Newlands Reclamation Project Water Rights: A Personal Property Issue

prepared for

Nevada Policy Research Institute

by

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News

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NPRI's New Study Places New Slant on Water Controversy

Nevada's current water wars continue impassioned by traditional, historical, and environmental precedents. However, no one has examined this issue from the perspective of private property rights. NPRI has discovered that there is a wealth of legal legacies which support claims by agricultural users of the rural lands in Nevada .... legacies which find their grounding within the body of the Fifth Amendment to the United States Constitution, popularly known as the "takings clause" (*"Nor Shall private property be taken for public use without just compensation"*). Federal "takings" becomes a serious issue especially after review of Supreme Court rulings.

Supreme Court decisions dating back to 1902 and as late as 1985 agree that the water vested in the original Newlands Reclamation Project are to be considered "irrevocable" and "appurtenant" to the land owned by the agricultural users. ("Appurtenant" refers to the addition of one entity to a more important entity - water belongs to the land which belong to the private property owner.)

In addition, economic benefits reported by a recent University of Nevada study indicate that agricultural practices in the Newlands area are essential to this areas

more

survival. Off-shoots of this industry, such as construction, agricultural services, transportation and public utilities, and mining are all quite dependent on the Newland farmers.

Following the Supreme Court Nollan decision in 1987, an Executive Order was issued by then President Reagan, requiring that agencies take into account the idea of "takings" when framing all new government regulations. This Executive Order (EO 12630) has been repeatedly spurned by the Environmental Protection Agency, the Department of the Interior, the Bureau of Land Management and the Bureau of Reclamation.

While the property owner in this area is not in favor of fouled air and polluted or wasted water and is willing to contribute to the achievement of important environmental objectives, most are not content to be left holding an empty box after all the value of their property has been removed by over-reaching environmentalists turned bureaucrats.

To order copy of *"Newlands Reclamation Project Water Rights: A Matter of Private Property,"* call the Nevada Policy Research Institute at 786-9600. There is a $5 charge for each study.

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or Sec. Churchill County Chamber of Commerce, Fallon Nev.

KEY TO: GOVERNMENT AND OTHER ABBREVIATIONS

OCAP	Operating Criteria and Procedures
MAD	Macimum allowable dversion
DOI	Department of Interior
AWHC	Available Water Holding Capacity
BoR	Bureau of Reclamation
PL	Public Law
T.C.I.D.	Truckee Carson Irrigation District
NWPA	Newlands Water Protective Association
USFWS	U.S. Fish and Wildlife Service
CFS	Cubic Feet per Second

Newlands Reclamation Project
Water Rights: A Personal Property Issue

Rationale

Strict adherence to Nevada law and long standing court decrees are the crucial element in resolving Nevada's continuing water rights controversy. The central theme of this controversy is the dis-entitlement of water rights legally designated by the federal government pursuant to the purpose of homesteading, settling, and developing Churchill County and Fernley, Nevada. [1]

The crux of the issue is a change in attitude by the federal government toward water management — the key factor for successful implementation of a specific land management policy designed to promote productive human habitation of a large arid tract of Northern Nevada.

Since our state is dependant on water for the health of its lifestyle, its business and its industry, Nevada Policy Research Institute presents this monograph in order to clarify the issue and to crystalize options for resolution of a controversy that threatens the lives and livelihood of northern Nevada farmers and protection of our wetlands.

Overview

Settlement and human habitation of the western territories was a policy objective of the post Civil War federal government. Recognizing that the predictable availability of water was key to the settlement of otherwise uninhabitable land, the government set forth policies to ensure the reliable availability of water. The Newlands Reclamation Project is the first enterprise undertaken by the United States Reclamation Service [2] after the Reclamation Act was passed by Congress in 1902. The project was named for one of its chief sponsors, Francis G. Newlands, Senator from Nevada.

The Newlands Project provides water for Fernley and Lahonton Valley ranchers and farmers through diversion of designated volumes of water from the Truckee River. In recent years and consonant with rising pressure from environmental and "rights" interest groups, the underlying rationale for the Newlands Irrigation District has been subjected to intense scrutiny and criticism. Complaints by the Pyramid Lake Paiute Indian Tribe and environmental protection groups include allegations of unauthorized

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1 The original document is reproduced as the forepage to this monograph.

2 Now known as the Bureau of Reclamation.

use of water intended for Pyramid Lake,[3] and water overuse which allegedly diverts water from wildlife habitats. Fernley and Lahontan Valley farmers and ranchers dispute these allegations, and respond to the claims by referring the original intent of the Reclamation Act and to the historical precedent set by establishing wetlands in a previously desert environment through run-off of irrigation water.

The core issue in this controversy is, in fact, not about endangered species, wetlands and clear water. It is, specifically, about property rights and government intrusion, "*takings*" [4] of water rights, and state sovereignty.

