which simply held that a farmer was permitted to use alternative technologies, in 1896 the new technology was apparently motorized pumps, to irrigate his fields. That case has nothing to do with whether this Court should reverse the district court's interpretation of its own *Alpine* Decree that the use of Decreed water rights for wetlands/wildlife is a use other than irrigation and

so is entitled only to transfer the consumptive use duty of 2.99 af/a to a new place of use.

Thus, the State Engineer runs afoul of his own pronouncement that the *Alpine* Decree must be interpreted consistently with *Nevada* law by asking this Court to reverse the district court's own interpretation of its Decree because that interpretation conflicts with the laws of other states. At bottom, reliance on cases from other states, especially when Nevada law is so clear, goes against both the direction of the Nevada Legislature that Nevada's water law is "special in character," and this Court's previous holding that it will apply Nevada water law in administering the *Alpine* Decree. *Jahn v. Sixth Jud. Dist. Court*, 73 P.2d 499 (Nev. 1937); *Application of Filippini*, 202 P.2d 535, 540 (Nev. 1949); *Alpine III*, 983 F.2d 1487.

E. The District Court Correctly Held That the State Engineer Was Wrong to Ignore the *Alpine* Decree When Considering Change Applications for *Alpine* Decreed Water Rights.

The State Engineer argues that the *Alpine* Decree must be limited to conform to Nevada law regarding change applications, and that the only considerations for the State Engineer when considering water right change applications are found in NRS 533.370(5): whether the change will conflict with existing rights and whether the change will threaten to prove detrimental to the public interest. SE Open Brief at 6, 23–25. Thus, argues the State Engineer, "the terms of paragraph VII of the

Administrative Provisions of the [*Alpine*] Decree must be interpreted in accordance with the requirements and policies of Nevada's water code." *Id*. at 24. Further, he argues,

> The narrow interpretation of "irrigation" as used in the change provision of the [*Alpine*] Decree must also be rejected since it leads to a result in conflict with Nevada law: a proposed change could be denied in part even though it does not conflict with existing rights or threaten to prove detrimental to the public interest.

Id. at 25–26. The State Engineer has it 180-degrees reversed and is demonstrably wrong. It is clearly the intent of the *Alpine* Decree that no matter the circumstances, a water right transfer from irrigation to any other use is to be transferred at only the 2.99 af/a consumptive use.

The district court correctly, and deftly, rejected the State Engineer's argument:

> In his brief, the State Engineer asserts that "were these proposed changes being pursued exclusively under the Nevada water code rather than the provisions of the *Alpine* Decree, the question of whether their proposed use constitutes a change from irrigation would not even be at issue [because the only consideration would be whether they conflict with existing rights or threaten to prove detrimental to the public interest]." The statement brings into focus that context is critical. [***] Whether the proposed change will conflict with existing rights [pursuant to NRS 533.370(5)] is irrelevant to determining . . . whether the proposed use is irrigation under the *Alpine* Decree. The context of the present petitions requires a determination whether, under the *Alpine* Decree, the proposed use of the water will be a change "from use for irrigation to any other purpose."

Final Order, *U.S. v. Alpine*, 788 F.Supp.2d at 1215. In finding that the proposed use of the Applications is not irrigation, and thus vacating Ruling 5759, the district court found that "the State Engineer's decision gives scant consideration to any aspect of the final *Alpine* Decree. . . ." *Id.*

Alpine I, adopting the Alpine Decree, gives clear and express direction to the Nevada State Engineer: "The State Engineer is directed that change of manner of use applications should only be permitted for the consumptive use amounts determined in this decree . . . when use is changed from irrigation to any other purpose." *Alpine I*, 503 F.Supp. at 893. For the State Engineer to claim, as he argues in his Opening Brief, that he is not bound by this direction, but is only bound by Nevada statute, is at odds with the *Alpine* Decree, and with the State Engineer's prior position, and most importantly with the role and function of the State Engineer vis a vis the *Alpine* Decree court. *U.S. v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857–58 (9th Cir. 1983) (State Engineer, who is given the initial role in hearing change applications for Decreed water rights, serves as an arm of the Decree court for the court's convenience).

The State Engineer's argument now is a radical departure from his prior position regarding the applicability of the *Alpine* Decree's Administrative Provisions. In *U.S. v. Alpine Land & Reservoir Co./Churchill County v. Turnipseed*, 174 F.3d 1007, 1010 (9th Cir. 1999), the State Engineer (and the

United States) argued that the *Alpine* Decree court has continuing and exclusive jurisdiction over the water rights subject to the *Alpine* Decree, and that therefore the Administrative Provisions of the *Alpine* Decree (in that case, the judicial review provisions) were binding upon all parties, including the State Engineer. The *Alpine* Decree court agreed, and was upheld by this Court. *Id*. at 1010–11, 1016. The Tribe agrees, too.

