

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER (OF APPLICATIONS)
36414, 36420, 36422, 36479, 44805,))
44883, 44884, 44886, 44894, 44917,))
44932, 44946, 44948, 44965 AND))
44979 FILED BY THE U.S. DEPARTMENT))
OF INTERIOR, BUREAU OF LAND))
MANAGEMENT TO APPROPRIATE THE))
PUBLIC WATERS OF UNDERGROUND))
SOURCES AND BLUE LAKE IN ELKO AND))
HUMBOLDT COUNTIES, NEVADA.

RULING

GENERAL

I.

Application 36414 was filed on January 11, 1979, by the U.S. Department of Interior, Bureau of Land Management, to appropriate 0.006 c.f.s. of water from an underground source for livestock and wildlife purposes within Lot 1, Section 7, T.29N., R.63E., M.D.B.&M. The point of diversion is described as being within Lot 1, Section 7, T.29N., R.63E., M.D.B.&M. The application proposes to provide water for 250 head of cattle, birds, small mammal species and other wildlife species.¹

The application was protested² on May 14, 1979, by the Board of County Commissioners of Elko County on the following grounds:

- "1. Upon information and belief, Applicant is not the beneficial user of the water applied for in that the purpose for which the water is to

¹ Public record in the office of the State Engineer under Application 36414. See also State Engineer's Exhibits 2 and 2A, public administrative hearing June 12, 1984, Elko, Nevada.

² Id.

be appropriated is for property to which the applicant has no proprietary interest.

2. The Applicant does not appear to have complied with the requirements or the intent and purpose of N.R.S. 328.030, et. seq.
3. The Board of County Commissioners is opposed to a non-private taking of water resources within Elko County unless the water sought is for a purpose available to, and consistent with the interests of the County residents at large."

The application was protested³ on May 9, 1979, by the State of Nevada, Department of Agriculture on the following grounds:

"The State Director of the Bureau of Land Management has stated that they intend filing approximately 7 to 9,000 applications to appropriate waters on the public lands of the State of Nevada which clearly indicates their intent to appropriate virtually all of the remaining waters of the State of Nevada. to grant these applications would be clearly contrary to the interests of the State of Nevada and its citizens. Since land in an arid state is almost unusable without water, the granting of these applications would prohibit the future development

³ Id.

of the lands of the State of Nevada and jeopardize the future welfare of its citizens.

The applicant does not have a permit to graze livestock in the area and in fact does not own any livestock and since it is the policy of the state to deny applications for livestock water to applicants who do not have a livestock grazing permit, the application should be denied. Since the applicant does not own any livestock, then it logically follows that the applicant could not make beneficial use of water for livestock, and the application should be denied.

Livestock grazing in this area was common prior to the enactment of state law requiring the filing of applications with the State Engineer to obtain livestock watering rights. The present owners and operators of livestock have vested rights to water livestock obtained from their predecessors on this land, even though the exact numbers of livestock and amounts of water may be lost to record or not of record.

Clearly, the Bureau of Land Management does not intend to consume these waters themselves, but rather to control or prohibit the future use of these waters by others. Of course, the control of the use of waters by others is the responsibility of the State Engineer, in accordance with definite

provisions set forth in Statutes of the State of Nevada. The granting of these applications would in effect delegate the future control of these waters to the Bureau of Land Management and would be contrary to the public policy of the State of Nevada.

The Federal Land Management Policy Act provides that use of the resources on the public lands shall be charged for at market value. This is contrary to Nevada law which does not charge for the use of state waters by its citizens. The granting of these applications can, and we believe will, lead to the charging by the federal government for use of these waters which would be free if granted direct from the state to the citizen, and therefore these applications should be denied.

The people of the State of Nevada were unlawfully denied the right to develop the agricultural lands of the state by the Secretary of Interior who placed a moratorium on filings under the Act from June 4, 1964 until January 1, 1979. Present and future filings under the Desert Land Entry Act are dependent on available water sources both underground and surface. The granting of these applications to appropriate waters by the Bureau of Land Management would unreasonably

interfere with the development of land by entrymen under the Desert Land Act.

The wildlife who drink or exist on or in these waters are resident species under the control and responsibility of the State of Nevada. The granting of these applications would allow the Bureau of Land Management to control the watering or use of this water by wildlife and unreasonably interfere with the state's authority and responsibility for wildlife management. The state's wildlife has used these waters on these lands since Statehood and the state has a vested right to have water for its wildlife.

The granting of these applications by the Bureau of Land Management to appropriate the waters of the State of Nevada would allow the federal government to interfere with the sovereignty and dominion of the State of Nevada over the use and control of the natural resources within its borders.

In view of the vast magnitude of these filings and the permanent severe adverse effects that the granting of these applications would have on the future development of the state and the welfare of its citizens, we are hopeful that we will be allowed to appear before the State Engineer to present evidence and further oral arguments in

opposition to the granting of these applications."

II.

Application 36420 was filed on January 11, 1979, by the U.S. Department of Interior, Bureau of Land Management, to appropriate 0.002 c.f.s. of water from an underground source for livestock and wildlife purposes within Lot 2, Lot 3, and the SW1/4 NE1/4 Section 3, T.39N., R.52E., M.D.B.&M.; and the SE1/4 SW1/4 Section 34, T.40N., R.52E., M.D.B.&M. The point of diversion is described as being within the SW1/4 NE1/4 Section 3, T.39N., R.52E., M.D.B.&M. The application proposes to provide water for 75 head of cattle, 5 deer, birds, small mammal species and other wildlife species.⁴

The application was protested⁵ on May 3, 1979, by James J. Wright on the following grounds:

"1. Beneficial use is the basis measure and limit of the right to use water. (NRS 533.035) Beneficial use refers to the amount of water actually applied by the appropriator to use. Appropriation must be coupled with the act of applying the water to a beneficial use recognized by Nevada. The United States does not own livestock or wildlife and so it is impossible for the United States to actually apply the water to

⁴ Public record in the office of the State Engineer under Application 36420. See also State Engineer's Exhibits 4 and 4A, public administrative hearing June 12, 1984, Elko, Nevada.

⁵ Id.

beneficial use. In the case of livestock, only the person who owns or controls the livestock can apply the water to beneficial stockwater use and in the case of wildlife, only the State of Nevada can apply the water to wildlife use, whether on private lands or public lands.

2. The United States has no necessity for the use of the water applied for. The person who owns or controls the livestock has the necessity to water the livestock; and the State of Nevada has the necessity to water the wildlife. The U. S. therefore, is not permitted to use the waters under Nevada law. (NRS 533.045)

3. The Protestant is informed and believes that it has vested rights to use the water for stockwater purposes to the extent that to grant the application would impair the vested rights of the Protestant.

4. No application shall be for water to be used for more than one purpose. (NRS 533.330) The U. S. applications include both livestock and wildlife use.

5. NRS 533.340 requires that the application contain, if for stockwatering purposes, the approximate number and character of animals to be watered. If the application does not contain that information, it is defective. This statute does

not list wildlife as a use specifically requiring application and appropriation.