The Fernley and Lahontan Valley inhabitants' title to these water rights has been consistently upheld by the U.S. Supreme Court and guaranteed as "*permanent and assured*" (see forepage). Ironically, it is this same U.S. government who is now attempting to "*take*" them back via administrative and legislative means without just compensation or consideration. The farmers and ranchers are dependent on water to raise their crops, cattle, sheep and dairy cows. Stated very simply: *along with the denial or confiscation of water rights goes the productivity of the land!*

Precedent and History

The United States government acquired the land which now comprises Nevada from the Spanish-Mexican government. The United States government later developed the Newlands Reclamation Project from pre-existing (vested) and new water rights which it claimed on the Truckee and Carson Rivers. These new water rights were then sold to the settlers of the Nevada Territory who, in good faith, paid cash for the water rights.

Construction of the Newlands Reclamation Project began shortly after the Act was passed by Congress.[5] The most critical developmental component of the project was construction of Derby Dam. Its primary purpose was to divert designated Truckee River water through the Truckee Canal[6] to the Carson River some 31 miles away. With

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3 Located within the boundaries of the Pyramid Lake Paiute Reservation.

4 "*Takings*" is a concept covered under the "Just Compensation Clause" of the Fifth Amendment of the Constitution which allows the Federal government to *"take" private property but not without just compensation.*

There is a case before Federal Court filed by another Nevadan, Wayne Hage. Mr. Hage has sued the Forest Service for $28.4 million under the "*just compensation*" clause of the Fifth Amendment. Hage's case is based on the argument that western settlers hold pre-existing rights which pre-date the establishment of the Forest Service. Should Hage win this suit, federal land managers, who make decisions everyday on how to balance competing demands for the use of hundreds of millions of acres, would be reluctant to limit logging or mining or grazing on public land for fear of similar private property "*takings*" suits.

5 July 2, 1902

6 The Truckee Canal was to have a carrying capacity of 1500 cubic feet per second (cfs) but it's actual carrying capacity is approximately 900 cfs. The irrigation diversions from the Truckee River were meant to supplement those of the Carson River to develop the lands [which are] "*naturally dry and arid*" and "*without [the] application of water are of little or no value; but with irrigations will*

(continued...)

the development of land adjacent to the Truckee Canal route, the farming and grazing communities of Fernley, Hazen, and Swingle Bench evolved.

Since storage in Lake Tahoe was not considered adequate to serve the acreage in production at that time, construction of Lahontan Dam and Reservoir began in 1911 to enhance water storage. Lahontan Reservoir was built to have a storage capacity of 295,000 acre feet. From onset of construction to completion on April 30, 1919, the entire Newlands project carried a price tag of $6,252,000.

Federal Litigation History for Establishment of the Newlands Project

United States of America Versus Orr Water Ditch Company, et al. (1904)

In 1904, in order to assure its original investment and to secure ample water rights to cover the lands within the Newlands Project Plan, the government filed action to lay claim to waters of the Carson and Truckee Rivers. On February 13, 1926 a temporary restraining order[7] was issued on the Truckee River waters. Forty years after the original motion was filed, it was heard and ruled on by a Federal District Court. When finalized in 1944, the action became known as the *United States of America versus Orr Water Ditch Company, et al.*[8]

During the forty years that this case was before the Court, all parties with claims on the Truckee River were given opportunity to "prove" their claims. Fourteen of these claims were incorporated into the final decree.

The Truckee River Agreement (1935)

Incorporated into the *Orr Ditch Decree* of 1944 was a section entitled *The Truckee River Agreement*, approved on June 13, 1935. The most notable sections of this agreement included Floriston Rates[9] and the operation and water level of Lake Tahoe.

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[6] (...continued)
produce valuable crops and furnish homes and support for a large population." — the Orr Ditch Decree.
Even though the Newlands Project was originally intended to consist of 232,800 acres of land, only 72,742 acres were ever developed.

[7] Unappropriated waters were claimed by the federal government. Under *temporary restraining order* history could be collected and parties that might be adversely affected would have time to prove claims before final adjudication or decree was issued by the Federal Court.

[8] a.k.a. the Orr Ditch Decree Final Decree, A-3 U.S.D.C., Nevada.

[9] Floriston Rates are the court ordered flows of the Truckee River as measured at the Floriston gauge on the river. Flows are governed by decree and monitored by the Federal Water Master. Changes in flows can be affected only by mutual agreement of all parties to the decrees. This generally takes place in drought years to conserve stored water for use in latter summer and autumn months.

The United States vs Alpine Land and Reservoir Co., et. al. 1925

On May 11, 1925, the United States Government filed action again to ensure storage and irrigation diversion rights to the Lahontan Reservoir. Known as *United States versus Alpine Land and Reservoir Co., et. al.*, this ruling established surface flows on the Carson River to coordinate its pre-1920 upstream diversion rights. [10] But, as in the Orr Action, a temporary restraining order was issued by the Court. [11]

55 years after the original filing, [12] a final decree was issued. This Decree reaffirmed, as did *The Orr Ditch Decree* of 1944, 1902 priority water rights for the Newlands Project. [13]

The most notable addition to The Alpine Decree was its deference to state's rights by establishing that the Newlands Project water would be distributed subject to Nevada State Statutes governing water law. In fact, applications for any changes in use or place of use were to be directed to the State of Nevada not the federal government.