The State Engineer's new position in his Opening Brief is a reversal of course: now he argues that he is no longer bound by the Administrative Provisions, which, incidentally, are the same provisions providing him with primary jurisdiction over these change applications in the first place. The Decree court could, for example, have chosen the Federal Watermaster's office as the administrative venue to consider water rights change applications for Decree rights and the State Engineer would never have been more than a bystander. The State Engineer cannot cherry-pick the *Alpine* Decree provisions that he is to follow, but is instead bound by all of them, including the provision limiting non-irrigation uses of *Alpine* decreed water to 2.99 af/a.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRIBE HAS STANDING TO APPEAL RULING 5759

NWA, but notably not the State Engineer, argues that the Tribe does not have standing because the Tribe will not be harmed if the applications are granted at the erroneous 3.50 af/a water duty instead of the legally appropriate 2.99 af/a

duty. NWA also erroneously proclaims that the Tribe tacitly admitted that it has no standing. NWA Open Brief at 22–28. The district court correctly determined that the Tribe does, indeed, have standing to challenge the State Engineer's erroneous decision to grant the applications at the full water duty.

NWA disingenuously and incorrectly argues that the Tribe's standing is only based upon harm to the Tribe's state-issued Truckee River surface water rights, as opposed to the Tribe's protected legal interest in maximizing all Truckee River flows by, among other things, challenging State Engineer decisions that fail to correctly apply the change provisions of the *Alpine* Decree. NWA Open Brief at 23. Yet, the district court correctly determined that it is the Tribe's overarching, legally protected interest in maximum Truckee River surface water flows that is the basis of the Tribe's standing herein.

The district court held that while the Tribe's challenge to Ruling 5759 does not allege injury to the Tribe's federally decreed Truckee River surface water rights, i.e. its water rights under Claim Nos. 1 and 2 of the *Orr Ditch* Decree,

> Nevertheless, both *Alpine II* and *Pyramid Lake Paiute Tribe v. Morton* recognize that *the Tribe has a protected legal interest to ensure that any water that is not obligated to be diverted from the Truckee River is not diverted*, but is instead permitted to continue flowing in the Truckee River to Pyramid Lake.

Final Order, *U.S. v. Alpine*, 788 F.Supp.2d at 1214 (emphasis added). Thus, the district court determined, "[w]hile the Tribe must allege an injury to maintain

standing, . . . so long as the injury is plausibly alleged to be caused by a State Engineer's decision regarding a decreed water right . . . the [district court] has jurisdiction to hear the Tribe's appeal." *Id*. NWA's argument that the Tribe has not alleged an injury sufficient to have the requisite standing to evoke the district court's jurisdiction was squarely, and correctly, rejected by the district court on the basis of the Tribe's protected legal interest in maximizing the surface water flows of the Truckee River pursuant to *Alpine II* and *Tribe v. Morton*.

As explained by NWA in its own Opening Brief:

> A portion of Truckee River water is diverted via the Derby Diversion Dam and the Truckee Canal to supply the Truckee Division [of the Newlands Reclamation Project]. Diverted water that is not used in the Truckee Division is impounded in Lahontan Reservoir. [***] Carson River water and Truckee River water in the Lahontan Reservoir is used for the Carson Division of the Newlands Project. [***] The Carson Lake and Pasture and Stillwater areas contain wetlands *at the end of the Carson River* that provide habitat to wildlife.

NWA Open Brief at 6–7 (emphasis added, citations omitted). If the district court had not vacated the State Engineer's decision to grant the water rights transfers to Carson Lake and Pasture wetlands for the full irrigation water duty, those water rights holders would have been able to call for the additional 0.51 af/a all the way to the end of the Carson River, which could reduce the amount of water in Lahontan Reservoir, which in turn would allow for increased diversions of the Truckee River to make up for shortages in Lahontan Reservoir, to the detriment of the Tribe's "legally protected interest" in ensuring maximum Truckee River

surface water flows. Thus, the district court correctly determined that the Tribe had standing, and that it had jurisdiction to review the Tribe's appeal of Ruling 5759.

IV. REMAND TO THE STATE ENGINEER WOULD HAVE BEEN IMPROPER AND UNNECESSARY.

NWA suggests that instead of vacating Ruling 5759, the district court should have remanded the matter back to the State Engineer so that the State Engineer could determine, among other things, the amount of "pasture" actually irrigated at Carson Lake and Pasture. NWA Open Brief at 52 (arguing that State Engineer found that some of the proposed places of use of the Applications are pasture, but failed to specify which portion of the non-consumptive use could be applied to pasture lands); *see also id*. at 46 (arguing district court should have remanded to State Engineer to determine whether wetlands/wildlife use proposed by Applications would be a "fully consumptive" use).

