

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS 44031)
AND 44033 FILED BY RONALD M.)
FLORANCE FOR THE PUBLIC WATERS OF)
TUB SPRINGS AND AN UNNAMED SPRING,)
AND APPLICATIONS 43969, 43970,)
43979 AND 43983 FILED BY HOWARD)
RANCHES FOR THE PUBLIC WATERS OF)
COPPER CREEK SPRING, MUD GULCH)
SPRING #1, ROCK SPRING AND HENRY)
SPRING IN ELKO COUNTY, NEVADA.)

RULING

GENERAL

I.

Application 43969 was filed on June 29, 1981, by Howard Ranches to appropriate 0.10 cubic feet per second (hereinafter "c.f.s.") of water from Copper Creek Spring for stockwater and domestic purposes (300 head of cattle) within the SE1/4 SE1/4 Section 3 and SW1/4 NE1/4 Section 10, T.44N., R.57E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 3, T.44N., R.57E., M.D.B.&M.¹

Application 43969 was protested² on February 3, 1982, by L. Kent Mays, Jr., on behalf of the U.S. Forest Service on the following grounds:

"The Forest Service has a prior right (Proof 03739) and has developed this spring to its full extent. There is no water available to fulfill a second right. There is no need for additional stockwater

¹ Public record in the office of the State Engineer under Application 43969. See also State Engineer's Exhibits 4 and 4A, public administrative hearing, July 25, 1984, Elko, Nevada.

² Id.

developments to serve this area, nor will any be permitted."

II.

Application 43970 was filed on June 29, 1981, by Howard Ranches to appropriate 0.10 c.f.s. of water from Mud Gulch Spring #1 for stockwater and domestic purposes (300 head of cattle) within the SW1/4 NE1/4 Section 28, T.45N., R.57E., M.D.B.&M. (unsurveyed). The point of diversion is described as being within the SW1/4 NE1/4 Section 28, T.45N., R.57E., M.D.B.&M. (unsurveyed).³

Application 43970 was protested⁴ on February 3, 1982, by L. Kent Mays, Jr., on behalf of the U.S. Forest Service on the following grounds:

"The Forest Service has a prior right (Proof 03737) and has developed this spring to its full extent. There is no water available to fulfill a second right. There is no need for additional stockwater developments to serve this area, nor will any be permitted."

III.

Application 43979 was filed on June 29, 1981, by Howard Ranches to appropriate 0.10 c.f.s. of water from Rock Spring for stockwater and domestic purposes (200 head of cattle) within the SW1/4 SW1/4 Section 12, T.46N., R.55E., M.D.B.&M. The point of

³ Public record in the office of the State Engineer under Application 43970. See also State Engineer's Exhibits 5 and 5A, public administrative hearing, July 25, 1984, Elko, Nevada.

⁴ Id.

diversion is described as being within the SW1/4 SW1/4 Section 12, T.46N., R.55E., M.D.B.&M.⁵

Application 43979 was protested⁶ on February 3, 1982, by L. Kent Mays, Jr., on behalf of the U.S. Forest Service on the following grounds:

"The Forest Service has a prior right (Proof 03727) to this source. Development of this source will also adversely affect and infringe on downstream developments and rights held by the Forest Service under Proof 03732. Development of this source by the applicant will not be permitted."

IV.

Application 43983 was filed on June 29, 1981, by Howard Ranches to appropriate 0.10 c.f.s. of water from Henry Spring for stockwater and domestic purposes (200 head of cattle) within the NE1/4 SW1/4 Section 3, T.46N., R.55E., M.D.B.&M. The point of diversion is described as being within the NE1/4 SW1/4 Section 3, T.46N., R.55E., M.D.B.&M.⁷

Application 43983 was protested⁸ on February 3, 1982, by L. Kent Mays, Jr., on behalf of the U.S. Forest Service on the

⁵ Public record in the office of the State Engineer under Application 43979. See also State Engineer's Exhibits 6 and 6A, public administrative hearing, July 25, 1984, Elko, Nevada.

⁶ Id.