6. The applications are detrimental to the public welfare. If granted they will undermine the sovereign control of the State of Nevada over wildlife by giving the United States Government control of the water sources for wildlife. Appropriating stockwater use to the U. S., which owns no livestock, will prevent Nevada residents and bona fide appropriators from appropriating stockwaters that may be available or become available through water development to water additional livestock in the future which may be grazed if forage increases. By granting the United States its appropriation, the State of Nevada is thereby delegating to the U. S. the right to determine how many livestock will use the Nevada public waters on each water source involved. In the event that the public lands upon which the water source is located, would be returned or transferred to the State of Nevada, this would create serious ownership and management problems for the State of Nevada. The State of Nevada would own the lands but the U. S. Government would have water right appropriations on the water sources on the lands and no use for such water. The application threatens to prove detrimental to the public

interest. The proposed use or change that would result from granting the application conflicts with existing rights of the Protestant and would grant the U. S. the authority to reduce the Protestant's stockwater use on the water source and replace it with use by some other livestock owner or operator, or with other beneficial use contrary to the long established water law of the State of Nevada and without the State of Nevada exercising its jurisdiction over the water. NRS 533.370 requires the rejection of the application by the State Engineer.

7. The Protestant has a subsisting right to water range livestock at the place and source applied for and in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at the place and source. Therefore, pursuant to NRS 533.495, the application must be denied.

8. Wildlife use is a natural use which does not require appropriation by any entity for the benefit of the wildlife.

9. The water of all sources in Nevada belong to the public. (NRS 533.025) Granting of the application will surrender this public ownership and the sovereign rights of the State of Nevada in and to the water, to the United States Government

contrary to the best interests and the general welfare of the State of Nevada.

10. Granting the application would give the United States the authority and the opportunity to take from the Protestant, without compensation, property of the Protestant in the form of water development, water development improvements and costs and stockwater use that have been applied to the water source by the Protestant.

11. Granting the application would place the U. S. Government in the position of being able to charge fees and licenses for the use of Nevada's water through the licensing of livestock grazing.

12. Granting the application could give the U. S. Government the legal basis upon which to dictate to the State of Nevada the numbers and types of wildlife that could use the water source and their seasons of use. Thereby interfering with the jurisdiction of the Nevada Department of Fish and Game.

13. Consent of the State of Nevada to the acquisition by the United States of America for such water rights has not been given as required by Nevada Revised Statutes 328.030 through 328.150.

14. The historical use of the water source for stock purposes has made such water appurtenant to the Protestant's ranch through a vested right or

appropriation. After Protestant's use is satisfied there may be no unappropriated water.

15. The source of the water applied for is on private lands owned or controlled by Protestant and the U. S. applicant has no legal access to the water source or right to use Protestant's lands to make use of the water.

16. The Protestant caused or contributed to the drilling and development of the well and in using the water for stockwatering purposes. There may not be enough water to satisfy Protestant's present and future needs and those applied for. Permitting others to use the water through BLM licensing would require the taking or using of Protestant's property without compensation.

*17. There are no so-called wild horses or burros legally in the area and no water should be appropriated for their use.

*17. The numbers of so-called "wild horses" to be watered under this application are in excess of those permitted by law and the use should be reduced.

*18. Provisions unique to each ranch are:"

(Emphasis added)

The application was protested⁶ on May 9, 1979, by the State

⁶ Id.

of Nevada, Department of Agriculture, on the same grounds as set forth under the protest to Application 36414.

The application was protested⁷ on May 14, 1979, by the Board of County Commissioners of Elko County on the same grounds as set forth under the protest to Application 36414.

III.

Application 36422 was filed on January 11, 1979, by U.S. Department of Interior, Bureau of Land Management, to appropriate 0.012 c.f.s. of water from an underground source for livestock and wildlife purposes within the N1/2 SW1/4, W1/2 SE1/4, and SE1/4 SE1/4 of Section 8; S1/2 SW1/4 of Section 9; NE1/4 NW1/4, N1/2 NE1/4, and SE1/4 NE1/4 of Section 16; W1/2 NW1/4, SE1/4 NW1/4, W1/2 NE1/4, SE1/4 NE1/4, and W1/2 SE1/4 of Section 15; S1/2 NW1/4, S1/2 NE1/4, and NE1/4 NE1/4 of Section 14; NW1/4 NW1/4 of Section 13; S1/2 SW1/4 of Section 12; W1/2 NE1/4, SE1/4 NW1/4, N1/2 SW1/4, and SW1/4 SW1/4 of Section 22; SE1/4 SE1/4 of Section 21; N1/2 NE1/4, SW1/4 NE1/4, E1/2 NW1/4, SW1/4 NW1/4, and NW1/4 SW1/4 of Section 28; and SE1/4 NE1/4 and NE1/4 SE1/4 of Section 29, T.30N., R.60E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SW1/4 Section 8, T.30N., R.60E., M.D.B.&M., (Elko County). The application proposes to provide water for 500 head of cattle, 20 antelope, 100 sage grouse, birds, small mammal species and other wildlife species.⁸

⁷ Id.

⁸ Public record in the office of the State Engineer under Application 36422. See also State Engineer's Exhibits 5 and 5A, public administrative hearing June 12, 1984, Elko, Nevada.

The application was protested⁹ on April 20, 1979, by Smith Brothers Ox Ranch on the following grounds:

"1. This well lies with our private grazing allotment, Ruby 7. The Bureau has never made beneficial use of the water from this well in any manner for it's livestock etc.

2. This well was not drilled or cased by the Bureau nor was there any expenditure made by the Bureau of Land Management for the payment of anyone to drill or case this well.

3. Where the Bureau is only assigned to manage the public domain, it, as a manager, cannot file for any water rights.

The application was protested¹⁰ on May 9, 1979, by the State of Nevada, Department of Agriculture on the same grounds as set forth under the protest to Application 36414.

The application was protested¹¹ on May 14, 1979, by the Board of County Commissioners of Elko County on the same grounds set forth under the protest to Application 36414.

IV.

Application 36479 was filed on January 17, 1979, by U.S. Department of Interior, Bureau of Land Management, to appropriate 66.5 acre-feet of water from Blue Lakes for fisheries,

⁹ Id.

¹⁰ Id.

¹¹ Id.

recreation, stockwater and wildlife purposes within the NE1/4 SW1/4, NW1/4 SE1/4, SE1/4 SW1/4 and SW1/4 SE1/4 Section 1, T.34N., R.28E., M.D.B.&M. The point of diversion is described as being within the NE1/4 SW1/4 Section 1, T.43N., R.28E., M.D.B.&M. The application proposes to provide water for 150 head of cattle and 25 deer and maintain a minimum pool for the fishery, recreational use, birds, small mammal species and other wildlife species.¹²

The application was protested¹³ on April 21, 1980 by Richard Drake and Kenneth Earp on the following grounds:

"The provisions of N.R.S. 328.030 have not been complied with.

The applicant has no basis to provide for the Beneficial Use of the water.

The issuance of any additional water rights from this source will adversely affect any existing rights.

The protestant requests that before any action is taken on this application, that a formal field investigation be held, as provided in N.R.S. 533.365."

The application was protested¹⁴ on April 21, 1980, by the

12 Public record in the office of the State Engineer under Application 36479. See also State Engineer's Exhibits 2 and 2A, public administrative hearing July 26, 1984, Winnemucca, Nevada.

13 Id.

14 Id.

Humboldt County Board of Commissioners on the following grounds:

"The issuance of a permit for 66.5 acre-feet of water from this source will adversely affect the values of this area.