NWA's arguments should be rejected because they fail to recognize that the district court determined that the requested manner of use was actually for wetlands and wildlife purposes, not irrigation of pasture lands. If NWA wishes to use some of its water rights for the purpose of irrigating pasture, it needs to follow the *Alpine* Decree and Nevada law to file a new application with the State Engineer requesting such a change. There is no need, nor is there a legally appropriate

avenue, for remanding the current applications to the State Engineer for factual determinations not requested in the original Applications.

Finally, as noted in detail in the Answering Brief of the United States, both NDOW and NWA lack any authority to manage any portion of the relevant wetlands areas as pasture. Additionally, the record, as detailed *supra*, clearly establishes that NDOW and NWA are charged with and intend to manage Carson Lake as a wetland area, not as pasture for livestock. NWA also failed to request this relief in the district court, and therefore it is waived on appeal here.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that this Court uphold the decision of the district court.

/s/ *Don Springmeyer*
Don Springmeyer
Christopher W. Mixson
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Rd.
Las Vegas, Nevada 89120
Tel: (702) 341-5200
Fax: (702) 341-5300
dspringmeyer@wrslawyers.com
cmixson@wrslawyers.com

STATEMENT OF RELATED CASES

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

/s/ *Don Springmeyer*
Don Springmeyer
Christopher W. Mixson
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Rd.
Las Vegas, Nevada 89120
Tel: (702) 341-5200
Fax: (702) 341-5300
dspringmeyer@wrslawyers.com
cmixson@wrslawyers.com

CIRCUIT RULE 32-1 CERTIFICATE

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more, and contains 11,546 words.

/s/ *Don Springmeyer*
Don Springmeyer
Christopher W. Mixson
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Rd.
Las Vegas, Nevada 89120
Tel: (702) 341-5200
Fax: (702) 341-5300
dspringmeyer@wrslawyers.com
cmixson@wrslawyers.com

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, I electronically served the foregoing **ANSWERING BRIEF OF PLAINTIFF-APPELLEE PYRAMID LAKE PAIUTE TRIBE** by using the United States Court of Appeals for the Ninth Circuit CM/ECF system.

/s/ *Christie Rehfeld*
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

ADDENDUM

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James C. Giudici, Esq.
Nevada Bar No. 229
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
P.O. Box 2670
Reno, Nevada 89505
Telephone No. (775) 788-2000
Facsimile No. (775) 788-2020

Paul G. Taggart, Esq.
Nevada Bar No.6136
King & Taggart Ltd.
108 North Minnesota Street
Carson City, Nevada 89703
Telephone No. (775) 882-9900
Facsimile No. (775) 883-9900

Attorneys for The Nevada Waterfowl Association

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALPINE LAND & RESERVOIR CO., ET AL.,

Defendants.

_____/

Civil No. 3:73 - CV-00183-LDG
Equity No.: D - 183 - LDG

NEVADA WATERFOWL ASSOCIATION'S RESPONSE TO MOTION OF PYRAMID LAKE PAIUTE TRIBE OF INDIANS TO DECLARE THAT THE MANNER OF USE OF WATER FOR THE MAINTENANCE OF WETLANDS IS FOR THE PURPOSE OF WILDLIFE OR RECREATION, NOT IRRIGATION

Nevada Waterfowl Association ("NWA") (incorrectly identified by the Pyramid Lake Paiute Tribe as "Nevada Wildfowl Association") responds to the motion of the Pyramid Lake Paiute Tribe of Indians ("Tribe") to declare that the manner of use of water for the maintenance of wetlands is for the purpose of wildlife or recreation, not irrigation. Simply put, the Court does not have primary jurisdiction over the change applications challenged by the Tribe. It is the Nevada State Engineer who has primary jurisdiction, and the Court should await his decision. This response is made and based upon the following memorandum of points and authorities and exhibits attached hereto as well as all other matters properly of record.

RESPECTFULLY SUBMITTED this 11th day of September, 2006.

James C. Giudici, Esq.
McDonald Carano Wilson LLP
Nevada Bar No. 229
100 West Liberty Street 10th Floor
P.O. Box 2670
Reno, Nevada 89505
Telephone No. (775) 788-2000
Facsimile No. (775) 788-2020

Paul G. Taggart, Esq.
King & Taggart Ltd.
Nevada Bar No. 6136
108 North Minnesota Street
Carson City, Nevada 89703
Telephone No. (775) 882-9900
Facsimile No. (775) 883-9900

/S/

BY _____
ATTORNEYS FOR THE
NEVADA WATERFOWL ASSOCIATION

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The motion filed by the Pyramid Lake Pauite Tribe of Indians ("Tribe") on August 23, 2006, is just the latest effort by the Tribe to interfere with and disrupt the efforts to save the Lahontan Valley Wetlands. The Tribe is now asking this Court to rule on a matter that is currently pending before the State Engineer pursuant to established procedures for the resolution of applications to transfer water rights to the wetlands. As Nevada Waterfowl Association will show, the Court does not have primary jurisdiction over the change applications challenged by the Tribe. The Court should abstain, deny the Tribe's motion, and await any appeal from the State Engineer's decision on the Tribe's administrative protests against the subject water right transfer applications that are set for hearing before the State Engineer on November 14-15, 2006. But first, a brief background to this dispute may be helpful.