Summation of Orr and Alpine Decrees

Both the Orr Ditch and Alpine Decrees declared that the water "*belongs*" [14] to the land once the water is put to beneficial use under state water law.

Nevada vs the United States Government (1969–1983)

The United States government argued that the water from the Newlands project "*belonged*" to the federal government. Property owners countered that the *"water right" was "appurtenant"* [15] *to the land* and, as such, was private property. Because of the government's assertion, water rights transfers within the Project were disallowed from 1969 to 1984.

On June 21, 1983 the United States Supreme Court upheld, in *Nevada verses the United States*, that the water rights belonged to the individual property owner.

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10 D-183 U.S.D.C., Nevada.

11 June 9, 1949.

12 October 28, 1980

13 It decreed a water duty or 3.5 acre feet per year for bottom ground and 4.5 acre feet per year for bench ground.

14 The legal term is "appurtenant."

15 "Appurtenant" refers to the addition of one entity to a more important entity.

" ... the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers on the Project, the Government's "ownership" of water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." [16]

In its *Nevada vs the United States Government* decision, the United States Supreme Court was unanimous. Justice Brennan's concurring opinion reads:

"In final analysis, our decision today is that thousands of small farmers in Northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in judicial decree..." [17]

Thus, in 1984, with individual property rights upheld, the owners of water rights in the *Newlands Project* began the process of once again transferring water rights according to *Nevada State Statute*.

Actions Following 1984

The Department of Interior, the Department of Justice and the Pyramid Lake Paiute Indian Tribe have persevered with their efforts to cut off water diversions at the Derby Dam. They have used (and continue to use) administrative and legislative means to "*take*" decreed water that the Supreme Court ruled belonged to the Project's private property owners.

The actions they have chosen to evoke legal arguments are from:

1) The Endangered Species Act,
2) Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990, [18]
3) Aerial and satellite surveillance of privately owned *Newlands Project* land,

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16 The Supreme Court of the United States, Nos. 81-2245, 81-2276, 82-38, June 24, 1983. writ of certiorari pp 14-15.

17 The Supreme Court of the United States, Nos. 81-2245, 81-2276, 82-38, June 24, 1983. Concurring p 2.

18 Also known as ***Public Law 101-618***, and *Truckee River Negotiated Settlement Act*.

4) Safety of Dams Act,[19]
5) Operating Criteria and Procedures (OCAP),[20]
6) Enforcement of the *Maximum Allowable Diversion (MAD)*, and
7) Administrative action in an attempt to render "null and void" the State Engineer's approved transfers.

All of these legal maneuvers have significantly reduced water diversions to Lahonton Reservoir via Derby Dam. Thus, irrigation water delivery to the farmers and ranchers in the Newlands Irrigation District has been dramatically reduced. The result is water delivery far below the decreed amount.[21]

ISSUES OF PROPERTY RIGHTS

Historical and legal precedents of Newlands Project and Supreme Court rulings established that water resulting from this project was inextricably linked to the land and private property. We will next examine specific private property violations subsequent to the relevant court rulings.

Bench and Bottom Allocations

In the Alpine Decree of 1980, Judge Bruce R. Thompson relied heavily upon historical data and records. His opinion underscored that agricultural interests work to achieve maximum production, and maximum production is never achieved by under-watering or over-watering crops. *"The very fact that they used for so many years a certain quantity of water is indeed, very persuasive evidence that such quantity was actually needed for such purposes."*[22]

As a result of his ruling, *duties*[23] were divided into two classifications: bench (lighter sandy soils with less water holding capacity) with a duty of 4.5 acre feet per year, and bottom soils (heavier clay soils with higher water holding capacity) with a duty of 3.5 acre feet per year.

In 1985, and in spite of the fact that established bench and bottom methods and

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19 Employed prior to 1985 to reduce water diversion to the Newlands project through allegations of "safety" problems.

20 OCAP were originally separate rules and regulations set down by the Secretary of Interior specifically for the Newlands Project. In 1990, these OCAP rules and regulations were incorporated into Public Law 101-618.

21 Through administrative regulation, "man-made droughts" are inflicted on Newlands area farmers.

22 Stinson Canal and Irrigation Co. v. Lemoore Canal and Irrigation Co., 188 p. 77, Cal Application 1919.

23 *Duties* are the quantified amount of water set by the Federal Court by decree which land is entitled to use per year if 100% of the water is available. 3.5 acre feet = 42 inches; 4.5 acre feet = 54 inches. Historical use is important since *duty* must be of a quantity to grow crops suited to the area.

maps had been in place for 60 years, the Department of Interior (DOI) redefined the criteria for determining bench and bottom classifications. The changes in 1985 marked the beginning of Federal Court proceedings. The outcome, decided by 9th Circuit Court of Appeals, ruled that DOI was authorized to "*promulgate regulations establishing initial bench/bottom classifications, provided that Nevada State 'beneficial use standards' were followed.*" In 1987 and again in 1992, the DOI followed through with establishing their new classifications and has proposed an overall reduction of at least 12,000 acres from the "bench land" classification to the "bottom land" classification.

