

**IN THE OFFICE OF STATE ENGINEER
OF THE STATE OF NEVADA**

IN THE MATTER OF APPLICATIONS 41526, 41527,)
AND 41528 FILED TO APPROPRIATE THE PUBLIC)
WATERS FROM ABRAHAM, WATER TANK AND)
TWIGHLIGHT SPRINGS, RESPECTIVELY, IN THE)
EAST WALKER AREA, HYDROGRAPHIC BASIN)
(109), MINERAL COUNTY, NEVADA.)

RULING

4767

GENERAL

I.

Application 41526 was filed on June 13, 1980, by the Estrella Cattle Company to appropriate 0.03125 cubic feet per second (cfs) of water from Abraham Spring for the stockwatering of 1,000 head of cattle within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T.11N., R.28E., M.D.B.&M.¹ The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 19.¹

II.

Application 41527 was filed on June 13, 1980, by the Estrella Cattle Company to appropriate 0.03125 cfs of water from Water Tank Spring for the stockwatering of 1,000 head of cattle within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T.10N., R.28E., M.D.B.&M.; the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14, and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 23, all within T.10N., R.27E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, T.11N., R.28E., M.D.B.&M.²

III.

Application 41528 was filed on June 13, 1980 by the Estrella Cattle Company to appropriate 0.03125 cfs of water from Twighlight Spring for the stockwatering of 1,000 head of cattle within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.11N.,R.28E., M.D.B.&M.; the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 27, the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 28, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 32, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, all within T.11N., R.27E., M.D.B.&M.

¹ File No. 41526, official records in the office of the State Engineer.

² File No. 41527, official records in the office of the State Engineer.

The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 28, T.11N., R.28E., M.D.B.&M.³

IV.

On August 24, 1990, ownership of Application 41526, 41527, and 41528 was assigned to ELW Ranches, Inc. in the records of the office of the State Engineer.^{1,2,3}

V.

Applications 41526, 41527, and 41528 were timely protested by the United States of America, Bureau of Land Management, generally on the grounds that the Bureau of Land Management needs the water to guarantee water availability for present and future livestock grazing, that the water is needed for game and non-game wildlife, and that the source is a public water reserve not open to appropriation under Nevada State Law by the authority of Executive Order 107 dated April 17, 1926.

FINDINGS OF FACT

I.

The grounds for the United States Bureau of Land Management's protests have been extensively and fully considered and ruled upon in prior proceedings.⁴

II.

The Bureau of Land Management advised the State Engineer's office in a letter dated July 6, 1999, that the grazing permittee for the grazing allotment which contained the subject points of diversion and places of use is ELW Ranches, Inc., who are authorized by the Bureau of Land Management to graze 1,000 head of sheep upon the federal range from June 15th to March 15th of each year.¹

III.

The authority for a public water reserve (PWR 107) was established by President Coolidge's Executive Order of April 17, 1926, signed pursuant to § 10 of the Stock Raising Homestead Act of 1916 (SRHA), formerly 43 U.S.C. § 300, which provided that public lands

³ File No. 41528, official records in the office of the State Engineer.

⁴ See State Engineer's Ruling No. 3219 on Application 37061, et al., issued on July 26, 1985, official records in the office of the State Engineer.

containing water holes and other bodies of water might be reserved under the Pickett Act, formerly 43 U.S.C. § § 141-143, "for...public purposes to be specified in the orders of withdrawal".⁵ The legislative history of SRHA § 10 strongly indicates that its purpose was to reserve water for public use and to prevent monopoly.⁶ In 1925, the Department of the Interior published Circular No. 1028,⁷ containing regulations which, as later codified,⁸ survived until withdrawn in 1981.⁹ These regulations (which until 1976¹⁰ construed PWR 107) contemplated appropriation, pursuant to state law, of water from sources reserved by PWR 107.¹¹ The State Engineer finds that, subject to (1) valid existing rights as of April 17, 1926, (where those rights have been maintained to the present time) and (2) the minimal quantity of water in PWR 107 for its limited purposes, water in PWR 107 sources may be available for appropriation under state law.

IV.

The springs that are the subject of this ruling are on public land. The land status maps provided by the U.S. Bureau of Land Management, indicate that these springs are on lands that have never been reserved from the public domain. The State Engineer finds that his records indicate the lands are vacant and eligible for homestead or Desert Land Entry and the

⁵ 43 U.S.C. § 141 repealed, 1976.