BACKGROUND TO CURRENT DISPUTE CONCERNING LAHONTAN VALLEY WETLANDS

The Nevada Waterfowl Association ("NWA") (incorrectly identified by the Tribe as "Nevada Wildfowl Association"), has played a key role in the national efforts to save the Lahontan Valley Wetlands. NWA was formed in 1988 by a group of concerned individuals who saw the Lahontan Valley Wetlands, including Stillwater National Wildlife Refuge and the Carson Lake Pasture, literally dry up and become poisoned killing grounds for migratory birds as a result of a lack of recognized water rights. NWA raised private local funds and bought the first water rights for Stillwater National Wildlife Refuge and Management Area near Fallon, Nevada. That purchase was the first time ever that private irrigation water rights had been transferred within a federal reclamation project to a national wildlife refuge. Because of that precedent, Congress was persuaded to include provisions in the Water Settlement Act (Public Law 101-618) that directs the Secretary of Interior to secure sufficient water rights to maintain 25,000 acres of primary wetlands in the Lahanton Valley. *See* Section 206 of PL 101-618, a copy of which is attached hereto as Exhibit "A", and incorporated by reference herein.

Following its Stillwater precedent, NWA also bought the first water rights for Carson Lake and Pasture, which is the second most important wetland complex remaining in the State of Nevada.

Other NWA projects include the first water rights purchase for the Humboldt Sink, where NWA was also instrumental in putting together a project to build nesting islands during the last major drought.

In 1991, just five years after NWA was formed, it received national recognition for its work. The U.S. Fish and Wildlife Service awarded NWA the 1991 National Wetlands Conservation Organization of the Year Award in conjunction with Lahontan Wetlands Coalition. Both groups shared the award for their joint efforts to save the Lahontan Valley Wetlands.

NWA's mission is to protect, restore and enhance Nevada's wetlands and the wildlife dependent upon them, especially waterfowl and shorebirds. NWA is a family-oriented conservation organization that works closely with other groups, such as the U.S. Fish and Wildlife Service, Nevada Department of Wildlife, Lahontan Wetlands Coalition, The Nature Conservancy, Ducks Unlimited, and other conservation organizations that share its goal of preserving Nevada's unique desert wetlands for future generations to experience and enjoy.

NWA's Stillwater precedent showed there was strong local support for saving the Lahontan Valley Wetlands and helped convince Congress to enact the Water Settlement Act. Public Law 101-618 was a national landmark in the efforts to address water problems in the west. It was the result of years of negotiations among all the key interested groups and resulted in a complex package of compromised solutions to one of the most difficult water projects in the nation. A key component of the legislation was Section 206 dealing with the Lahontan Valley Wetlands and the transfer of Carson Lake Pasture to the State of Nevada to become a State Wildlife Management Area.

The legislation also assured the survival and recovery of Pyramid Lake and its fisheries, as well as assuring the Truckee Meadows a reliable source of water. Indeed, those provisions of PL 101-618 concerning Pyramid Lake and its fisheries have been very successful. It is no exaggeration to say that Pyramid Lake has been saved and its fisheries significantly restored.

At the same time, Congress recognized the Federal government's obligation to save 25,000 acres of primary Lahontan Valley Wetlands and specifically provided in Section 206(a)(1)(A) that "water right(s) acquired under [Section 206 for the wetlands] *shall* ... be used for *direct application* to *such wetlands* ... for the benefit of fish and wildlife *within the Lahontan Valley*." (Emphasis added). Congress further provided in Section 206(a)(1)(C) that the water be transferred to the

wetlands "in accordance with *applicable court decree*s and *State law*, and *shall be used* to apply water *directly* to wetlands." (Emphasis added).