The DOI, in making it's most recent changes on the Bench/Bottom Map to redefine the definition of beneficial use, created conflict with the State of Nevada's definition. The new DOI definition includes the qualifying clause: "***reduction of water use to minimize environmental effects.***" This qualification is not a part of Nevada's "beneficial use" definition as previously prescribed by the Courts.

Soils in the bench areas have historically been those with an *Available Water Holding Capacity (AWHC)* of less than 8 inches. In concert with the inclusion of the wording, "... ***the ... environmental effects***", the DOI employs seasonal high water table levels rather than averages to ascertain the *Available Water Holding Capacity*. By using this skewed method, the DOI has proposed a reduced water allocation to the redefined 12,000 acres by 1 acre foot of water.[24]

Economic Impact

A reduction in irrigated acreage of this amount would devastate the economic infrastructure of Churchill County. In technical report UCED 93-05, the University of Nevada Department of Agricultural Economics documents a ***location quotient*** of 3.19 for the Newlands area agricultural sector. As can be seen in **FIGURE 1**, a location quotient measures the degree of self-sufficiency for a local economic sector.

FIGURE 1

A Location Quotient Classification of the Agriculture Sector and Other Economic Sectors

Economic Sector	Location Quotient	Location Quotient Classification	Flow of Funds Direction
Agriculture	3.19	Export	Injection
Agricultural Services	1.31	Export	Injection
Mining	2.49	Export	Injection
Construction	1.35	Export	Injection
Manufacturing	0.21	Import	Leakage
Transportation and Public Utilities	1.11	Export	Injection

[24] A one acre foot reduction results in a one ton reduction in alfalfa production per acre. At $100 per ton value, the total loss to Newlands Project farmers will amount to $1 million annually!

Wholesale and Retail Trade	0.81	Import	Leakage
Finance, Insurance, and Real Estate	0.65	Import	Leakage
Services	0.95	Import	Leakage
Local Government	1.00		

Compiled by the University Center for Economic Development, Department of Agricultural Economics, University of Nevada, Reno.

- A value of 1 indicates local self-sufficiency for the economic sector.
- A value greater than 1 indicates **export** activity. An export sector makes sales outside the county and results in an **injection of funds** into the local economy.
- A value less than 1 indicates that the local economy is not self-sufficient in the sector and some or all of the goods and services of the economic sector must be **imported** or purchased from outside the sector. These purchases result in a **leakage of funds** from the county economy.

The total economic activity for the agricultural sector in 1990 was 51 million dollars. The total economic activity generated in all economic sectors (agriculture combined with all agriculture sector activity) amounted to 88 million dollars. The data contained in FIGURE 1 clearly demonstrate that the economy of Newlands Project area is dependant on agriculture, which, in turn, is dependant on the reliable delivery of water to the land.

Private Aggregate Ownership Violated

This issue is directly related to the proposed Bench/Bottom reduction. At present, the Truckee-Carson Irrigation District operates a hydro-electric power plant at Lahontan Dam. The plant was purchased and built by the water rights owners living within the Newlands Project. Net storage of about 16,300 acre feet within the Lahontan Reservoir normally results from the 22,820 acre feet of water diverted from Derby Dam. Operation and maintenance charges (delivery charges) are reduced to water users by $5.00 for every acre foot that passes through the power plant. Thus, electricity generation revenue losses will amount to $81,500 per year as a result of the proposed bench/bottom reduction.

Utilizing stored water to generate electricity is true multiple use[25] of a resource. Loss of power generation revenues (in this example) applies to any reduction in decreed

[25] The concept of "multiple use" is a fundamental principle proposed by the Bureau of Reclamation. It embraces the use of a designated volume of water in a wide variety of ways that range from recreational use (i.e. fishing, boating and swimming), Municipal and Industrial (potable drinking water and commercial) use, electrical generation, agricultural reclamation and production, and wildlife habitat support. The "environmental" lobby does not support the "multiple use" philosophy as applied to water usage in the West; opting instead, to promote single use purposes which, ironically, takes us back to the era before the inception of the Bureau of Reclamation before the West was settled!

duties discussed hereafter.

Storage Rights and Floriston Rates[26]

Reservoir storage capacity is a major function in any land reclamation project. To a large degree, reservoir storage protects a river system in both drought and high water.[27] In addition to storage considerations, a method to release water in accordance with the needs of the users of the system is of vital importance. In the case of agriculture, failure to deliver at critical times can destroy a crop. For certain crops such as small grains or new seeding alfalfa, this critical time is measured not by days but by hours.

The Floriston Rates, as defined in the *Truckee River Agreement* of 1935 and incorporated into *The Orr Ditch Decree*, is the mechanism that governs water release from upstream reservoirs. These were established to provide needed water for human, wildlife, agriculture, and recreation. The storage rights and proper releases (governed by Floriston Rates) into the river are also considered a valuable "property right" for the Newlands Project. The Fernley, Hazen, and Swingle Bench areas are wholly dependent upon these releases.