⁷ Public record in the office of the State Engineer under Application 43983. See also State Engineer's Exhibits 7 and 7A, public administrative hearing, July 25, 1984, Elko, Nevada.

⁸ Id.

following grounds:

"The Forest Service has a prior right (Proof 03722) and has developed this spring to its full extent. There is no water available to fulfill a second right. There is no need for additional stock water developments to serve this area, nor will any be permitted."

V.

Application 44031 was filed on June 29, 1981, by Ronald M. Florance to appropriate 0.10 c.f.s. of water from Tub Springs for stockwater and domestic purposes within the SE1/4 SW1/4 Section 12, T.44N., R.59E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SW1/4 Section 12, T.44N., R.59E., M.D.B.&M. The application proposes to provide water for 200 head of cattle.⁹

Application 44031 was protested¹⁰ on February 3, 1982, by L. Kent Mays, Jr., on behalf of the U.S. Forest Service on the following grounds:

"The Forest Service has a prior right and has developed this spring to its full extent. There is no water available to fulfill a second right. There is no need for additional stock water developments to serve this area, nor will any be

⁹ Public record in the office of the State Engineer under Application 44031. See also State Engineer's Exhibits 8 and 8A, public administrative hearing, July 25, 1984, Elko, Nevada.

¹⁰ Id.

permitted."

VI.

Application 44033 was filed on June 29, 1981, by Ronald M. Florance to appropriate 0.10 c.f.s. of water from an Unnamed Spring for stockwater and domestic purposes (300 head of cattle) within the SW1/4 NE1/4 Section 25 and SE1/4 NE1/4 Section 36, T.44N., R.59E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NW1/4 Section 25, T.44N., R.59E., M.D.B.&M.¹¹

Application 44033 was protested¹² on February 3, 1982, by L. Kent Mays, Jr., on behalf of the U.S. Forest Service on the following grounds:

"The Forest Service has a prior right and has developed this spring to its full extent. There is no water available to fulfill a second right. There is no need for additional stock water developments to serve this area, nor will any be permitted."

VII.

A public administrative hearing before the State Engineer in the matter of the subject applications to appropriate was held on July 25, 1984, in Elko, Nevada.¹³ The State of Nevada was

¹¹ Public record in the office of the State Engineer under application 44033. See also State Engineer's Exhibits 9 and 9A, public administrative hearing, July 25, 1984, Elko, Nevada.

¹² Id.

¹³ See Transcripts of the public administrative hearing, public record in the office of the State Engineer.

granted standing as an intervenor in support of the applications.¹⁴ Evidentiary presentations by the applicants, protestants and Attorney General were introduced into the record in support of and in opposition to the pending applications. Post hearing written briefs were submitted by the parties who had standing in the proceedings. The State Engineer took administrative notice of various matters as more specifically set forth below.¹⁵

VIII.

In these proceedings, the State Engineer is represented by special counsel because his usual counsel, the Attorney General, 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" statute¹⁶ 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

¹⁴ See transcript of the public administrative hearing, July 25, 1984, pp. 6 - 9. The Attorney General formally appears in these proceedings as counsel of record for the State of Nevada. The Attorney General has formally appeared in other proceedings as counsel of record for the Nevada State Department of Agriculture and State of Nevada. The Attorney General was granted leave to intervene in the name of the State of Nevada pursuant to NRS 228.190 (1981) in support of the instant applications. See transcript of public administrative hearing, July 25, 1984, p. 7.

¹⁵ See transcript of the public administrative hearing, July 25, 1984, pp. 8, 38-39, 54 and 99. The State Engineer took administrative notice of the record of other public hearings relating to federal agency water filings and protests as well as any other public records available in the office of the State Engineer.

¹⁶ NRS 321.596 to 321.599, inclusive (1981).

Rebellion Act. In articulating this position, 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.¹⁷

The Attorney General, on behalf of the State of Nevada, has sought and been granted standing as an intervenor-protestant in other proceedings before the State Engineer and intervenor in support of the applications in the instant proceedings.