As part of its efforts to save the Lahontan Valley Wetlands, NWA has filed two separate applications with the State Engineer to transfer certain water rights to Carson Lake and Pasture. Application No. 71775 was filed on October 15, 2004 by NWA to change the place of use of a portion of the water previously appropriated under Claim No. 3, *United States v. Orr Ditch Water Co.* and *U.S. v. Alpine Land and Reservoir Co.* The Application proposes to change the place of use of 6.58 acre-feet (1.88 acres x 3.5 acre-feet per acre) of the waters of the Truckee and Carson Rivers from the NW$^{1/4}$ SW$^{1/4}$ and the SW$^{1/4}$ SW$^{1/4}$ of Section 32, T.19N., R.28E., M.D.B.&M. to Carson Lake. *See* Tribe's Exhibit 2. Application No. 71775 was timely protested by the Tribe.

Application No. 73574 was filed on December 12, 2005 by NWA to change the place of use of a portion of the water previously appropriated under Claim No. 3, *United States v. Orr Ditch Water Co.* and *U.S. v. Alpine Land and Reservoir Co.* The application proposes to change the place of use of 19.25 acre-feet (5.50 acres x 3.5 acre-feet per acre) of the waters of the Truckee and Carson Rivers from the NW$^{1/4}$ NE$^{1/4}$ of Section 34, T.19N., R.28E., M.D.B.&M. to Carson Lake. *See* Exhibit "B", attached hereto and incorporated by reference herein. Application No. 73574 was also timely protested by the Tribe.

In its motion, the Tribe addresses NWA's application Number 71775 as well as the application filed by the Nevada Department of Wildlife (NDOW). *See* Tribe's Exhibit 1. The Tribe's motion completely ignores NWA's second application (No. 73574). *See* Exhibit "B". Yet, the Tribe is well aware of that application because they filed a protest against it with the State Engineer[1].

In any event, the Tribe timely protested both of NWA's applications as well as NDOW's application before the State Engineer. In response to the Tribe's protests, the State Engineer issued a Scheduling Order on March 29, 2006. *See* Scheduling Order attached hereto as Exhibit "C", and incorporated by reference herein. The State Engineer has set hearings on the Tribe's protests for Tuesday and Wednesday, November 14 and 15, 2006. The State Engineer also directed the parties

[1]The Tribe's failure to address NWA's Application No. 73574 appears to constitute an admission by the Tribe that Application No. 73574 is proper and should be granted at full duty rate.

to prepare and file opening briefs by Monday, October 16, 2006 and reply briefs by Monday, November 6, 2006 on the issues identified in the March 29th Scheduling Order. Those issues include, but are not limited to, the identical issues the Tribe has raised in its motion.

Pursuant to the State Engineer's Scheduling Order, NWA has been spending significant time and resources preparing for the hearing and drafting its opening brief. NWA's opening brief is not yet complete as it depends upon the final preparation of NWA's case to be presented before the State Engineer. The Tribe's motion is nothing more than an attempt to circumvent the administrative process; the very same process that the Tribe itself initiated by filing its protests with the State Engineer. The Tribe is doing so, not only to prevent the State Engineer from doing his job, but also in order to obtain discovery from NWA that the Tribe is not entitled to pursuant to the State Engineer's March 29th Scheduling Order and procedures.

NWA opposes the Tribe's motion and requests that the Court abstain from acting on the Tribe's motion. The Court should allow the State Engineer to proceed with the scheduled hearings and allow him to make his decision. If any party is not satisfied with his decision, then that party can bring the matter before this Court pursuant to proper procedure.

NWA understands that other parties to the *Alpine Decree* are also opposing the Tribe's motion on procedural and jurisdictional grounds. NWA joins in those other parties' oppositions to the Tribe's motion and asserts its own argument in opposition to the Tribe's motion as follows.

1. <u>The Court Does Not Have Primary Jurisdiction over the Change Applications Challenged by the Tribe</u>.

It is not the province of the Court to decide, in the first instance, the issues presented by the Tribe because, as the Tribe is well aware, the *Alpine* Court only has appellate jurisdiction over the change applications at issue. The Decree itself is clear:

> Applications for changes in the place of diversion, place of use or manner of use as to Nevada **shall be directed to the State Engineer**. Any person feeling himself aggrieved by any order or decision of the State Engineer on these matters may appeal that decision or order to this Court. (Emphasis added).

The long line of jurisprudence interpreting the *Alpine Decree* is unequivocal that the Nevada State Engineer is vested with primary jurisdiction over change applications such as those at issue here.

See U. S. v. Alpine Land & Reservoir Co., 174 F.3d 1007, 1011-12 (9th Cir. 1999) ("Alpine IV"); *U. S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1222-23 (9th Cir. 1989) ("Alpine II"); *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857-58 (9th Cir. 1983) ("Alpine I"). The Ninth Circuit has repeatedly "approved this arrangement," the purpose of which is to adhere to the Congressional mandate that a federal decree defer to the water laws of the individual states. *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989); *see California v. United States*, 438 U.S. 645, 653 (1978); *U. S. v. Alpine Land & Reservoir Co.*, 878 F.2d 1217, 1222-23 (9th Cir. 1989) ("Alpine II"). In other words, the governing principle is that "[s]tate law control[s] the distribution of water rights to the extent that there is no preempting federal directive." Alpine I, 697 F.2d at 858.