The following is excerpted from a position statement of the *Newlands Water Protective Association*[28] which explains the importance of carry-over storage and the Floriston Rates to the water rights owners within the Newlands Project:

> *"The water rights appurtenant to the privately owned lands in the Newlands Project form the skeleton that supports the businesses and the communities of our area. Water stored in Tahoe/Boca and Lahontan provides the flesh to complete the body that has grown from the dream of those who foresaw the Newlands Project to the collection of communities, homes, businesses, and people that are the Fernley and Fallon of today. Our economic lives depend more on water than any other resource.*
>
> *No reasonable person will deny that we have a right to share in the waters of the Carson and Truckee Rivers. We do not ask for more than our rights entitle us to receive. Those rights either pre-dated the formation of the Project or were*

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[26] Reservoir storage is required to insure that water "duties" are met. Storage right, therefore, is integral to the property right under discussion.

The Truckee River Settlement Act of 1990 (PL 101-618) allows for changing the Floriston Rates. Lowering the Floriston Rates will result in reduction in the amount of divertable water at Derby Dam. The amount of water **not diverted** is stored in Stampede Reservoir by the Pyramid Lake Paiute Tribe and Sierra Pacific Power Company. This action results in reduction of "carry over" storage in Lahontan Reservoir and promote "man-made drought."

[27] In high water years, the system is protected from the extremes of nature such as the erosion of precious top soil from farmland and damage to river channels. In drought years it is the carry-over storage that reduces the impact of drought and often saves valuable investments that would otherwise perish in the summer heat.

[28] An association formed to protect the historical legal precedents of the Newlands Reclamation Project. The Association is composed of private property owners throughout Nevada.

bought from the United States. The Orr Ditch, Alpine, and Nevada v. United States decrees recognized our rights and settled the question of ownership.

A very necessary part of those rights is carry-over storage. Tahoe Dam and Lahontan Dam exist today for one reason —to store water in times of excess for later use to soften the blow of drought. The only private money that has been spent since the formation of the Newlands Project or the construction and/or maintenance of those dams came from the Newlands water right holders. Anyone who wants to can enjoy the recreation created by Tahoe and Lahontan Dams without paying anything toward the creation or maintenance of the dams. As water right owners on the Newlands Project, we gain nothing from the recreational resources created by those dams.

However, some people deny that we have a right to store water in Tahoe and Lahontan for later use. They would destroy a large part of the recreational benefits of Lahontan Reservoir so others may gain from our loss of storage. They want us to forget that the Decrees grant a storage right in addition to our yearly water right allotment. Their desire to abolish our storage rights would put our water-dependent investments in jeopardy.

Those who would deny us our storage rights want to alter the mechanism that was created to transport that stored Tahoe water to Lahontan by altering Floriston rates. The concept that is the foundation of Floriston rates is as valid and necessary today to those of us who own Newlands water rights as it was when it was created by the Truckee River Agreement. One should remember that the Truckee River Agreement was incorporated into the Orr Ditch Decree and as such was reviewed and left intact by the Supreme Court in Nevada v. United States."

<u>*Aerial Surveillance*</u>

For several years, the Bureau of Reclamation (BOR) has been taking high and low altitude surveillance photos of the Newlands Project. Maps are digitized and overlaid on water rights maps. Any area not appearing to have been watered in a previously water righted area is removed from the owners allotment. Levees on farm laterals, roadways, drainage laterals, and corners of fields which are rounded, appear non-irrigated in these photos. Water delivery is, therefore, disallowed, resulting in farmers and ranchers having paid for an allotment which they do not receive. The farmers are not compensated for this reduced water delivery.

Nevada law[29] designates water rights to 40 acre parcels. Where the water is used within the 40 acres is not specified so long as the ***total duty*** is not exceeded. Thus, farmers and ranchers in Newlands Project areas are treated differently than specified under State law. In practice, the farmer's pay for their entire water allotment, the BOR disallows delivery of a portion of the allotment, and the disallowed volume of water is delivered to Pyramid Lake instead of through the Derby Dam facility to Newlands Project farmers.

Transfers[30]

Water rights transfers which were suspended in the Newlands Project in the late 1960's by action of the federal government were an important part of the final settlement of the *Alpine* Supreme Court case. This issue also provided a substantial test of the *Orr Decree* before the Supreme Court in *Nevada vs The United States Government*[31] and cleared the way legally for transfers to take place according to Nevada Revised Statute. The first transfers occurred in 1984. A second and third series of transfers occurred in 1985. There have since been five hearings. In 1989, after a legal challenge to the transfer process by the DOI and Pyramid Lake Tribe, the Ninth Circuit Court of Appeals remanded the transfers from the last five hearings back to the District Court for further review on *"issues of perfection, abandonment, and forfeiture."*[32] In the mean time, those protested transfers have been allocated for use in their new locations while the involved parties wait for the court to resolve the matter.

