

IN THE MATTER OF APPLICATION 45493)
FILED BY FRANK W. LEWIS TO)
APPROPRIATE THE WATERS OF HORSE)
CREEK IN DIXIE VALLEY, CHURCHILL)
COUNTY, NEVADA.)

RULING

GENERAL

Application 45493 was filed on April 1, 1982, by Frank W. Lewis to appropriate 1.084 c.f.s. of water from Horse Creek for mining, milling and domestic purposes in the Dixie Valley Basin.¹ The point of diversion is described as the SW1/4 SE1/4 Section 12, T.19N., R.35E., M.D.B.&M., and the place of use is within the NW1/4 SW1/4 Section 17, NE1/4 SE1/4 Section 18, all in T.19N., R.35E., M.D.B.&M.

In the heading of Application 45493, it states: "Application is made to appropriate the waters permitted under Nevada Permit No. 9428, Certificate No. 2566, for 1.084 c.f.s. which water rights have been abandoned".

A hearing was held on April 8, 1982, before the Division of Water Resources in Fallon, Nevada, in the matter of protested Application 42972 filed by Horse Creek Ranch to appropriate 10.0 c.f.s. of water from Horse Creek for irrigation and domestic purposes.²

Frank W. Lewis protested Application 42972 in part on the grounds that:

"The waters of Horse Creek are fully appropriated. Said waters are the subject of existing certificated and permitted rights obtained on application to appropriate waters made to the State Engineer of Nevada."

Two existing certificated water rights from Horse Creek were made part of the record at the hearing.

- 1.) Permit 1510, Certificate 6, for 0.28 c.f.s. used for irrigation, domestic, mining, milling and power purposes in the ownership of Frank W. Lewis.

¹ Application 45493 is a public record on file in the office of the State Engineer.

² Transcript of hearing dated April 8, 1982, in the matter of protested Application 42972 is a public record on file in the office of the State Engineer.

- 2.) Permit 9428, Certificate 2566, for 1.084 c.f.s. used for irrigation of 108.4 acres in the ownership of Horse Creek Ranch.

At the onset of the hearing, Mr. Ross deLipkau, attorney for the applicant Mr. Charles Chisholm, brought attention to a letter dated June 24, 1981, wherein he requested the State Engineer to declare Permit 1510, Certificate 6, abandoned, forfeited or both, "since the waters had not been used at the Wonder Mine for more than 50 years".

The hearing officer ruled that, although the letter was contained in the official records brought into evidence at this hearing, the hearing was properly noticed only to consider the protest of Application 42972 as provided under NRS 533.365.

Testimony was received by Donald E. Lewis, licensed water right surveyor, on behalf of Frank W. Lewis, that through a series of measurements, he found Horse Creek had a high flow of 405 gallons per minute (0.9 c.f.s.) and a low of 84.5 gallons per minute (0.19 c.f.s.).

Ernest E. Muller, water right surveyor for Charlie Chisholm, testified that he measured Horse Creek (from a small dam on the Horse Ranch property) to be "slightly over five c.f.s. on one occasion and between 1 and 1.5 c.f.s. on another".

Charlie Chisholm, applicant, testified that he acquired the Horse Creek Ranch in 1976 and had been familiar with the property since 1972. He identified the property of the present ranch to be 108.4 acres as depicted in Permit 9428 and that he had applied for approximately 100 additional acres in adjacent land as a Desert Land Entry. The proposed place of use of Application 42972 included all of the land referred to above.

In a ruling dated June 6, 1983, the State Engineer overruled the protest to Application 42972 and issued the permit for 10.0 c.f.s. for collection of flood waters on Horse Creek.³ In the findings of fact it was noted that there were no existing surface water rights located downstream on Horse Creek from the proposed point of diversion of Application 42972.

³ Ruling No. 2808 dated June 3, 1983, is a public record filed in the office of the State Engineer.

FINDINGS OF FACT

I.

The abandonment of a water right requires an intent by the owner to relinquish possession.⁴ Mere non-use of the water to which an appropriator is entitled under valid rights without substantial and conclusive evidence of intent to abandon and relinquish possession, is not sufficient.