The Ninth Circuit has further clarified this point: "Nevada state law controls **both the process and the substance** of a proposed transfer of water rights." *United States v. Alpine Land & Reservoir Co.,* 341 F.3d 1172, 1180 (9th Cir. 2003) ("Alpine VI") (emphasis added). To this end, the Court's review of a decision by the State Engineer is circumscribed by certain standards. First, "[d]ecisions of the State Engineer are *prima facie* correct, and the burden of proof is on the party challenging the decision." *Id.* Second, factual determinations by the State Engineer must be supported by substantial evidence. Third, legal conclusions of the State Engineer must be upheld "as long as they are not contrary to law." *Id.* The Tribe should not be allowed to evade this standard of review by bringing the change applications to the Court in the first instance.

The Tribe is no stranger to this well-established procedure, and on numerous occasions, it has—as it seeks to do here—attempted to circumvent the State Engineer's primary jurisdiction over change applications. For example, the Tribe has already unsuccessfully argued that the Secretary of the Interior should retain authority over transfer applications and the distribution of water in the Newlands Project. *See* Alpine I, 697 F.2d at 858-59; *Pyramid Lake Tribe of Indians v. Hodel*, 878 F.2d 1215, 1216-17 (9th Cir. 1989). The Tribe's motion currently pending before the Court is no different. It asks the Court to decide, in the first instance, the substance of a proposed transfer of water rights. Such a request is clearly outside of the Court's appellate jurisdiction. *See* Alpine VI, 341 F.3d at 1180.

Moreover, the Tribe knows the proper procedure, as evidenced by examples of when the Tribe has adhered to that procedure in the past. For example, the Tribe protested to the State Engineer and then appealed his decision to this Court over transfer applications in which the Tribe argued that the underlying water rights had been either forfeited or abandoned. *See United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1065 (9th Cir. 2002) ("Alpine V"). By filing the motion currently before the Court, the Tribe seeks to evade a procedure with which it is extremely familiar. Indeed, the Tribe has already filed protests against NWA's and NDOW's applications with the State Engineer, and the evidentiary hearing on the applications is already scheduled. Only once that hearing has proceeded and the State Engineer has made a decision is the appellate jurisdiction of the Court triggered.

In furtherance of its attempt to evade these jurisdictional mandates, the Tribe misleadingly suggests that what is essentially a ruling on a change application is an issue of law to be decided by the Court in the first instance. This is simply not the case, and the Tribe's position reveals a thinly-veiled effort to avoid the governing law. Neither NDOW nor NWA are seeking increased diversion rates as the Tribe submits. (*See* Tribe's Motion at 8.) To the contrary, the applicants are seeking to change the full duty which they are allowed under the Decree, the right to which they had earlier reserved in order to avoid a conflict with the Tribe at a time when the wetlands were in desperate need of water. These applications fall squarely within the primary jurisdiction of the State Engineer. *See* Alpine I, 697 F.2d at 858.

The Tribe's accusation that the State Engineer would be biased because one of the applicants is a state agency and the state has expressed the position that it deserves the full duty on transfers to wetlands is groundless. The Tribe has tried this argument in the past and lost. *See id.* The Ninth Circuit has made clear that "the notice and protest procedures of Nevada law are adequate to allow exploration of [the Tribe's interest] before the State Engineer." *Id.* These procedures are ample "safeguards [to] provide full vindication of the admitted federal interests [in the Newlands Project]." *Id.* As a result, any due process concerns raised in the Tribe's motion are meritless. *See id.*

In sum, the issues raised by the Tribe are not novel. To the contrary, the long legacy of *Alpine* litigation has addressed them and instructed that: (1) the State Engineer has primary jurisdiction over

change applications such as NWA's and NDOW's; (2) the Decree Court has appellate jurisdiction **only** to review the State Engineer's decision on those applications; and (3) the Decree Court's standard of review is deferential to the State Engineer. This well-established law is based on "[f]undamental principles of federalism [that] require the national government to consult state processes and weigh state substantive law in shaping and defining federal water policy." *Id.* In light of this governing law, NWA respectfully asks the Court to deny the Tribe's motion.

2. Congress Required That Applications to Transfer Water Rights to the Lahontan Valley Wetlands Be Heard First by the Nevada State Engineer.