The provisions of N.R.S. 328.030 have not been complied with.

The applicant has no basis to provide for the Beneficial use of the water.

The issuance of any additional water rights from this source will adversely affect any existing rights.

The protestant requests that before any action is taken on this application, that a formal field investigation be held, as provided in N.R.S. 533.365."

V.

Application 44805 was filed on October 29, 1981, by the Bureau of Land Management, Winnemucca District, to appropriate 0.03 c.f.s. of water from an underground source for stockwater and wildlife purposes within the NE1/4 SW1/4 Section 10, T.42N., R.25E., M.D.B.&M. The point of diversion is described as being within the NE1/4 SW1/4 Section 10, T.42N., R.25E., M.D.B.&M., (Humboldt County). The application proposes to provide water for 250 head of cattle, 275 wild horses, 10 antelope and miscellaneous wildlife species.¹⁵

¹⁵ Public record in the office of the State Engineer under Application 44805. See also State Engineer's Exhibits 3 and 3A, public administrative hearing July 26, 1984, Winnemucca, Nevada.

The application was protested¹⁶ on February 4, 1982, by Soldier Meadows Ranch and Willow Creek Ranch on the same grounds as set forth under the protest of James J. Wright to Application 36420 and additionally on the grounds:

"Water rights are personal property rights and have a market value. By holding a water right, the Federal Government, in effect, owns rights not constitutionally intended by the framers of our Constitution. The Federal Government unfairly competes with the private citizen for these rights by using our own tax monies to acquire the water rights.

VI.

Application 44883 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.004 c.f.s. of water from an underground source for stockwater purposes within the SE1/4 NE1/4 Section 2, T.38N., R.60E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 2, T.38N., R.60E., M.D.B.&M. The application proposes to provide water for 116 head of cattle and 32 antelope.¹⁷

The application was protested¹⁸ on January 18, 1982, by

16 Id.

17 Public record in the office of the State Engineer under Application 44883. See also State Engineer's Exhibits 7 and 7A, public administrative hearing June 12, 1984, Elko, Nevada.

18 Id.

Dahl, Inc., and on April 9, 1982, by Winchell Ranch on the same grounds as set forth under the protests to Application 44805 and 36420.

VII.

Application 44884 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.06 c.f.s. of water from an underground source for stockwater purposes within the NW1/4 SW1/4 Section 2, T.40N., R.56E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SW1/4 Section 2, T.40N., R.56E., M.D.B.&M., (Elko County). The application proposes to provide water for 1800 head of cattle and 20 deer.¹⁹

The application was protested²⁰ on January 14, 1982, by Rancho Grande Ranch on the same grounds as set forth under the protests to Applications 44805 and 36420.

VIII.

Application 44886 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.008 c.f.s. of water from an underground source for stockwater purposes within the S1/2 SW1/4 Section 24, T.38N., R.54E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SW1/4 Section 24, T.38N., R.54E., M.D.B.&M. The application proposes to provide water for 150 head of cattle, 10

¹⁹ Public record in the office of the State Engineer under Application 44884. See also State Engineer's Exhibits 8 and 8A, public administrative hearing June 12, 1984, Elko, Nevada.

²⁰ Id.

deer and 20 antelope.²¹

The application was protested²² on January 5, 1982, by John Oldham on the same grounds as set forth under the protests to Applications 46420 and 44805.

IX.

Application 44894 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.0064 c.f.s. of water from an underground source for stockwater purposes within the NE1/4 SW1/4 Section 4, T.46N., R.64E., M.D.B.&M. The point of diversion is described as being within the NE1/4 SW1/4 Section 4, T.46N., R.64E., M.D.B.&M., (Elko County). The application proposes to provide water for 190 head of cattle and 192 antelope.²³

The application was protested²⁴ on June 30, 1982, by Wheeler Enterprises, Inc., on the same grounds as set forth under the protest to Applications 36420 and 44805 and additionally on the following grounds:

"(2) That the livestock using the waters in question belong to the Protestant.

(3) That at least in part the Protestant expended

²¹ Public record in the office of the State Engineer under Application 44886. See also State Engineer's Exhibits 9 and 9A, public administrative hearing June 12, 1984, Elko, Nevada.

²² Id.

²³ Public record in the office of the State Engineer under Application 44894. See also State Engineer's Exhibits 10 and 10A, public administrative hearing June 12, 1984, Elko, Nevada.

²⁴ Id.

funds to develop the water source.

X.

Application 44917 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.015 c.f.s. of water from an underground source for stockwater purposes within the SE1/4 NE1/4 Section 10, T.42N., R.63E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 10, T.42N., R.63E., M.D.B.&M., (Elko County). The application proposes to provide water for 450 head of cattle, 50 horses and 192 antelope.²⁵

The application was protested²⁶ on December 30, 1981, by Boies Ranch/Marla Boies Griswold on the same grounds as set forth under the protests to Applications 36420 and 44805.

XI.

Application 44932 was filed on October 29, 1981, by United States Bureau of Land Management to appropriate 0.016 c.f.s. of water from an underground source for stockwater purposes within the SE1/4 NE1/4 Section 29, T.39N., R.60E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 29, T.39N., R.60E., M.D.B.&M., (Elko County). The application proposes to provide water for 150 head of cattle, 10 deer and 20 antelope.²⁷

²⁵ Public record in the office of the State Engineer under Application 44917. See also State Engineer's Exhibits 12 and 12A, public administrative hearing June 12, 1984, Elko, Nevada.

²⁶ Id.

²⁷ Public record in the office of the State Engineer under Application 44932. See also State Engineer's Exhibits 13 and 13A, public administrative hearing June 12, 1984, Elko, Nevada.

The application was protested²⁸ on July 27, 1982, by Wm. Max Spratling on generally the same grounds as set forth in the protests to Applications 36420 and 44805.

XII.

Application 44946 was filed on October 29, 1981, by United States Bureau of Land Management to appropriate 0.01 c.f.s. of water from an underground source for stockwater purposes within the NW1/4 NW1/4 Section 33, T.38N., R.46E., M.D.B.&M. The point of diversion is described as being within the NW1/4 NW1/4 Section 33, T.38N., R.46E., M.D.B.&M., (Elko County). The application proposes to provide water for 400 head of cattle and 20 deer.²⁹

The application was protested³⁰ on June 15, 1982, by Ellison Ranching Company on the following grounds:

"1. Beneficial use is the basic measure and limit of the right to use water, (N.R.S. 533.035). Beneficial use refers to the amount of water actually applied by the appropriator to use. appropriation must be coupled with the act of applying the water to a beneficial use recognized by Nevada. The United States does not own livestock so it is impossible for the United States to actually make beneficial use.

²⁸ Id.

²⁹ Public record in the office of the State Engineer under Application 44946. See also State Engineer's Exhibits 17 and 17A, public administrative hearing June 12, 1984, Elko, Nevada.

³⁰ Id.

2. The United States has no necessity for the use of the water applied for. The person who owns or controls the livestock has the necessity to water the livestock. The United States therefore is not permitted to use the waters under Nevada law, (N.R.S. 533.045).

3. Protestant, in cooperation with the Bureau of Land Management, made the necessary improvements for the stock watering from the well which exists at this time. Granting the application would give the United States the authority and the opportunity to take from the protestant, without compensation, property of the protestant in the form of water development, water development improvements and costs and stock water use that had been applied to the water source by the protestant.