In June, 1993, by administrative decision, the BOR sent a letter to the transferees stating that they would no longer allow delivery of water on these lands.[33] At the center of this issue is the question of the BOR's administrative authority on an matter that is before a Federal Court. The Court may act in behalf of the water users petition and grant an injunction until the court rules on the review. As it now stands, a partial or temporary *"taking"* has occurred

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29 NRS 533.400

30 *Transfer* is the mechanism whereby private property is exchanged or conveyed between individuals. As the cities of Fallon and Fernley gave grown, alfalfa fields have been converted from agricultural to residential and commercial use. Additionally, marginally productive agricultural acreage has been idled in favor or more fertile land. The transfer process (controlled by State Water Statute) is the means to relocate water rights within the Newlands Project.

31 No. 81-2245, 81-2276, and 28-38 issued on June 24, 1983.

32 As stated within the Nevada Water Law (Nevada Revised Statutes).

33 The amount of land in dispute is 3072 acres. Farmers, who had invested tens of thousands of dollars to put land into production, were suddenly (in the middle of the irrigation season!) told that they were not entitled to the water. Some of these lands had been receiving water for as many as 8 years. At present, this case is awaiting a hearing date with the hope of securing an injunction to allow continued use of their water. Total losses from non-production of crops will amount to $10 million annually.

OCAP[34] *and Public Law 101-618*

These two issues will be treated together since they both focus on the agricultural reclamation aspect of the Newlands Project.

OCAP

The OCAP establishes standards ("efficiency savings") imposed on agricultural water use. The "efficiency savings" standards are not applied to wildlife areas. Failure to achieve the standards results in penalties which amount to forced decreased diversions from Derby Dam. By imposing efficiency standards, the federal government employs administrative regulations to side-step the original decreed rights.

Public Law 101-618

PL 101-618 goes even farther. It allows the Secretary of Interior to enact operating criteria that will remain in effect until December 31, 1997. The following language from P L 101-618 reads:

> *"... no court or administrative tribunal shall have jurisdiction to set aside any of such operation criteria and procedures or to order or direct that they be changed in any way. All actions taken heretofore by the Secretary under any operating criteria and procedures are hereby declared to be valid and shall not be subject to review in any judicial or administrative proceeding ..."*

This means that the *Newlands Project* is no longer permitted to seek judicial review regarding the Secretary of the Interior's actions to carry forth such regulations involved in the Endangered Species Act (as outlined in PL 101-618) or to challenge the claims of the Pyramid Lake Paiute Indian Tribe. The Pyramid Lake Tribe, backed by the DOI and Department of Justice, is in the process of sending notification to 2200 water rights owners declaring that portions of their water rights are no longer valid.

Public Law 101-618 further directs the U.S. Fish and Wild Life Service to buy water rights from existing farms in the Newlands Project in order to protect the wildlife interests of the area. A cascade of consequences result from this directive:

1) It places agricultural interests and wildlife as competing interests instead of mutual interests.
2) Instead of employing the multiple use concept, available water is now relegated to single use.
3) Under Federal Reclamation Law, water rights could not be transferred outside of the project. This eliminates all other potential buyers except the

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[34] **OCAP = Operating Criteria and Procedures.** They are issued administratively by the Secretary of Interior.

United States Government who through conflict of interest has rendered down-stream water four to five times less valuable, thus artificially regulating prices.

4) As water is removed from privately owned land, overall property value plummets.
5) The property tax base is reduced. And, finally
6) Environmental impact becomes a factor on "stripped" lands. These include airborne dust and weed growth, and lack of soil moisture resulting in erosion.

The following is excerpted from a NWPA position letter and will explain this issue further:

"The Newlands Project never was exclusively an agricultural project. The founding fathers of reclamation believed "efficiency" was the multiple use of water. Water that once ran through a stream system at natures whim could be impounded. Reservoirs, and streams became facilities to control the ravages of runoff and drought, and they brought the added blessing of recreation, fresh water wild life habitat, power generation, municipal and industrial use, agricultural reclamation, ground water recharge, and finally marshes at the end of the system. From the beginning of the Newlands Project, agricultural reclamation and wild life enjoyed a "bedfellow relationship." That relationship was shored up by the 1948 Tri-Party agreement. That harmony continued until approximately 1967. The 1926 contract provided water for winter power generation. That water flowed through the canal system providing a constant flow of fresh water to the marsh during the winter months. In the summer, drainage water provided inflows to the wild life areas. The Project also boasted 9 diversion and regulating reservoirs which provided fresh water marsh lands for many species of shore birds, water fowl, fish, and the endangered Bald Eagle. In 1967, at the Government's insistence, the practice of using winter power water to make hydro-electric power was discontinued. The cutting of this supply, additional government regulations (OCAP) and drought have caused the steady decline of fresh water wet lands primarily in the regulating reservoirs and the marsh wet lands in Stillwater and Carson Lake. We emphasize that this decline is due entirely to federal government policy (OCAP) and drought, not because of agriculture. Agriculture is now being called on to pay the price of federal intervention. The mandated 25,000 acres of wetland (legislated in P. L. 101-618 a.k.a. Truckee River Settlement 1990) is presently stripping farmland of water leaving in its wake unsightly weed patches and dust bowls. The tax base to the Counties are being lost and delivery efficiencies to the remaining agricultural lands are being reduced as the pre-reclamation use of water is re-adopted. How deep will the "stripping" go? The BOR says, "Acquisition and transfer of water rights by the U. S. Fish and Wildlife Service could idle over 40,000 acres of the roughly 53,000 acres of presently irrigated Carson Division lands." [35]