In Section 206(a) of PL 101-618, Congress authorized and directed the Secretary of the Interior, in conjunction with the State of Nevada and such other parties (NWA) as may provide water and water rights for the purposes of saving the Lahontan Valley Wetlands, to acquire by purchase or other means water and water rights, with or without the lands to which such rights are appurtent, and to transfer, hold, and exercise such water and water rights and related interests to sustain, on a long-term average, approximately 25,000 acres of primary wetland habitat within the Lahontan Valley Wetlands. The primary Lahontan Valley Wetlands are those wetland areas associated with the Stillwater National Wildlife Refuge and Management Area, Carson Lake and Pasture, and the Fallon Indian Reservation. *See* Section 203(e) of PL 101-618.

Section 206(a)(1)(A) provides that water rights acquired for the Lahontan Valley Wetlands "shall, to the maximum extent practicable, be used for direct application to such wetlands and shall not be sold, exchanged, or otherwise disposed of except . . . for the benefit of fish and wildlife within the Lahontan Valley." Section 206(a)(1)(C) requires that water rights for the wetlands "shall . . . be transferred in accordance with applicable court decrees and State law, and shall be used to apply water directly to wetlands." Section 209(a)(2) specifically states that water rights acquired for the wetlands "shall be transferred in accordance with State law."

Congress's intent was clear that transfers of water rights to the Lahontan Valley Wetlands had to be done consistent with state law and the applicable decrees, which requires that such applications be heard first by the State Engineer.

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3. The Federal Government Recognizes That the Water Transfer Applications Must Be Heard First by the State Engineer.

When the United States constructed the Newlands Project, certain public lands were withdrawn for project purposes, including those lands known as Carson Lake and Pasture. Subsection 206 (e) of PL 101-618 authorizes the Secretary of the Interior to convey Carson Lake and Pasture to the State of Nevada to become a State Wildlife Management Area. On October 28, 2004, the State of Nevada and the U.S. Department of the Interior entered into an agreement for the transfer and management of Carson Lake and Pasture. *See* Interior Agreement Number 05-LC-20-8359, attached hereto as Exhibit "D", and incorporated by reference herein. The Agreement was signed by Benett W. Raley, Assistant Secretary for Water and Science on behalf of the U.S. Department of the Interior; by Kenny C. Guinn, Governor of the State of Nevada; by Brian Sandoval, Attorney General of the State of Nevada, who approved the agreement as to form only; and it was witnessed by United States Senator Harry Reid. *See* Exhibit "D", at page 4.

The agreement for the transfer of Carson Lake and Pasture to the State of Nevada provides that the deed conveying title will contain a restrictive covenant as follows:

> *Any water right transferred by the State for use on Carson Lake and Pasture shall be limited to no more than 2.99 acre - feet per acre, except as further provided in this paragraph.* The covenant shall be applicable to all previously acquired and transferred water rights; all previously acquired but not yet transferred water rights; and any water rights not yet acquired by the State. *The 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.* The Secretary reserves the right to assert in any administrative or judicial proceeding its view that the appropriate water duty for wetlands use at Carson Lake and Pasture is not more than 2.99 acre - feet per acre. *As provided in the applicable decree, any such transfer application shall be directed to the Nevada State Engineer, and appeals from the decision of the State Engineer may be taken to the District Court for the District of Nevada, Ninth Circuit Court of Appeals and the United States Supreme Court. The State agrees that any approval of an increase in the amount of water that may be used on Carson Lake and Pasture for wetlands use above 2.99 acre - feet per acre shall not go into effect until set forth in a final court ruling.* In the event of such an approval, the State may file transfer applications requesting use of more than 2.99 acre - feet per acre for any other water rights previously transferred or to be transferred in the future for use on Carson Lake and Pasture. Any increase would go into effect as determined by the State Engineer, the District Court, the Ninth Circuit Court of Appeals and the United States Supreme Court without any restriction under the agreement. (Emphasis added).

As expressly stated in the restrictive covenant that the federal government has insisted will be placed on the transfer of Carson Lake and Pasture to the State of Nevada, any application to transfer

water rights to Carson Lake and Pasture above the previously - approved 2.99 acre feet per acre duty rate "shall be directed to the Nevada State Engineer, and appeals from the decision of the State Engineer may be taken to the District Court for the District of Nevada, Ninth Circuit Court of Appeals and the United States Supreme Court." Therefore, it is clear that pursuant to the Carson Lake and Pasture Agreement, water rights transfer applications must be first heard by the State Engineer.

4. The Tribe's Motion is an Improper Collateral Attack on the Administrative Process by which the Tribe is Trying to Have the Court Prejudge the Water Duty Rate Issue and Obtain Prehearing Discovery to which the Tribe is Not Entitled.

