STATE OF NEVADA

OFFICE OF THE STATE ENGINEER

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MATTIER CREEK (aka WILSON CREEK OR BENNETT CREEK)
ADJUDICATION

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IN THE MATTER OF THE DETERMINATION

OF THE RELATIVE RIGHTS IN AND TO THE

WATERS OF MATTIER CREEK (aka WILSON CREEK OR BENNETT CREEK)

AND ITS TRIBUTARIES

WHITE PINE COUNTY, NEVADA

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PRELIMINARY ORDER OF DETERMINATION

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PETER G. MORROS

STATE ENGINEER

CARSON CITY, NEVADA

C O N T E N T S

CERTIFICATION OF STATE ENGINEER

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IN THE OFFICE OF THE STATE ENGINEER

OF THE STATE OF NEVADA

IN THE MATTER OF THE DETERMINATION OF)
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CREEK OR BENNETT CREEK) AND ITS TRIBU-)
TARIES IN WHITE PINE COUNTY, NEVADA.)

I. GENERAL

On July 6, 1973, a petition was submitted by R. L. Means on behalf of Means Land and Cattle Co. requesting the determination of the relative rights of claimants to the waters of Mattier Creek (aka Wilson or Bennett Creek) and its tributaries in White Pine County, Nevada.

A field investigation of the stream system was made on October 22, 1974, by L. Edward Parmenter, Adjudication Engineer, and Robert R. Dorsey, Hydraulic Engineer, both of the Division of Water Resources. Based upon that investigation, the State Engineer found that facts and conditions justified the granting of the petition and that proceedings should be initiated to make such determination.

On May 24, 1976, the State Engineer entered an Order granting the petition and made proper arrangements to proceed with the determination of the relative rights of the water users in accordance with NRS 533.090.

II. CLAIMANTS

The investigation by the State Engineer disclosed that the waters of Mattier Creek and its tributaries were being placed to beneficial use on lands in Wilson Canyon and Steptoe Valley for irrigation, stock watering and domestic purposes. Evidence contained in title documents and proofs of appropriation submitted by the present claimants indicates that they are the successors in interest to vested rights initiated by their predecessors, only as set forth hereinafter.

Proof of Appropriation 0778, filed June 20, 1910, by Peter Benetti is presently in the name of Means Land and Cattle Company. According to the proof, water was first used to irrigate about twenty acres in unsurveyed sections. At the time Proof 0778 was filed (1910), Mr. Benetti claimed he was cultivating about 60 acres, mostly in unsurveyed Section 13, T.21N., R.64E., and part in Section 24, T.21N., R.64E. He claimed that he irrigated about 48 acres in Section 13, and about 12 acres in Section 24. There is no indication on the file jacket of Proof 0778 that a map was

ever submitted in support of Proof 0778; however, the proof indicates that a map may have been submitted but was apparently returned to the claimant at his request for the addition of a description of the cultivated area. In any event, there is no record of any map ever having been received; or, if received and returned to the claimant, of the map ever having been returned to the Office of the State Engineer and being filed.

Further adding to the confusion is the claimant's statement that there were about 12 acres cultivated in Section 24, T.21N., R.64E., M.D.B. & M. Field investigations made by personnel of the Division of Water Resources show that the topography of Section 24 is steep and the character of the soil is rocky, and that there is no land in Section 24 capable of cultivation. It is realized that when the use of water began in 1869 or 1870, or even as late as 1910, when Mr. Benetti filed Proof 0778, none of the lands in question had been surveyed; and, in fact, Section 14 was not surveyed and subdivided until 1966. Sections 13 and 24 have never been surveyed.

Because it is impossible to determine the location of the lands claimed to have been cultivated, or the location of the lands claimed to have been first cultivated in 1869 or 1870, this order does not establish a vested right under Proof 0778.

Proof of Appropriation 02870 was filed February 9, 1976, by the Means Land and Cattle Co., claiming vested rights to the waters of Mattier Creek for irrigation, stock watering and domestic purposes with a period of use from January 1st to December 31st of each year. Proof 0778 stated that Mr. Bennetti, predecessor in interest to Means Land and Cattle Co., resided on Mattier Creek for about 37 years prior to 1910 and during that time the water from the stream was used for irrigation only from April 1st to September 30th of each year. Therefore, in this Order, the period of use allowed for irrigation purposes is from April 1st to September 30th of each year, and the date of priority is 1873.