4. Granting the application would place the United States government in the position of being able to charge fees and licenses for the use of Nevada's water through the licensing of livestock grazing.

5. Protestant holds vested, or permitted waters in the vicinity of the subject underground source and approval of said application may be in violation of N.R.S. 533.495 regarding impairment of subsisting rights.

6. If granted, it should be subject to

existing prior rights, applications and permits of protestant and protestant should be granted a permit to water protestant's livestock on the source pursuant to protestants preference, license or permit to graze livestock in the area of the source.

7. Consent of the State of Nevada to the acquisition by the United States of America for such water rights has not been given as required by Nevada Revised Statutes 328.030 through 328.150."
(Emphasis added)

XIII.

Application 44948 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.004 c.f.s. of water from an underground source for stockwater purposes within the NW1/4 SE1/4 Section 34, T.37N., R.58E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SE1/4 Section 34, T.37N., R.58E., M.D.B.&M., (Elko County). The application proposes to provide waters for 141 head of cattle.³¹

The application was protested³² on January 28, 1982, by McCormick Brothers, James L. McCormick, on the same grounds as set forth under the protests to Applications 36420 and 44805.

³¹ Public record in the office of the State Engineer under Application 44948. See also State Engineer's Exhibits 18 and 18A, public administrative hearing June 12, 1984, Elko, Nevada.

³² Id.

XIV.

Application 44965 was filed on October 29, 1981, the United States Bureau of Land Management to appropriate 0.006 c.f.s. of water from an underground source for stockwater purposes within the NW1/4 NW1/4 Section 10, T.33N., R.62E., M.D.B.&M. The point of diversion is described as being within the NW1/4 NW1/4 Section 10, T.33N., R.62E., M.D.B.&M., (Elko County). The application proposes to provide water for 180 head of cattle and 26 antelope.³³

The application was protested³⁴ on March 1, 1982, by W. E. Rouse, Warm Creek Ranch, on the same grounds as set forth under the protests to Applications 36420 and 44805.

XV.

Application 44979 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.004 c.f.s. of water from an underground source for stockwater purposes within the SE1/4 NE1/4 Section 18, T.34N., R.59E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 18, T.34N., R.59E., M.D.B.&M., (Elko County). The application proposes to provide water for 130 head of cattle, 15 horses and 20 deer.³⁵

³³ Public record in the office of the State Engineer under Application 44965. See also State Engineer's Exhibits 19 and 19A, public administrative hearing June 12, 1984, Elko, Nevada.

³⁴ Id.

³⁵ Public record in the office of the State Engineer under Application 44979. See also State Engineer's Exhibits 20 and 20A, public administrative hearing June 12, 1984, Elko, Nevada.

The application was protested³⁶ on July 8, 1982, by Duilio Bottari on the same grounds as set forth under the protests to Applications 36420 and 44805.

XVI.

Public administrative hearings³⁷ before the State Engineer in the matter of the subject applications to appropriate were held on and at the following dates and places:

July 26, 1982 - Winnemucca, Nevada

June 12, 1984 - Elko, Nevada

July 26, 1984 - Winnemucca, Nevada

Evidentiary presentations by the applicants, protestants and the Attorney General were introduced into the record in support of and in opposition to the pending applications. Additionally, intervention was sought by and allowed to the State of Nevada, Sierra Club Legal Fund, and the National Wildlife Federation. Extensive post-hearing written briefs were submitted to the State Engineer by the parties who had standing in the proceedings. The State Engineer took administrative notice of various matters, as more specifically set forth below.³⁸

XVII.

In these proceedings, the State Engineer is represented by special counsel because his usual counsel, the Attorney General,

³⁶ Id.

³⁷ See transcripts of public hearings, public record in the office of the State Engineer.

³⁸ See transcript of public hearing, June 12, 1984, pp. 13 - 28, Sierra Club Exhibits 1 and 2. Transcript of public hearing, July 26, 1984.

found his office in a position - actual or potential - of conflicting interests. The "conflict" apparently stems from the Attorney General's interpretation of Nevada's "Sagebrush Rebellion" statute³⁹ and his assertion that the granting of water rights to the United States of America (or its agencies) under Nevada Water Law would contravene the "policy" of the Sagebrush Rebellion Act. In articulating this position,⁴⁰ the Attorney General has generally contended that the act and other applicable Nevada laws set forth "public policy" by which the State Engineer is bound, without regard to inconsistent federal law.

While the State Engineer is bound by and has great respect for the laws of Nevada and owes due deference to its Attorney General, he is not at liberty to disregard federal law while applying Nevada law in these proceedings, or to prefer Nevada law over applicable federal law.⁴¹

³⁹ NRS 321.596 to 321.599, inclusive (1981).

⁴⁰ The Attorney General formally appears in these proceedings as counsel of record for the Department of Agriculture of the State of Nevada and for the State of Nevada. The Department has protested certain water rights applications filed by federal agencies. The Attorney General was granted leave to intervene in the name of the State of Nevada pursuant to NRS 228.190 (1981). See footnote 38.

⁴¹ Nev. Const. Art. 15, §2 (1982); U.S. Const. Art. VI, Cl. 2 (1976). See United States v. City and County of Denver, 656 P.2d 1, 17 (Colo. 1982) (In view of the supremacy clause and property clause of the U.S. Constitution and binding constructions by the U.S. Supreme Court, the State does not have "an unfettered right ...to determine all federal claims to the use of water [in that state by the law of that state]".) The State Engineer, like other public officers, has taken a solemn oath to "support, protect and defend the Constitution and Government of the United States, and the Constitution and government of the State of Nevada...." NRS 282.020 (1979). The Federal Constitution and the Acts of Congress are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2 (1979). (Continued)

FINDINGS OF FACT

I.

In his opinion and post-hearing briefing, the Attorney General manifests an anxiety for the "displacement of state authority and therefore sovereignty". He argues that a distinction must be drawn between federal water needs for "proprietary" purposes and those rights which could or would be utilized for "governmental" purposes. While he acknowledges that proprietary use is permissible, he insists that governmental use offends Nevada's policy to gain control and to assert her sovereignty over the public lands within her boundaries. He contends that approval of applications for governmental purposes would be in violation of state law and "public policy". From this, he concludes that the risk can be avoided by denying the applications if they are in furtherance of governmental purposes. The error of these conclusions is apparent and is evidenced by the very authorities cited by the Attorney General.⁴² Theories of state sovereignty flowing from the

41 (Continued)

The Courts have not hesitated to remind the State Engineer of his constitutional responsibilities. "We are assured that the United States will receive notice of each change application, and may participate, under Nev. Rev. Stat. §§ 533.110 - 533.130 in proceedings before the State Engineer who is, under our Constitution bound to follow federal law." United States v. Alpine Land & Reservoir Co., 503 F.2d (D. Nev. 1980), Modified, 697 F.2d 851, 858 (9th Cir. 1983), Cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 78 L. ed. 2nd 170, 104 S. Ct. 193 (1983).