In light of the clear and overwhelming authority that this Court lacks primary jurisdiction and should await an appeal from the State Engineer's decision, the Tribe nevertheless filed its motion. Apparently the Tribe desires the Court to prejudge the water duty rate issue by suggesting the water duty rate for Carson Lake and Pasture is as simple as the Tribe portrays it in their motion; and because the Tribe is trying to obtain prehearing discovery from NWA to which the Tribe is not entitled pursuant to the State Engineer's Scheduling Order and procedures.

NWA is a relatively small organization with limited resources. It has been working diligently pursuant to the March 29th Scheduling Order of the State Engineer to prepare its case and opening brief. Significant time and effort has already gone into NWA's opening brief and more work needs to be done before its due date. The Tribe's motion has forced counsel for NWA to divert time and effort from their case preparation to oppose the Tribe's motion. In opposing the motion, NWA is further forced to make a decision whether to stand on its jurisdictional challenges to the Tribe's motion and protect the integrity of the State Engineer's role and process in these matters and not answer the Tribe's substantive arguments. That, potentially, places NWA at risk the Court might assert primary jurisdiction and decide the substantive issue.

Responding to the Tribe's substantive arguments now would be inappropriate in light of the jurisdictional concerns and would further disrupt NWA's preparation of its case before the State Engineer. NWA would essentially be forced to accelerate and finish its case preparation and file its opening brief as part of its opposition to the Tribe's motion. NWA's opening brief is not due before the State Engineer until October 16, 2006, but its opposition to the Tribe's motion is due September

11, 2006. Additionally, if NWA responded to the Tribe's substantive arguments as part of NWA's opposition to the Tribe's motion, then that would also provide the Tribe discovery of NWA's case that the Tribe is not entitled to under the State Engineer's Scheduling Order or process. NWA, of course, completely disputes the Tribe's substantive arguments.

Rule 1 of the Federal Rules of Civil Procedure directs that procedure in all cases of a civil nature, whether cognizable as cases at law or in equity, be administered to secure the just, speedy and inexpensive determination of every action. NWA should not be forced to incur the costs of having to respond to the Tribe's substantive arguments in NWA's opposition to that motion unless and until the Court first decides for some reason that it will preempt the State Engineer and exercise primary jurisdiction. NWA reserves its right to oppose the Tribe's motion on the merits if the Court rejects NWA's jurisdictional objections to the motion and decides to exercise primary jurisdiction over this dispute concerning the water duty rate for Carson Lake and Pasture.

CONCLUSION

NWA respectfully requests that the Court deny the Tribe's motion for lack of primary jurisdiction. The Court should abstain and allow the State Engineer to exercise primary jurisdiction over NWA's application Nos. 71775 and 73574 (as well as NDOW's Application No. 73444 which has been consolidated with NWA's Applications for a single hearing before the State Engineer).

If either party is not satisfied with the State Engineer's decision, then that party has the right to bring the matter to this Court pursuant to well-established and proper procedure.

The Court should not allow the Tribe to have the Court prejudge the substantive issues; nor should the Court require NWA to respond to the merits of the Tribe's motion before completion of the State Engineer's hearing process and decision.

Finally, and in the alternative, should the Court decide for some reason to exercise primary

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jurisdiction over the Tribe's motion, NWA then reserves its right to response to the Tribe's motion on the merits.

RESPECTFULLY SUBMITTED this 11th day of September, 2006.

James C. Giudici, Esq.
McDonald Carano Wilson LLP
Nevada Bar No. 229
100 West Liberty Street 10th Floor
P.O. Box 2670
Reno, Nevada 89505
Telephone No. (775) 788-2000
Facsimile No. (775) 788-2020

Paul G. Taggart, Esq.
King & Taggart Ltd.
Nevada Bar No. 6136
108 North Minnesota Street
Carson City, Nevada 89703
Telephone No. (775) 882-9900
Facsimile No. (775) 883-9900

/S/

BY_____
ATTORNEYS FOR THE
NEVADA WATERFOWL ASSOCIATION

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of KING & TAGGART, LTD., and that on this date I served, or caused to be served, a true and correct copy of the preceding document, addressed to:

[__X__] By **U.S. POSTAL SERVICE**: I deposited for mailing in the United States Mail, with postage prepaid, an envelope containing the above-identified document, at Carson City, Nevada, in the ordinary course of business, addressed to:

Don Springmeyer, Esq.
Robert C. Maddox & Assoc.
3811 West Charleston Blvd., Suite 110
Las Vegas, Nevada 89102

Stephanie Zehren-Thomas, Esq.
Fredericks, Pelcyger & Hester, LLC
1900 Plaza Drive
Louisville, Colorado 80027

Robert D. Stitser, Esq.
P.O. Box 6627
Reno, Nevada 89513

Michael Van Zandt, Esq.
McQuaid Bedford & Van Zandt, LLP
221 Main Street, 16th Floor
San Francisco, California 94105-1936

Nhu Nguyen
Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701-4717

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