The United States of America, Forest Service, filed Proofs of Appropriation 02931 and 02932 on June 20, 1977.

Proof 02931 claims vested rights for stock watering purposes from Mattier Creek and its tributaries within the Humboldt National Forest. To establish a claim of vested right, it must be shown that the water

was put to use prior to 1905. The lands shown on Proof 02931 were not withdrawn for National Forest purposes until February 10, 1909. Therefore, the Forest Service can only claim a vested right for stock watering by showing it is somehow a successor in interest to the person or entity which did in fact put water to beneficial use by watering stock at the claimed locations prior to 1905. Additionally, the recent case of United States v. New Mexico, 438 U.S. 696 (1978); clearly holds that the primary purpose for which the National Forests were withdrawn was for the protection of timber lands and watersheds, and further that the determination of the relative rights of those claiming water rights should be left to the various states. Thus, it appears that the Forest Service cannot succeed to an interest in any stock water right established through actual use by others on the subject lands prior to 1905, without at least some legally binding instrument of transfer from the actual originator of the vested right. No such evidence is of record in this instance.

Accordingly, no vested right presently owned by the Forest Service through lawful succession is established for stock watering purposes in Mattier Creek.

Proof 02932 claims a vested right from the natural channel of Mattier Creek and its tributaries within the boundaries of the Humboldt National Forest for fish and wildlife propagation and to maintain acquatic habitat and riparian vegetation. A vested right for these purposes is not recognized; first, because these lands were not managed for these purposes prior to 1905; second, these lands were not withdrawn for National Forest purposes until February 10, 1909; and third, the National Forests were only withdrawn for the protection of timber lands and watersheds.

The United States of America, Department of the Interior, Bureau of Land Management, filed Proof of Appropriation 02990 on November 30, 1977, claiming a vested right for stock watering, wildlife, fishery, and maintenance of riparian vegetation purposes. Subsequently, Amended Proof 02990 was filed by the Bureau of Land Management on February 8, 1978.

Since the Bureau of Land Management did not come into existence until after 1905, it can only claim a vested right for stock watering by

showing it is somehow a successor in interest to the person or entity which did in fact put water to beneficial use by watering stock at the claimed locations prior to 1905. In this proceeding, the Bureau of Land Management cannot be determined to be a successor in interest to those who actually put the water to use prior to 1905. Accordingly, no vested right presently owned by the Bureau of Land Management through lawful succession is established for stock watering purposes in Mattier Creek.

The claims of Amended Proof 02990 for wildlife, fishery, and maintenance of riparian vegetation is not recognized in this order, because the public land through which Mattier Creek flows for which the claim is being made was not being managed for these purposes prior to 1905, or for many years thereafter.

III. SOURCE

The headwaters of Mattier Creek and its tributaries originate at an elevation of 9,000 feet on the west slope of the Schell Creek Range in White Pine County. The stream flows in a westerly direction and terminates in Steptoe Valley nineteen miles north of McGill. It has a high spring runoff from melting snow, receding to a minimum flow, discharged from many springs, for the remainder of the year.

IV. PERIOD OF USE

The irrigation season shall begin on April 1st and extend through September 30th of each year as allowed under Proof No. 02870.

V. DUTY OF WATER

The seasonal duty of water on lands irrigated from Mattier Creek and its tributaries is herein fixed and shall not exceed:

Class A ..... Harvest Crop ..... 6.0 a.f./ac./season

Class B ..... Meadow Pasture ..... 3.0 a.f./ac./season

Class C ..... Diversified Pasture .... 1.5 a.f./ac./season

VI. DIVERSION OF WATER AND METHOD OF USE

The claimants shall have the right to divert 2.5 cubic feet per second of water per 100 acres of land irrigated, but not to exceed the annual duty in acre-feet as established herein.

The claimants or their successors in interest will not be required to take or use the amount of water allotted to them in a continuous

flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits, with the approval of the water commissioner and subject to the control and direction of the State Engineer.

VII. MEASUREMENT OF WATER

All measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated or as near thereto as practicable; the location, if not selected by the State Engineer, to be approved by him. The claimants shall install and maintain at their own expense, where applicable, substantial and easily operated regulating headgates and measuring devices in the ditch or ditches or channel. Due allowance for losses in ditches will be made by the State Engineer in case it becomes necessary.