42 The State Engineer reluctantly must extend factual determination in this matter to the provisions of NRS 321.596 through 321.599, inclusive, in order to clear the underbrush in the proprietary/governmental purpose distinction advanced by the Attorney General. The Attorney General finds this distinction in the case of Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885)
(Continued)

admission of states on the basis of equal footing cannot alter the plain facts of federalism in a dual-government society. The admission of a state does not deprive Congress of the power to

42 (Continued)

(See A.G.O. No. 83-15). The A.G.O. cites that Supreme Court opinion for the general proposition that property acquired by the United States for furthering governmental purposes is necessarily exempt from State control, whereas property not used for governmental purposes, but held by the United States only as a proprietor, is subject to State control. The Attorney General then reaches the conclusion that Nevada's sovereignty will be impaired if Nevada permits the United States to appropriate water for governmental purposes.

Before considering whether the distinction is embedded in decisions of the U.S. Supreme Court, it is well to note that the distinction is engrafted onto Nevada statute law. As examples:

1. Nevada denies that it ever effectively disclaimed ownership of the public domain within Nevada. NRS 321.596(5).
2. Nevada asserts that if it did disclaim ownership, the disclaimer was a void condition precedent to statehood. NRS 321.596(2)(a), citing Pollard v. Hagen, 44 U.S. (3 Haw.) 212 (1845).
3. Nevada claims that federal jurisdiction over lands held for purposes other than governmental ones is limited to that of an ordinary proprietor. NRS 328.075(2).
4. The United States must apply to the state for consent to use lands for proprietary purposes "relating to retention and management" of public lands. NRS 328.065(4).
5. The United States must apply to the State Engineer to appropriate water on public lands. NRS 328.065.
6. The State Engineer must reject applications where the use of water "threatens to prove detrimental to the public interest". NRS 533.370(3).

The proprietary/governmental distinction drawn in Fort Leavenworth, supra, and other cases under Art. I, § 8, Cl. 17, or otherwise, involving the federal acquisition of land within a state or the cession of land by a state to the United States, e.g., Paul v. U. S., 371 U.S. 245, 83 S.Ct. 426 (1963); Macomber v. Bose, 401 F.2d 545 (9th Cir. 1968), if it is still applicable
(Continued)

legislate for the protection of the public lands.⁴³

The Federal District Court in Nevada has held that land in the public domain passes to the United States' ownership on the admission of the state to the union; that no state legislation may interfere with Congress' power over the public domain; and that the suspicion "that a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power"⁴⁴ (emphasis added). The Attorney General's argument here is the same line disposed of by that court, and by the Ninth Circuit in its affirmance. A state may give expression to state interests in state law, but not in a manner which is inconsistent with Congressional directives.⁴⁵

This finding is not intended to suggest that the State lacks jurisdiction to entertain, grant or deny federal applications for water rights, to administer rights once granted, or to attach

42 (Continued)

at all, is not applicable to public domain lands. The presence or absence of federal jurisdiction obtained through a state's consent or cession is unrelated to Congress' powers under the Property Clause, U.S. Const. Art. IV §3, Cl., United States v. Brown, 552 F.2d 2 (7th Cir. 1977), Cert. den. 431 U.S. 949 (1977). Under the Property Clause, Congress exercises power both of a proprietor and of a legislature over the public domain, Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). Minnesota v. Block, 660 F.2d 1240, 1248 (8th Cir. 1981), Cert. den. 455 U.S. 1007 (1982).

⁴³ Minnesota v. Block, 660 F. 2d. 1240, 1252 (8th Cir. 1981), Cert. den. 455 U.S. 1007 (1982); Camfield v. U.S., 167 U.S. 518, 527 (1897).

⁴⁴ State ex rel. Nevada da State Bd. of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981), Aff'd. 699 F.2d 486 (9th Cir. 1983).

⁴⁵ California v. United States, 438 U.S. 645, 675, 98 S.Ct. 2985 (1978); Kleppe v. New Mexico, supra.

procedural or substantive limitations to federal appropriative water rights based on state law principles, such as the rule of priority or the requirement that unappropriated water be available for appropriation. Neither is it intended to suggest that a federal non-reserved appropriative right exists which would pre-empt state laws, procedures and priorities.

The State of Nevada may not fabricate a federal-state conflict and then resolve it under a state "public policy" or law to the practical disadvantage of the federal government.⁴⁶ More particularly, a state may not, in effect, refuse to consider or entertain an application for an appropriative water right on the theories advanced by the Attorney General, i.e. that approval of a federal water right for use on public domain lands for governmental purposes would unlawfully displace state sovereignty, even though approval of an application for a water right for proprietary purposes would not. There is no basis in federal decisions for such a distinction as applied to federal activities on the public domain and, indeed, the federal decisions make it clear that it is precisely when federal

⁴⁶ As an example, the fundamental theme of the Attorney General "public policy" argument is submerged in the theory that the federal "government has breached its trust obligation to pursue an orderly program of public land disposal. Rather it has retained the lands, managed them, extracted revenue from them and as a result, now asserts jurisdiction and power over the state's political and sovereign life that it does not have in other states". The scenario goes on to say that "needless grants to the federal government of the state's remaining supplies of water would not only be inconsistent with state policy to conserve water for needed purposes, it would undoubtedly aggravate the division of powers problems between the state and federal authorities". A.G.O. 83-15. (Emphasis added.)

governmental interests are at stake that the Supremacy Clause comes into play. The State Engineer finds no substantial or conclusive evidence that Nevada's sovereignty will be impaired by approval of the subject applications and no legal basis to deny the subject applications on the basis of any "proprietary/governmental" dichotomy.

The State's control and authority over the public waters is set forth in Nevada Revised Statutes Chapters 533 and 534 which prescribe the statutory procedures for appropriation and adjudication of the public waters. NRS 321.596 through 321.599, inclusive, intimate no repeal or diminution of that control and authority, nor do these sections purport to preclude or limit federal agencies as applicants for water rights under state water law. The "Sagebrush Rebellion" statute asserts a claim to ownership of certain public lands--a claim which will be subject ultimately to judicial and/or congressional determination. Should the State of Nevada be successful in asserting its ownership of the public lands, it would then follow that any appurtenant water rights and improvements would pass into State ownership, and any need of the federal agencies to divert and place water to beneficial use would no longer exist.⁴⁷

⁴⁷ The Attorney General, in addressing this issue, opins: "To suggest that water rights granted to the United States would pass to the State with a disposal of the public lands to the State, therefore, is misleading, even if true, because it is the act of reuniting the land and water for management purposes which will fulfill the prophecy that for the future the federal government will exercise dominion and sovereignty over both". A.G.O. 83-15. (Emphasis added.)

II.

NRS 533.010 specifically qualifies the United States as a "person" who may appropriate water. That the United States is legally represented by various Federal agencies, such as the Bureau of Land Management and the Forest Service, in water rights applications (or protests) in no way impairs the standing of the United States as a qualified applicant.

III.