Some of the water rights purchased for the wetlands are run to the refuge only in the fall. This type of federal management creates not wild"life" but "death" to the ducks and

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[35] U.S. Bureau of Reclamation, Efficiency Study, 1st draft, 09/29/93.

geese of the wetlands. OCAP has changed the definition of "efficiency" causing Agricultural reclamation and wild life to become "estranged bedfellows" as they compete for the same drops of water. Water allocated to wildlife goes directly to the marsh without any benefit to agriculture thereby defeating the multiple use concept. We believe that true "efficiency" is not singling out agriculture reclamation by controlling every drop of water it uses but by efficient multiple-use where all beneficiaries work together. It shouldn't have to be agricultural reclamation or wildlife, but should be agricultural reclamation and wildlife".

Endangered Species Act

There is no doubt that the federal government's position on water management has changed from the purpose avowed by the United States Reclamation Service of the early 1900s.[36] They now use the Endangered Species Act (ESA) in an effort to return the water of the Truckee and Carson Rivers to ancient and often inefficient purposes. Some of these purposes include: providing direct feeds to highly alkaline lakes which minimally support life; rerouting water back to historical "wetlands" within the Newlands Project to sustain certain biological species, and, of course, to *save* the (endangered) Cui-ui sucker fish, found only in Pyramid Lake. The ESA is frequently quoted as the legal means by which the federal government can violate contracts and agreements with the Newlands farmers.

How can the federal government, having created a legitimate mechanism for settling a vast territory and insuring that purpose by protecting the participants through basic guarantees of property law, now justify a change of purpose? The Endangered Species Act, however well-intentioned, directly conflicts with established legal precedent. If the ESA, established some 90 years after the pertinent legislation to settle the West, is

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[36] On a recent ABC 20/20 program, one of the program's segments focused in on the recent wildfires in Malibu, California. Tragedy is always fodder for such programs, but this one was a little different. In interviewing several people who lost their homes, the 20/20 crew uncovered a fine point of the Endangered Species Act which could be held responsible for the magnitude of the losses experienced.

In the Malibu area of California, it was common practice to "disk" around the periphery of one's property to make a natural fire break, should wildfires, common to that area during the Fall occurrence of Santa Ana winds, threaten the area. A disk is a thin round attachment usually used on farm tractors to till the soil.. It effectively turns surface vegetation underground to prepare the soil for planting. Disking provided a simple solution for providing an artificial firebreak to the Malibu homeowners.

Recently, however, the environmentalists protested the practice on the grounds that the Fish and Wildlife Service had identified a rat, which they categorized as endangered. Disking supposedly destroys the rat's habitat. According to the 20/20 account, those homeowners who disobeyed the law still have homes in the Malibu canyons and those who obeyed the law are left with piles of ash and rubble not to mention the emotional scares that will last a lifetime. A wildlife biologist for the U.S. Fish and Wildlife Service was asked if the species of rat was more important than people? He replied that people belong stacked in cities so the countryside can remain undisturbed.

In a recent newspaper article appearing in the *Las Vegas Sun*, Colorado River Commission Director Thomas Cahill stated *"that the water management assumptions proposed to protect four endangered species of fish by the Fish and Wildlife Service totally ignore the laws, regulations, contracts and court decrees that control the allocation and distribution of water and power from the Colorado River."* This further demonstrates the irresponsibility of the government agency.

In the case of the property owners within the Newlands Project, the Fish and Wildlife Service has acted in a similarly irresponsible manner by pushing the aforementioned regulations in the name of a "sucker fish" at the expense of real people who supply, in part, the nation's food supply.

upheld as the "new" standard, the development of the entire Western United States is jeopardized. Potentially, all water use by citizens is at risk.

CONCLUSION

There is no question that the framers of our Constitution equated the protection of privately owned property with life and liberty. That fact is underscored by the *Just Compensation Clause* contained in the Fifth Amendment which contains the only express guarantee for a money judgement in the document:

"Nor shall private property be taken for public use without just compensation."

Noted *takings* scholar, Richard Epstein aptly describes the approach many extreme environmentalists have taken toward private property rights:[37]

> *"They want to take all of the juice, pulp and seeds from the orange and leave the owner with the worthless rind or, merely the bare title to his or her property."*

According to Epstein, over the past decades environmentalists have accomplished their objectives by the enactment of complex and intrusive regulatory schemes including those dealing with wetlands, endangered species, historic preservation and landmark designation, OSHA, general land use laws and Superfund. Courts have traditionally acquiesced or even extended the reach of such laws and regulations. The cumulative effect is that the "orange rind" theory threatens to undermine traditional notions of private property rights in this country, ironically, at a time when the rest of the world is looking to the United States for leadership in establishing free democratic political systems.