II.

There is no requirement in statute or case law that mandates, as a condition precedent to denying an application to appropriate, that the State Engineer must first determine that prior rights have been abandoned or forfeited.

⁴ McFarland v. Alaska Perseverance Min. Co., 3 Alaska 308, 337 (1907).
Gila Water Co. v. Green, 29 Arizona 304, 306, 241 Pac. 307 (1925).
Wood v. Etiwanda Water Co., 147 Cal. 228, 234, 81 Pac. 512 (1905).
Beaver Brook Res. and Canal Co. v. St. Vrain Res. and Fish Co., 6 Colo. App. 130, 136, 40 Pac. 1066 (1895).
Hawaiian Commercial and Sugar Co. v. Wailuka Sugar Co., 15 Haw. 675, 691 (1904).
Union Grain and Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 223, 240 Pac. 443 (1925).
Atchison v. Peterson, 1 Mont. 561, 565 (1872), affirmed 87 U.S. 507, (1874).
State v. Nielsen, 163 Nebr. 372, 381, 79 N.W. (2d) 721 (1956).
In re Manse Spring and its Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2d) 311 (1940).
Borman v. Blackmon, 60 Oreg. 304, 308, 118 Pac. 848 (1911).
Edgemont Improvement Co. v. N.S. Tubbs Sheep Co., 22 S. Dak. 142, 145, 115 N.W. 1130 (1908).
Anson v. Arnett, 250 S.W., (2d) 450, 454, (Tex. Civ. App. 1952, error refused n.r.e.).
Desert Live Stock Co. v. Hooppiania, 66 Utah 25, 32, 239 Pac. 479 (1925).
Sander v. Bull, 76 Wash. 1, 6, 135 Pac. 489 (1913).
Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 400, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).
Valcada v. Silver Peak Mines, 86 Fed. 90, 95 (9th Cir. 1898).
Franktown v. Marlette, 77 Nev., 354 Ped 1069 (1961).
Revert v. Ray, 95 Nev. 783, 786 P2d 262 (1979).

III.

The burden of proof is upon whomever seeks a declaration of abandonment, whether it is the State Engineer, a private party, protestant or an applicant, to establish by conclusive and substantial evidence that the act of abandonment has occurred.⁵

IV

At the hearing on April 8, 1982, which occurred after the filing of Application 45493, there was no indication given by the owner of Permit 9428, Charles Chisholm, that said certificated right had been abandoned or that the water was not being put to beneficial use.⁶ At the time of the ruling on Application 47972, it was determined that Permit 9428 was still in good standing.⁷

V.

On the basis of certificated water rights 6 and 2566 and Permit 42972, the total allocation exceeds the highest measured flows of Horse Creek on record in the office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.⁸

II.

The State Engineer is prohibited by law from granting a permit where:

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

⁵ Nevada State Engineer's Ruling No. 2804, Aram and Stella Harootunian, p. 5, footnote 27, public record in the office of the State Engineer.

⁶ Transcript of hearing dated April 8, 1982, in the matter of protested Application 42972 is a public record on file in the office of the State Engineer.

⁷ Ruling No. 2808 dated June 3, 1983, is a public record filed in the office of the State Engineer.

⁸ NRS 533.325.

C. The proposed use threatens to be detrimental to the public welfare.⁹

III.

The evidence and information available indicates that filing of Application 45493 was a frivolous response to the request of counsel for Charles Chism for the State Engineer to declare Permit 1510 abandoned.

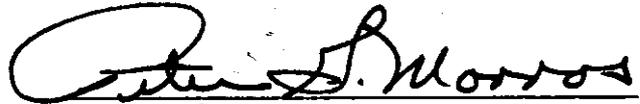
IV.

From the record of the hearing on protested Application 42972 and records of the certificated and permitted water rights, it is determined that Horse Creek is fully appropriated.

RULING

Application 45493 is hereby denied on the grounds that there is no unappropriated water in the source.

Respectfully submitted



Peter G. Morros
State Engineer

PGM/GC/b1

Dated this 13th day of
AUGUST, 1984.