Throughout these proceedings, the protestants and Attorney General have challenged the standing or capacity of the United States to hold an appropriative right for stockwatering purposes primarily because it is not in a position -- owning no livestock in its own right -- to put stockwater to beneficial use. The protests seek denial under the provisions of NRS 533.045. NRS 533.045 provides that:

"When the necessity for the use of water does not exist, the right to divert it ceases and no person shall be permitted to divert or use the waters of this state except at such times as the water is required for a beneficial purpose." (Emphasis added)

Nevada Water law clearly establishes stockwatering as a beneficial use no less than irrigation, municipal, recreational, mining and other beneficial uses.⁴⁸

The protestants and Attorney General rely upon NRS 533.045

⁴⁸ NRS 533.490(1).

for the proposition that the Federal government, owning no livestock, has no need for water rights for stockwatering purposes, and seek to defeat the government at the application stage of the appropriation procedure. At that stage, the applicant has not yet been required by Nevada law to prove diversion or placement of the water to beneficial use. NRS 533.045 applies only after the applicant has been granted a permit to divert the water. The application manifests the applicant's intent to divert and place water to beneficial use. No applicant under NRS Chapter 533 is required to prove beneficial use at the time of application, but only at a later time in the appropriative process.⁴⁹ If, at the time prescribed in the permit for submitting proof of beneficial use, it appears that a permittee is delinquent or lacking in due diligence, the State Engineer may take appropriate action, including cancellation of the permit.⁵⁰ Denial of a permit at the threshold, based on an unfounded suspicion that the applicant may fail to place the water to beneficial use, is not a basis for denial of an application.

IV.

Neither the protestants nor the Attorney General deny that the United States is an entity upon whom Nevada Law ⁵¹ confers

⁴⁹ NRS 533.380.

⁵⁰ NRS 533.395, 533.410.

⁵¹ NRS 533.325. "Any...person, as defined in NRS 533.010, desiring to appropriate any of the public waters...shall...make an application to the state engineer for a permit to make the same." (Continued)

the right to appropriate water. Federal entities may acquire water rights "as would any other private claimant within the various states".⁵² The State Engineer may approve any application if it contemplates (1) the application of the water to a beneficial use, (2) there is unappropriated water in the proposed source, (3) the proposed use will not impair existing rights, and (4) the appropriation is in the public interest.⁵³

V.

The Attorney General, in his opening brief (September 4, 1984), states that Nevada would not oppose federal agency applications for water for national forest campgrounds, for wild

51 (Continued)

NRS 533.010. "As used in this chapter, 'person includes' a corporation, an association, the United States, and the state, as well as a natural person."

NRS 328.065(2). "An officer of an agency or instrumentality of the United States:

2. Shall apply to the state engineer pursuant to Title 48 of NRS to appropriate water on the public lands or other federal lands of this state. The state engineer has continuing jurisdiction over any acquisition by the United States of the water of the State of Nevada, whether by purchase, gift, condemnation, appropriation pursuant to the state's water laws or otherwise, and whether appurtenant to lands acquired by or retained by the United States."

The Attorney General has elsewhere acknowledged that the United States is a qualified appropriator under Nevada water law: "Under this statutory scheme [NRS chapters 533 and 534] the federal government is treated as any other claimant when acquiring water rights through the application and permit system. NRS 533.010." A.G.O. 81-1 (1981).

52 Solicitor's Opinion, M-36914 (Supp. I) Non-Reserved Water Rights--United States Compliance with State Law, 88 I.D. 1055, 1065 (1981). (Hereinafter Coldiron).

53 NRS 533.030(1) and 533.370(3).

horse watering by the BLM, or for the irrigation by the BLM of reseeded areas of the range, but that Nevada does oppose federal appropriations for the watering of livestock of permittees, for wildlife and in place fisheries, and for recreational and aesthetic purposes.

Setting aside the objections based on sovereignty and proprietary-governmental distinctions, the effect of granting the federal applications to appropriate water for the contested uses warrants discussion since the protestants and Attorney General argue that:

(1) the applications, in this proceeding, represent only a small portion of the Nevada water rights applications that the federal government intends to file⁵⁴ and that, consequently, vast quantities of water will be permanently removed from State administration, precluding other uses by private appropriators;

(2) the "public interest" is one abstract criteria that the State Engineer must consider when acting on applications to appropriate and they espouse a "public policy" of substantial restriction on the right of federal agencies to hold State-sanctioned water rights on public lands;

(3) if the rights are held privately, it should

⁵⁴ Protestant's Exhibit No. 4, public administrative hearing June 12, 1984, Elko, Nevada. Testimony of Tom Ballow, transcript pp. 76-137.

not impede resource management by the federal agencies while still enabling the State to retain at least a modicum of control or have a voice in such resource management decisions; and

(4) a primary aim of the federal government is to reassert control over water resources located on public lands -- to reunify land and water under federal jurisdiction.

The record disposes of the speculation surrounding the water rights applications the Federal government intends to file and reflects a relatively modest number (in comparison to water rights held by private appropriators for the same uses) of anticipated federal applications statewide involving primarily the development of new ground water sources and seeking minimal quantities of water.⁵⁵ There is no evidence that the applications represent any "cannibalization" of the States water resources.

In evaluating the subject applications the State Engineer has, in the case of each beneficial use, considered whether Congress has authorized water to be appropriated for that use and if so, whether Congress has directed that water be appropriated, State law notwithstanding. Coldiron, in this context, appears to

⁵⁵ State Engineer's Exhibit No. 23, public administrative hearing, June 12, 1984, Elko, Nevada. The records of the State Engineer's office reveal that since 1905 in excess of 50,000 applications to appropriate or claims of vested rights for all uses have been filed. Specifically, in reviewing almost 19,000 applications to appropriate filed since 1976, approximately 13% involve stockwatering uses by private appropriators.

be authoritative guidance with respect to appropriation of water pursuant to FLPMA and the Taylor Grazing Act and pursuant to State law. Examination of range "betterment" measures in Section 401 of FLPMA, 43 U.S.C.A. § 1751(b)(1) and the Taylor Grazing Act, 43 U.S.C.A. §§ 315b and 315c strongly suggests that they are on the same footing as provisions of the Public Rangelands Improvement Act (PRIA), 43 U.S.C. 1902(f) and 1904(a) and (c), cited by the Bureau of Land Management in its brief of October 19, 1984, as "Congressional directives". These provisions appear to be authorizations for expenditures of public funds for various improvements including, among other things, water structures deemed advisable or directed by the Secretary. PRIA directs management of public rangelands in accordance with the Taylor Grazing Act and FLPMA, both of which contain disclaimers as to preemption of State water law.

Clearly, the federal agencies have federal statutory authority to appropriate water for the stated purposes, but the State Engineer perceives no overriding "congressional directive". It is appropriate, therefore, that the State Engineer now proceed -- under state law and procedures -- to evaluate the subject applications to determine whether permits may issue.⁵⁶ In so doing, the State Engineer is faced with the responsibilities of enforcing Nevada law, hopefully in a manner calculated to avoid confronting the federal agencies with a

⁵⁶ This procedure is consistent with Congress' intent as interpreted by the U.S. Supreme Court in United States v. New Mexico, 43 U.S. 696, 702 (1978). Coldiron, supra, 88 I.D. 1064 (1981).

compelling reason to seek congressional relief or a judicial expansion of the reservation doctrine. In United States v. New Mexico,⁵⁷ the U.S. Supreme Court held that stockwatering is not a purpose for which water was reserved by Congress and that Congress intended water for livestock to be allocated under state law. The opinion does not address the issue of whether the United States may also appropriate water.