Decades ago the predominant theory of those who opposed the free market principles of self-determination and private ownership of property expounded what is referred to as the "public trust doctrine" which says that private rights in land are subordinate to certain public rights in land. We can now see that the public trust doctrine is but a mild form of the virulent "orange rind virus" which leaves the property owner with nothing but mere title (and the continuing obligation to pay taxes) to his land. In the case of wetlands, endangered species or historic designation, the property owner is also saddled with the burden of maintaining his property into perpetuity and in accordance with government dictates.

The Undermining of Executive Order 12630[38]

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[37] Nancie Marzulla, *Legal News and Views*, Landsright Letter, Sharpsburg MD, July 1992, p 7.

[38] EO 12630 states: *"Government actions that may have a significant impact on the use or value of private property should be scrutinized to*

(continued...)

Secretary of Interior Bruce Babbitt has targeted a significant Reagan policy—Executive Order 12630— for roll-back or repeal.

EO 12630 is the "*takings*" Executive Order Reagan issued after the Supreme Court's *Nollan* decision in 1987. The Nollan[39] case was the key step in reviving the "*takings*" clause of the Fifth Amendment. This represented a reversal of 50 years of liberal jurisprudence on the issue, in which the courts allowed regulation of private property to grow unchecked.

But progress through the courts is slow and halting, and many forms of regulation which might now be susceptible to court challenge, such as wetlands, and endangered species regulation, will take years, and huge expense, to get through the courts. Even then, regulators can often respond simply by changing the regulation slightly to comply narrowly with a court opinion, and the intent of the law is circumvented.

The Reagan Justice Department thought it could give a boost to the new "takings" jurisprudence by having the President issue an Executive Order to the administrative branch requiring that agencies take into account the idea of "takings" when framing new regulations. The artfully drafted EO 12630 requires that federal agencies perform a "Takings Implication Assessment" (TIA) of any new regulation or policy that affects private property. The purpose of the TIA is to force regulators to confront the potential liability to the taxpayers if their regulations were subsequently challenged in the courts.

What Can Be Expected Under the Clinton Administration

EO 12630 has begun to bear some tangible results. In 1993 the Department of Interior announced that the government would have to allow mining companies to exercise their mineral rights in national parks and on other federal lands, or else pay the companies for their mineral rights.

But there still remains vast cleavage between environmentalists and private property owners. EO 12630 will no doubt be a target for some time to come, largely

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[38] (...continued)
avoid undue or unplanned burdens on the public treasury." Note: The EO does not say the government may not regulate property at all. It merely delivers a strong hint to regulators that they might have to pay for the cost of their regulation, and nudges regulators to regulate in a more cost-effective and less obtrusive manner. EO 12630 requires that all federal agencies promulgate internal guidelines for compliance with the EO, and also requires that a "Takings Implication Assessment" (TIA) be performed for each new regulation or policy that night affect private property. The federal bureaucracy has resisted the EO ever since it was written into law in 1988. The Environmental Protection Agency initially claimed that it was exempt from the EO because everything it did was for the "health and safety" reasons, which is a derivative of the "nuisance" exception to the takings clause. The Reagan White House soundly rejected this reasoning.

[39] The Nollan case found that land use regulations of the California Coastal Commission constituted a "taking" of private property, and went as far as describing Commission's regulations as "extortion." Nollan and related cases such as First English established that government regulations which do not formally invoke the power of eminent domain or restrict total use of a person's property may still run afoul of the takings clause.

because of the parallels between private property owner's **"Takings Implication Assessment"** and the environmentalist's **"Environmental Impact Report"**, which is required by law for practically every pot-hole filling or fence-building project in the nation.[40] Clinton will, no doubt, be considered the environmentalists' greatest hope in decades to rescind EO 12630.

Who is Right?

While the property owner is obviously not in favor of fouled air and polluted water, and is willing to contribute to the achievement of important environmental objectives, most are not content to be left holding an empty box after all the value of their property has been removed by overreaching environmentalists. Nancie Marzulla stated in a July, 1992 Defenders of Property Rights newsletter that environmentalists seem to have forgotten that we have a constitutional system of government which expressly guarantees private ownership of property irrespective of the goals which the government may be seeking to achieve. The warning of Justice Holmes is as accurate today as it was back in 1922:

> **We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."** [41]

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[40] When Bush arrived in the White House in 1989, after having campaigned that he would be the environmental President, environmental groups put on the coordinated full court press to get Bush to rescind EO 12630. More than 50 environmental groups wrote to Bush, pointedly arguing that if he really wanted to prove his claim to environmentally sensitive, he would eliminate 12630. White House council Boyden Gray and others held the line.

[41] *Pennsylvania Coal Co. V. Mahan, 260 U.S. 393, 416 (1922).*