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.¹⁸

¹⁷ Regretably, the Attorney General and the State Engineer disagree on what constitutes the public policy or the public interest which must be considered by the Engineer in ruling upon water rights applications. The Attorney General would narrow the scope of these concepts to what he believes is the mandate of the Sagebrush Rebellion statute, but the Engineer believes he must look to the total blend of all applicable law - state and federal - to ascertain the public interest and public policy as it exists at any relevant time.

¹⁸ 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 Nevada 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
(Continued)

FINDINGS OF FACT

I.

The instant applications seek to appropriate water from surface water sources located on national forest reserve lands for the purpose of watering livestock. Testimony at the administrative hearing established that both of the applicants, Howard Ranches and Ronald M. Florance, are Forest Service permittees and are authorized to range livestock in areas adjacent to the water sources described herein.¹⁹ The record also establishes that livestock grazing is a permitted and desirable secondary use of national forest lands.²⁰

18 (Continued)

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). 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., 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).

¹⁹ See transcript of public administrative hearing, July 25, 1984, Elko, Nevada, testimony of Gary Boyle, p. 21; testimony of Katherine Foster, p. 76-77, 107-110; testimony of Walt Hanks, p. 82. Testimony of Katherine Foster indicates that applicant Howard Ranches does not hold grazing privileges within the vicinity of the source of water under Application 44031. The applicant has been allowed to range livestock in the area under a "condoned drift".

²⁰ See transcript of public administrative hearing, July 25, 1984, Elko, Nevada, testimony of Walt Hanks, p. 24-25. See also footnote 22.

II.

Stockwatering is declared to be a beneficial use of the public waters. 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.²¹

III.

The availability and administration of grazing privileges on national forest lands are a matter of federal law.²² The State Engineer, as a long standing policy, has limited approval of private applications for stockwatering rights on public domain and national forest lands 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 stockwatering use have been recognized or granted to private appropriators over the years on both public domain and national forest lands. There is no evidence that these rights have impaired the public interest or welfare or the orderly administration of these lands 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

²¹ NRS 533.490, 533.495, 533.030(1), and 533.370(3).

²² Organic Administration Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 473 et seq. (1976 Ed.). Multiple-Use Sustain-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 et seq.

ownership of livestock.²³ The contention of the protestant that the approval of the subject applications would, in effect, impair the orderly management of national forest lands is not supported by the historic record in the State Engineer's office nor the record of evidence in the instant matter.²⁴ U. S. Forest Service policy may encourage federal ownership of water rights for permittees' uses within the reserve but the Supreme Court in New Mexico refused to recognize any federal claim for a "reserved" stockwatering right or any need for the U. S. Forest Service to allocate water for stockwatering purposes.²⁵ The extent to which the U. S. Forest Service may reserve water is well settled and limited to the primary purpose of the reservation. The right of the U. S. Forest Service to hold state-sanctioned water rights

²³ Testimony had been presented at previous public administrative hearings 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. The State Engineer found that this testimony was inconclusive. See State Engineer's Ruling in the matter of Applications 36414 et al., dated July 26, 1985, public record in the office of the State Engineer. See also 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.

²⁴ Testimony by the protestants at the public administrative hearing established that livestock grazing is a "permitted and desirable" use of national forest lands but grazing permittees holding water rights in support of that grazing use is "contrary to Forest Service policy". See transcript of public administrative hearing, July 25, 1984, testimony of Walter E. Hanks, Katherine Foster and Gary Boyle, pp. 21-82. See also State of Nevada Exhibit No. 1 and USFS Exhibit No. 3.

²⁵ United States v. New Mexico, 438 U.S. 696, 716-717 (1978).

has been addressed in previous rulings of the State Engineer.²⁶ While some management difficulties may arise because of privately held stockwatering rights on national forest lands, the State Engineer can find no basis or foundation that would dictate a finding that the applicants may not appropriate water for stockwatering purposes where they are legitimate holders of range privileges, especially in view of New Mexico.²⁷ Private appropriators or the jurisdictional federal agency may and indeed must apply to secure appropriative water rights under State law needed to support authorized secondary uses of federal reservations.