Priorities are fixed by years and where the years are the same, the priorities are equal.

VIII. STOCK WATERING AND DOMESTIC

The right to the diversion and use of water for stock watering and domestic purposes shall be continued by the claimants named herein, or their successors in interest at any time during the year, and such diversions shall be according to the dates of priorities of such users and limited to the quantity of water reasonably necessary for such use. If a claimant is not in priority for irrigation water, then the claimant is not in priority for stock water and domestic water.

The amount of water diverted for irrigation purposes shall not be increased by any amount to be used for stock watering and domestic purposes, but the quantity allowed and diverted for irrigation during the irrigation season shall include water for stock watering and domestic purposes.

IX. CHANGE OF PLACE OF USE

All water allotted under this Order shall be appurtenant to the place of use designated herein. Any water user desiring to change the point of diversion, manner of use or place of use of the waters allotted herein, must make application to the State Engineer for permission to make the change pursuant to NRS 533.345.

X. RIGHTS OF APPROPRIATION

The following tabulation lists the rights as determined by this Order:

PROOF NO: 02870

CLAIMANT: Means Land & Cattle Company

SOURCE: Mattier Creek (aka Wilson Creek or Bennett Creek) and Tributaries

USE: Irrigation, Stock Watering and Domestic

MEANS OF DIVERSION: Small dams and ditches

POINTS OF DIVERSION:

1. NW1/4 NE1/4 Section 13, T.21N., R.64E., M.D.B.&M., (Unsurveyed), or at a point from which the NE corner of Section 14, T.21N., R.64E., M.D.B.&M., bears N. 70° 22' 15" W., a distance of 2,908.80 feet.

2. NE1/4 NW1/4 Section 13, T.21N., R.64E., M.D.B.&M., (Unsurveyed), or at a point from which the NE corner of Section 14, T.21N., R.64E., M.D.B.&M., bears N. 67° 19' 10" W., a distance of 2,516.50 feet.

3. NW1/4 NW1/4 Section 13, T.21N., R.64E., M.D.B.&M., (Unsurveyed), or at a point from which the NE corner of Section 14, T.21N., R.64E., M.D.B.&M., bears N. 49° 15' 20" W., a distance of 1,486.21 feet.

4. NE1/4 NE1/4 Section 14, T.21N., R.64E., M.D.B.&M., or at a point from which the NE corner of the said Section 14 bears N. 17° 38' 10" E., a distance of 1,119.40 feet.

5. SE1/4 NE1/4 Section 14, T.21N., R.64E., M.D.B.&M., or at a point from which the NE corner of the said Section 14 bears N. 31° 10' 51" E., a distance of 1,819.97 feet.

6. SE1/4 NE1/4 Section 14, T.21N., R.64E., M.D.B.&M., or at a point from which the NE corner of the said Section 14 bears N. 35° 04' 15" E., a distance of 1,842.60 feet.

7. SE1/4 NW1/4 Section 14, T.21N., R.64E., M.D.B.&M., or at a point from which the NE corner of the said Section 14 bears N. 58° 18' 25" E., a distance of 3,577.1 feet.

PROOF NO. 02870 (Continued)

PRIORITY	CULTURAL ACREAGE			LOCATION				DUTY OF WATER	
	Harvest	Meadow Pasture	Divers. Pasture	SUBD.:	SEC.:	TWP. N.:	RGE. E.:	C.F.S.	AC.-FT.
1873	--	0.41	--	NW1/4NE1/4	13	21	64	.010	1.23
1873	--	2.65	2.51	NE1/4NW1/4	13	21	64	.129	11.72
1873	0.10	5.01	2.38	NW1/4NW1/4	13	21	64	.187	19.20
1873	2.16	2.25	--	NE1/4NE1/4	14	21	64	.110	19.71
1873	4.21	0.62	--	SE1/4NE1/4	14	21	64	.121	27.12
1873	0.54	5.28	--	SW1/4NE1/4	14	21	64	.146	19.08
1873	--	--	4.35	SE1/4NW1/4	14	21	64	.109	6.52
1873	--	--	7.14	SW1/4NW1/4	14	21	64	.178	10.71
TOTAL	7.01	16.22	16.38					.990	115.29