⁶ "This is a new section and authorizes the Secretary of the Interior to withdraw from entry and hold open for the general use of the public important water holes, springs and other bodies of water that are necessary for large surrounding tracts of country, so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply in that vicinity". H.R. Rep. No. 35, Jan. 11, 1916, 64th Cong., 1st Session.

⁷ 51 L.D. 186 (1925).

⁸ See 43 C.F.R. Subpart 2311 (1979).

⁹ 46 Fed. Reg. 5805 (Jan. 19, 1981).

¹⁰ The Federal Land Policy and Management Act of 1976, 43 U.S.C. § § 1702 et seq. (1980) (FLPMA) repealed authority to create new withdrawals under the Pickett Act and SRHA effective October 21, 1976, but left withdrawals then existing in place. See Solicitor's Opinion, M-36914, 86 I.D. 553, 588 (June 25, 1979) (hereinafter "Krulitz").

¹¹ The Executive Order of April 17, 1926, creating PWR 107, can be read to reserve only land, and not the water sources it contains:

"[I]t is hereby ordered that every smallest legal subdivision of the public land surveys which is vacant and unappropriated unreserved public land within one quarter of a mile of every spring water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec. 10 of [SRHA], and in aid of pending legislation". (Emphasis added.)

However, it has been held that the Order withdrew the water from appropriation under state law. Krulitz, supra, N. 16, 86 I.D. at 580, citing Jack A. Jedd, 60 I.D. 83 at 99 (1947). That view is consistent with the "primary purpose" of the reservation, to the extent of the minimal requirements of that purpose. See United States v. New Mexico, 438 U.S. 696, 699-701 (1978).

lands from which these springs rise have never been withdrawn for the purpose of a public water reserve (PWR 107).

V.

The Colorado Supreme Court further interpreted the Stock Raising Homestead Act and the purpose, limit, and extent of public water reserves.¹² The Court stated that the Act gave the Department of Interior authority to regulate public springs and water holes so that no person could monopolize or control vast areas of western land by homesteading the only available water supply.

In response to the Denver opinion, the Solicitor for the Department of Interior in 1983 adopted the Colorado Court's holding and concluded, among other things, that PWR's are limited to "important springs" and the purposes for which water was reserved are limited to human and animal consumption. The right to use water for any other uses must be obtained pursuant to state law.¹³ The State Engineer finds that for a member of the public to go to these sources to get a drink or fill his canteen, or even for his horse or pack string to get a drink would consume a very small quantity of water. Therefore, any spring larger than a seep would yield more water than required for the PWR and, therefore, would have unappropriated water at the source.

VI.

On June 13, 1984, the State Engineer held a public administrative hearing on similar applications filed for the same use. The protestant filed a protest on similar grounds. Each party was given a full opportunity to provide evidence and testimony to support their respective positions. The State Engineer, in 1985, fully considered the evidence, entered a ruling overruling the protest, and the ruling was not appealed.⁴ The State Engineer in this matter finds that the applications and protest are identical to those already ruled upon and makes the same findings by reference.

¹² United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

¹³ 90 I.D. 81, 83 (1983).

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁴

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:¹⁵

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

III.

The State Engineer concludes that if in fact these sources of water meet the criteria of a Public Water Reserve, they shall be recognized as such and any permits granted would be subject to the prior reserved right. Conversely if the sources do not qualify for reserved status, any permits granted on the source would only be later in priority to any other vested rights that may exist. Only after a general adjudication of all water rights would there be a determination made of the extent of any other vested claims and the validity of any claimed or unclaimed reserved rights.

IV.

The State Engineer concludes that the issues in this matter are identical to those already considered in 1985 and adopts the same conclusions by reference.

V.

The State Engineer concludes that the approval of the subject applications would not interfere with existing rights.

VI.

The State Engineer concludes that stockwatering is a beneficial use and that the applicant is the current range user, therefore, the approval of said applications would not threaten to prove detrimental to the public interest.

¹⁴ NRS Chapter 533.

¹⁵ NRS § 533.370 (3).

RULING

The protests to Applications 41526, 41527, and 41528 are hereby overruled and said applications are hereby approved subject to the following conditions:

1. Payment of the statutory permit fees.
2. To the prior reserved rights of the United States if in fact these rights exist and the sources meet the proper criteria.
3. To all other existing rights.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/MB/jr

Dated this 26th day of
August, 1999.