IV.

The protestant has filed claims of vested rights on the sources of water subject to the instant applications to

²⁶ See State Engineer's Ruling of October 4, 1985, in the matter of Applications 42920 et al., public record in the office of the State Engineer.

²⁷ United States v. New Mexico, 438 U.S. 696 (1978). In interpreting New Mexico, one must be mindful of the questions that were presented to the court. The court addressed only the reservation doctrine claim for stockwater rights. The court did expressly hold that congress intended that the water supply of the Rio Mimbres not subject to the primary purpose reservation claim, would be allocated under state law. The State Engineer can find nothing in the decision that expressly requires that appropriative stockwater rights in national forests belong solely to permittees or expressly prevents the U.S. Forest Service from appropriating or otherwise acquiring an ownership interest in stockwater rights. The U. S. Forest Service may be expressing a legitimate administrative concern relating to stockwatering rights held by range permittees but should not lose sight of the fact that this concern could have been more directly addressed or treated by a timely joint or exclusive federal recognition and compliance with State appropriation procedures. Their failure to do so in a given case does not justify denial of private applications for such uses.

appropriate.²⁸ The validity of the claims of vested right cannot be determined in the absence of a general adjudication of the source.²⁹ However, the record is lacking any conclusive evidence that the granting of the applications will interfere with or adversely affect any valid existing rights subject to a final determination of the validity, limit and extent of the claims of vested rights. This finding is also made with the understanding that any approval of the applications would be subject to existing rights.³⁰

V.

The record does not provide evidence that there is a lack of unappropriated water at the sources described in the subject applications.

VI.

The record does not provide evidence that the public interest will be impaired by approval of the subject applications.

²⁸ See Proofs of Appropriation 03708, 03709, 03722, 30727, 03737 and 03739, public record in the office of the State Engineer.

²⁹ NRS 533.090 through 533.320, inclusive. See also 66 Stat. 560, 43 U.S.C. 666, commonly known as the "McCarran Amendment".

³⁰ In the absence of a valid grazing privilege in the vicinity of the source, a privately held stockwatering right may well become subject to the provisions of NRS 533.045.

NRS 533.045 provides:

"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."

Public interest is a flexible concept, primarily designed to promote strong public policy concepts and the public welfare.

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 resources as a whole which is in the public interest.

VII.

Under the provisions of NRS 533.367, the applicants must provide access to wildlife that customarily frequent the sources of water described herein.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.³¹

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:³²

- A. There is no unappropriated water at the proposed source,
or
- B. The proposed use conflicts with existing rights, or

³¹ NRS Chapters 533.

³² NRS 533.370, subsection 3.

C. The proposed use threatens to prove detrimental to the public interest.

III.

There is no evidence to support a lack of unappropriated water at the sources of water described under the subject applications set forth herein.

IV.

There is no evidence that the proposed use described under the subject applications would adversely affect existing rights.

V.

The sources of water described under the subject applications are within national forest lands, therefore, the State Engineer may rely on New Mexico for authoritative guidance in this matter.³³

VI.

There is no evidence that the granting of the subject applications will be detrimental to the public interest or welfare.

VII.

The applicants must ensure that wildlife which customarily use the water of the subject sources will continue to have access to the source.³⁴

³³ United States v. New Mexico, 438 U.S. 696 (1978).

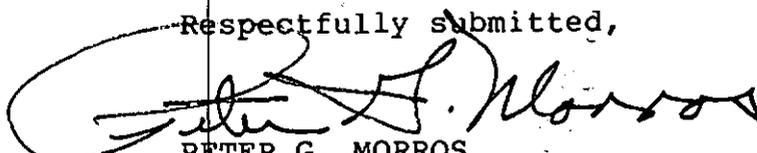
³⁴ NRS 533.367.

RULING

The protests to the granting of Applications 44031, 44033, 43969, 43970, 43979 and 43983 are herewith overruled and said applications will be approved upon receipt of statutory permit fees subject to:

1. provisions of NRS 533.367, and
2. existing rights.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/bl

Dated this 12th day of
March, 1986.