IN THE MATTER OF APPLICATION 44904)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND SOURCE)
WITHIN THE SALMON FALLS CREEK) RULING
GROUND WATER BASIN IN ELKO COUNTY,)
NEVADA.)

GENERAL

I.

Application 44904[1] was filed on October 29, 1981 by United States Bureau of Land Management to appropriate 0.008 c.f.s. of underground water for use within the NE1/4 NE1/4 Section 4, T.44N., R.61E., M.D.B.&M., for stockwatering purposes. The point of diversion is described as being within the NE1/4 NE1/4 Section 4, T.44N., R.61E., M.D.B.&M.

FINDINGS OF FACT

I.

A timely protest[1] was filed to the granting of Application 44904 by Horace Smith on January 15, 1982. The grounds of the protest are as follows:

"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 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.

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[1] Public record in the office of the State Engineer under Application 44904.

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 applicant 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 managment 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 <u>natural use</u> 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:

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."

II.

On May 12, 1983, the stated application was assigned by the Bureau of Land Management, U. S. Department of the Interior to Ronald M. Florance.[1]

III.

By letter dated July 18, 1983, the Division of Water Resources informed Horace Smith that the Bureau of Land Management assigned the application to Ronald M. Florance, who is the permittee within that range area. The letter requested information as to whether the protestant wished to pursue the protest since Application 44904 had been assigned by the Bureau of Land Management to the range permittee in the area. No response has been received to the request for additional information.[1]

IV.

By letter to the Bureau of Land Management dated March 20, 1984, the Division of Water Resources inquired as to who was the current rancher permittee within the described place of use.[1]

V.

On April 13, 1984, the Bureau of Land Management, by letter, informed the State Engineer that Ronald M. Florance was the permittee within the described place of use.[1]

CONCLUSIONS

I.

The State Engineer has jurisdiction over this matter under the provisions of NRS 533.365 and 533.370.

II.

Ronald M. Florance is the owner of record under Application 44904 and the range permittee within the described place of use.

RULING

The protest to the granting of Application 44904 is hereby overruled on the grounds that the applicant is the range permittee and can place the water to beneficial use and further on the grounds that the protestant has failed to provide the State Engineer with the additional information requested. The granting of Application 44904 will not affect existing rights and will not be detrimental to the public interest.

Respectfully submitted

Peter G. Morros
State Engineer

PGM/BD/bl

Dated this 8th day of
MAY, 1984.