Federal grazing privileges available to farmers and ranchers are primarily determined by discretionary decisions⁵⁸ of the federal land managers, hopefully based on the forage available on the land and on the general condition of the range. Forage and range conditions are determined by terrain, precipitation, soil, climate and other factors largely independent of the existence or non-existence of water sources. The quantity of forage available is not related to or influenced by vested ownership of water rights. The existence of domestic livestock and wildlife on the public lands is dependent to a degree on adequate water sources but is more dependent on forage and habitat.

In dealing with this question in light of New Mexico, Coldiron noted that Congress generally did not or has not intended that the United States would acquire water rights for

⁵⁷ United States v. New Mexico, 438 U.S. 696, 715, note 24 (1978). The Attorney General and protestants rely on New Mexico for the proposition that the United States is disqualified as an appropriator because issuance of appropriation permits to it would result in reduction of water available to private appropriators. This is a legal non sequitur.

⁵⁸ State Engineer's Exhibits No. 24 and 25, public administrative hearing, June 12, 1984, Elko, Nevada.

the "ultimate beneficiaries of the disposed public lands or the users of the non-renewable resources thereupon (such as miners, homesteaders, or railroads)".⁵⁹ Grazing permittees are neither the "ultimate beneficiaries" of "disposed lands" nor the users of non-renewable resources.⁶⁰ Other than such inference as may be drawn from preference under the Taylor Act, 43 U.S.C. § 315b, for grazing permittees who already own water rights to enable them to make proper use of their water, nothing in federal law dictates the finding that the United States may not appropriate water for permittees uses on federal lands. To the contrary, the federal agencies may apply to the state to secure appropriative water rights needed to meet multiple-use management objectives set forth by Congress in land management statutes.⁶¹

VI.

It is urged, in the Elko County Commissioners' brief, that Prosole⁶² prevents the United States from being an appropriator because the ultimate water user must be the holder of a water right. BLM and intervenors point out that Prosole does not stand

⁵⁹ Solicitor Op., M-36914 (Supp. I), 88 I.D. at 1057.

⁶⁰ The lands here involved are public domain lands, not "disposed lands" such as homestead or railroad grants, or mining claims. Forage, unlike for example minerals, is a renewable resource.

⁶¹ For example, the savings clause of FLPMA, Section 710(g), 43 U.S.C.A. § 1701, Note, maintains the status quo in the relationship between the states and the United States and preserves the right of the United States to use water for congressionally-recognized and mandated purposes set forth in federal legislation providing for the management of the public domain, pursuant to state substantive and procedural law for these purposes.

⁶² Prosole v. Steamboat Canal Co., 37 Nev. 154, 140 P. 720 (914).

for the proposition for which it is cited and that to treat the government landowner who owns no livestock as agent for its permittee or licensee is backward thinking. (See reply brief of Intervenors Sierra Club, etc., p. 14, Oct. 22 1984.) An important public interest issue, as to the relationship between water supplier and water user, is protection of the water user (whatever semantics of ownership may be involved) from being cut off from his source of supply. Labored analogies to carrier ditch companies, municipalities, water districts and other distributors/appropriators of water under State law, in the context of uses or ownership of livestock, is not necessary for the purpose of determining the ability of the applicant to place water to beneficial use. Requiring an ownership determination of livestock before approving an application would create a chaotic process when considered in the context of, as an example, a fee landowner who owns no livestock but seeks to appropriate water for the use of tenants or contract livestock growers on his land.

VII.

Testimony presented at the public administrative hearing, to the effect that the value of the base property of a ranching or farming operation may be affected by federal ownership of water rights on public lands, was inconclusive.⁶³ The availability and

⁶³ Testimony of William J. Guisti, Elko County Assessor, transcript pp. 67-72; testimony of Elbert G. Davis, transcript pp. 139-155; testimony of Edward B. Buckner, transcript pp. 165-167; testimony of John Carpenter, transcript pp. 167-170; testimony of Marla Boies Griswold, transcript pp. 170-181; testimony of DeLoyd Satterthwaite, transcript pp. 199-215; testimony of Bruce B. Hall, transcript pp. 216-213, public administrative hearing, June 12, 1984, Elko, Nevada.

administration of grazing privileges on the public lands are a matter of federal law. The State Engineer, as a long standing policy, has limited approval of private appropriations for stockwatering on public domain to the federal permittee and has done so in the historical absence of federal recognition and compliance with State water law. The records of the State Engineer's office will disclose that many hundreds of water rights (both vested and appropriative) for the contested uses have been established by private appropriators over the years. There is no evidence that these rights have impaired the public interest or welfare; and the State Engineer is unable to justify any conclusive distinction to be made purely on the basis of ownership of a water right or ownership of livestock.

The State Engineer finds that the development of new watering sources, whether by the federal agency or the federal permittee, is beneficial in promoting new areas for grazing and more efficient use of existing areas, all of which in turn should reduce grazing pressure in the vicinity of existing watering sources, thus increasing the quantity and quality of grazing privileges as a whole.

With the exception of Application 36479, the applications subject to this ruling represent requests for minimal quantities of water through the development of wells in areas where present sources of water are either limited or nonexistent. The waters sought by these applications have little or no potential benefit, other than for stockwatering, in support of grazing and wildlife habitat maintenance. Except for obvious seniority under the

doctrine of prior appropriations, there is no evidence that the granting of the applications would prejudice or impair private appropriators who may, in the future, seek rights for the same or similar uses in the same area.

VIII.

It is conceivable that a junior appropriator might have his application denied or his right curtailed to protect a senior right held by a federal agency. That, of course, is the essence of prior appropriation and protection of existing rights. To deny the federal applications, in favor of private speculation on future demands and availability of water for irrigation, mining, municipal or any other uses, would not only violate the doctrine but place the same burden on the private appropriator. Any potential conflict with existing rights or availability of unappropriated water in the source is simply factual.

IX.

Public interest is a flexible concept, primarily designed to promote strong public policy concepts and the public welfare. Nevada, like the other western states, has staunchly defended her right to control and administer her most vital resource, but the public interest is not served by impeding congressionally mandated resource management⁶⁴ by the federal agencies, especially if those agencies recognize and comply with state water law.

Nevada has a limited, finite quantity of water to serve all

⁶⁴ See footnote 58.

purposes; and that limited supply is being subjected to ever increasing competitive demands. This is nothing new. It has been the "name of the game" since appropriative water law was adopted in the western states. Because the water is scarce, it is an important principle of public policy that all the water be applied to beneficial use, and in the public interest. The development of sources of water and uses contemplated by the United States are beneficial uses and in the public interest. If the United States is a prior appropriator, it must be treated with the same respect as all other prior appropriators.

It is also true that the United States may be a more formidable competitor than a private party. It has abundant money and can print more; it is clothed with sovereign immunity and has the inherent sovereign power of eminent domain; it is exalted by the Supremacy Clause of the U.S. Constitution; and in addition, the court system has fashioned a number of water rights doctrines (for example, the reservation doctrine) which enhances the Government's advantages. All of these are inherent in our dual system of government and are not likely to be altered in administrative proceedings before a state agency. °

The Attorney General and protestants have not only failed to meet the test of conclusive and substantial evidence that the public interest would be impaired, but have failed to provide even marginal evidence of impairment.

X.

These findings are not inconsistent with the policy of other western states regarding appropriations of public waters for

similar uses, consistent with water law of the respective states.⁶⁵

XI.

BLM has filed application 36479 to appropriate the waters of Blue Lake for the purpose of preserving the recreational values of that water source, stockwatering and wildlife uses.⁶⁶ The Attorney General opposes this application on the grounds (1) that a physical diversion of the water is essential to any appropriation, and (2) the "public trust doctrine" precludes the State Engineer from granting the application.

Nevada case law has long since dispensed with any requirement for a physical diversion of water from the source as a prerequisite to a valid appropriation. Steptoe Livestock Co. v. Gulley,⁶⁷ holds that a cow's gullet is a sufficient diversion works; and a recent decision of the U.S. District Court for the District of Nevada made clear that no diversion is required for an appropriation to maintain instream flows.⁶⁸ The Legislature

⁶⁵ State Engineer's Exhibit No. 12, public administrative hearing, June 12, 1984, Elko, Nevada.

⁶⁶ The State Engineer views the uses described and set forth under the application as consistent with the congressionally mandated multiple use objectives of FLPMA and the Taylor Grazing Act - See also PRIA. The enumerated uses in the application, being all recreational in character, render harmless the possible technical contravention of NRS 533.330, which limits applications to a single use.

⁶⁷ 53 Nev. 163, 173, 295 P. 772 (1931); accord; Waters of Horse Springs v. State Engineer, 99 Nev. 776, 778, 671 P.2d 1131 (1983).

⁶⁸ United States v. Alpine Land & Reservoir Co., 503 F.2d 877 (D. Nev. 1980), Modified, 697 F.2d 851 (9th Cir. 1983), Cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 104 S. Ct. 193 (1983).

in 1969 declared that "(t)he use of water...for any recreational purpose is...a beneficial use".⁶⁹

The State Engineer does not view the lack of physical diversion of the waters of Blue Lake as an impediment to the appropriation sought by BLM.

Nor is the "public trust doctrine" a barrier to such an appropriation. That doctrine has largely been limited in its application to navigable bodies of water and tidelands.⁷⁰ The State Engineer views the doctrine as offensive to the law of prior appropriation⁷¹ and thus contrary to the public policy of Nevada, as declared by its Legislature in NRS Chapter 533. But if the "public trust doctrine" has any viability in Nevada, it would appear to support, rather than oppose, BLM's application for the waters of Blue Lake.

XII.

There is no evidence to suggest lack of unappropriated water in the sources described in the subject applications set forth

⁶⁹ NRS 533.020(2) (1983). See McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (1976) (Construing a statute similar to NRS 533.020(2) to dispense with a requirement for artificial diversion).

⁷⁰ See e.g., Illinois C.R. Co. v. Illinois, 146 U.S. 387 (1892); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

⁷¹ In National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709 (1983), the Supreme Court of California held that vested appropriative rights on streams tributary to Mono Lake might be reconsidered at any time, and terminated without compensation to the owners of such rights, if found to be inimicable to the purposes for which California held the waters "in trust". The State Engineer is loath to believe, and absent legislative or judicial mandate, will not believe that this doctrine prevails in Nevada.

herein.

XIII.

There is no substantial or conclusive evidence that the granting of the applications set forth herein will adversely affect or conflict with existing rights with the exception of applications 44886, 44948 and 44979.

XIV.

The protestants assert that consumption of water by wildlife is not a beneficial use under Nevada law; that wildlife is a natural use which does not require appropriation. This must be dismissed. The Nevada Legislature has acknowledged the need to maintain access by wildlife to watering sources it customarily uses.⁷² The State Engineer has historically recognized wildlife use as a beneficial use. He has ruled that little, if any, distinction exists between stockwatering and wildlife use as it relates to the watering of animals.⁷³ Testimony at the public administrative hearing supports the cooperative efforts of federal and state authorities to enhance wildlife habitat and well being through the development of additional water sources.⁷⁴ As a practical matter, wildlife is simply unimpressed

⁷² NRS 533.367 (1981). This statute applies specifically to natural springs and seeps and is not applicable to developed ground water sources.

⁷³ Transcript pp. 182-198, public administrative hearing, June 13, 1984.

⁷⁴ Statement of William A. Molini, Director of the Nevada Department of Wildlife. Transcript pp. 289-296, public administrative hearing, June 13, 1984. Certainly an application by the Nevada Department of Wildlife for water to be used for consumption by wildlife would signify a use beneficial to the purposes of that agency and one in furtherance of the public interest. That the subject application is by a federal agency for the same beneficial use, should support no distinction.
(Continued)

with the record ownership or stated beneficial use associated with a water right on a given source and, absent any physical restrictions to access, will benefit from the development of ground water sources under the subject applications.

XV.

The points of diversion described under applications 44886, 44948 and 44979 are the subject of existing rights under permits 37665, 37860 and 37979 respectively. The approval of applications 44886, 44948 and 44979 would therefore conflict with existing rights.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.⁷⁵

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁷⁶

- A. There is no unappropriated water at the proposed source, or
- B. The proposed use conflicts with existing rights, or
- C. The proposed use threatens to prove detrimental to the public interest.

74 (Continued)

The Attorney General's opposition is further based on and he opins:

"It is not unusual for a state to claim ownership to various aspects of its natural resources. Thus, the State claims ownership to the wildlife within the State (NRS-501.100) even though the United States Supreme Court has held that a state does not 'own' the wild creatures within its borders. Hughes v. Oklahoma, 441 U.S. 322 (1979)." (See A.G.O. No. 83-15.)

75 NRS Chapters 533 and 534.

76 NRS 533.370.

III.

There is unappropriated water available in the sources that are described in the applications set forth herein.

IV.

The granting of applications 36414, 36420, 36422, 36479, 44805, 44883, 44894, 44932, 44946 and 44965 will not adversely effect or conflict with existing rights. The granting of applications 44886, 44948 and 44979 will conflict with existing rights.

V.

The State Engineer concludes that there is no basis or foundation under applicable law to support the position of the Attorney General or protestants that the applications set forth herein should be denied on the grounds that they are for uses which are for governmental purposes. The denial of an application to appropriate for a use as to which a federal agency has Congressional directive to conduct the government's business and protect federal interests would bring the State of Nevada into direct confrontation with the federal government. Such a confrontation would be governed by the Supremacy Clause of the U.S. Constitution. The State Engineer further concludes that denial of the applications on this basis, or on the basis that state sovereignty is impugned, in the absence of substantial and conclusive evidence would only serve to provoke judicial or congressional creation of non-reserved rights or the broadening of the federal reservation doctrine.

VI.

When federal and state policy are properly taken into account, it becomes clear that the granting of applications will not be detrimental to public interest and welfare.

VII.

The granting of the applications will not conflict with the provisions of NRS 321.596 through 321.599.

RULING

The protests to applications 36414, 36420, 36422, 36479, 44805, 44883, 44894, 44932, 44946, and 44965 are herewith overruled and the applications will be granted subject to existing rights, upon receipt of the statutory permit fees.

The grounds of the protests to the granting of applications 44886, 44948 and 44979 are herewith overruled. Applications 44886, 44948 and 44979 are denied on the grounds that the granting thereof would conflict with and impair existing rights.

Applications 44884 and 44917 were withdrawn by the applicant on March 1, 1985 and May 24, 1985 respectively, therefore no ruling is made in the matter of these applications.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/bl

Dated this 26th day of
JULY, 1985