

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

IN THE MATTER OF APPLICATION 53108 FILED)  
TO APPROPRIATE THE SURFACE WATERS OF )  
JOSIE PEARL SPRING WITHIN THE BLACK ROCK )  
DESERT GROUND WATER BASIN (28), HUMBOLDT )  
COUNTY, NEVADA. )

RULING

# 4249

GENERAL

I.

Application 53108 was filed on April 6, 1989 by Lowell E. Potter to appropriate 1.0 cubic feet per second (cfs) of surface water from Josie Pearl Spring. The proposed manner of use is for mining, milling and domestic purposes for use within the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 25, T.42N., R.27E., M.D.B.&M. The proposed point of diversion is described as being within the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 25, T.42N., R.27E., M.D.B.&M.<sup>1</sup>

II.

Application 53108 was timely protested on October 20, 1989, by Pine Forest Land & Stock Co., Inc., President Laurence Montero, for the following reasons and on the following grounds:<sup>1</sup>

Protestant owns property in the area and has grazing rights on lands surrounding this spring. Protestant and predecessors in interest have used this spring since prior to 1905 for watering livestock. Protestant claims vested rights on the source. Protestant claims there are no unappropriated waters in the source and that approval of this application would be detrimental to the public welfare.

III.

Application 53108 was timely protested on October 18, 1989, by James H. Cole for the following reasons and on the following grounds:<sup>1</sup>

Mr. Potter cannot put the water to beneficial use because he has no property rights in the proposed place of use. Protestant has located the ELOC claims 1, 2, 4, 5, 10,

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<sup>1</sup> File No. 53108, official records in the Office of the State Engineer.

and 11 within the SE  $\frac{1}{4}$  of Section 25, T.42N., R.27E., M.D.B.&M. These claims are recorded in the Official Records of Humboldt County at Book 175, Page 10, Frame 2.

IV.

Application 53108 was timely protested on October 19, 1989, by Frances Roberts Nelson and Maxine Roberts Briggs for the following reasons and on the following grounds:<sup>1</sup>

Mr. Potter proposes to put the water to beneficial use on ground in which he has no property right. The proposed place of use, Pearl Camp, lies within the millsites Match Box Number 3, NE Plus Ultra Number 2, and EMCO. These millsites have been located by protestants' successor, are recorded in the official records of Humboldt County, Nevada, at Book 67, Pages 217 through 219, and are currently owned by protestants.

V.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held on November 8, 1993, at Winnemucca, Nevada, before representatives of the State Engineer. Evidence and testimony were received into the record regarding the protests to the application as well as the merits of the application.<sup>2</sup>

FINDINGS OF FACT

I.

Josie Pearl Spring (aka Pearl Spring) is one of several springs located on the east slope of Bartlett Peak in the Pine Forest Range in Humboldt County.<sup>3</sup>

II.

Application 23410 was filed on September 19, 1966, by E.H. Potter to appropriate 0.5 cfs of water from a spring for mining,

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<sup>2</sup> Transcript Public Administrative Hearing before the State Engineer, November 8, 1993.

<sup>3</sup> United States Geologic Survey 15 minute Map, Idaho Canyon Quadrangle.

milling and domestic purposes.<sup>4</sup> The proposed point of diversion under Application 23410 was within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  Section 25, T.42N., R.27E., M.D.B.&M. The proposed place of use under Application 23410 was for use within the SE $\frac{1}{4}$  Section 25, T.42N., R.27E., M.D.B.&M.<sup>5</sup> The State Engineer finds that Application 23410 was denied on April 12, 1971, on the basis that the proposed application would interfere with existing water rights and where requested information is not supplied by the applicant, it would be detrimental to the public welfare to grant the application.<sup>6</sup>

### III.

The State Engineer finds that Application 53108, filed on April 6, 1989, by Lowell E. Potter to appropriate 1.0 cfs of water from Josie Pearl Spring, is in essence the same request as filed under Application 23410.<sup>7</sup> The proposed points of diversion described are the same, as being within the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 25, T.42N., R.27E., M.D.B.&M, and the proposed manner of use under both applications is for mining, milling and domestic purposes for use within the SE $\frac{1}{4}$ , Section 25, T.42N., R.27E., M.D.B.&M.

### IV.

On September 7, 1989, a copy of a letter from the United States Department of Interior, Bureau of Land Management (BLM), addressed to Mr. Lowell Potter was received in the Office of the State Engineer.<sup>1</sup> The letter indicated that the BLM had reviewed the notice of Application 53108 that had been published in the local newspaper. Based on that letter, the State Engineer finds that Application 53108 applied for water rights on a parcel that is

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<sup>4</sup> Administrative notice was taken of Application 23410 and the related ruling. Transcript of Public Administrative Hearing before the State Engineer, November 8, 1993, p. 27.

<sup>5</sup> File No. 23410, official records in the Office of the State Engineer.

<sup>6</sup> State Engineer's Ruling No. 1780, dated April 12, 1971.

<sup>7</sup> Transcript, p. 8.

public land, that Mr. Potter was not the owner of any mining claims at the identified location, and that he had not filed any documents necessary to pursue mining operations on public lands.

V.

Pursuant to the provisions of NRS 533.375, the applicant was notified by certified mail on September 11, 1989, that before further consideration could be given toward issuance of any permit, should the application become ready for action, it would be necessary for the applicant to submit additional justification data and information to the State Engineer's Office regarding annual consumptive use of the water for the mining and milling purposes under the application. The certified mail return receipt was received from the applicant on September 15, 1989.<sup>1</sup> The State Engineer finds that in response to the State Engineer's September 11, 1989, letter requesting information, on October 30, 1989 Mr. Potter filed a letter in the Office of the State Engineer stating that he could not give the State Engineer the information requested and to date the information requested has not been filed in the Office of the State Engineer.

VI.

An examination of the records of the State Engineer's Office reveals several active water filings on the springs within the immediate area of the application, with two water right filings specifically appropriating or claiming appropriation of Josie Pearl Spring.

On February 21, 1957, Certificate 4486 was issued on Permit 8658 to Pearl Spring (now commonly known as Josie Pearl Spring) for 0.0044 cfs, not to exceed 1,440 gallons of water per day from Pearl Spring for domestic use from January 1 to December 31 of each year. The point of diversion is located in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  Section 25, T.42N., R.27E., M.D.B.&M.<sup>8</sup> Application 53108 and Application 23410 identified Josie Pearl Spring as located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  Section

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<sup>8</sup> File No. 8658, official records in the Office of the State Engineer.

25, T.42N., R.27E., M.D.B.&M. However, Permit 8658 located the spring within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 25, T.42N., R.27E., M.D.B.&M. Application 8658 noted that the point of diversion was "probably" in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  Section 25, T.42N., R.27E., M.D.B.&M., but that the area was unsurveyed.<sup>7</sup> Based on testimony provided by Mr. Potter at the Administrative Hearing, November 8, 1993, that he was trying to apply for Josie Pearl's water since she had died, the State Engineer finds that Permit 8658 and Application 53108 both relate to the same source of water.

The other claim on the waters of the spring is a Proof of Appropriation #04815 filed by Lowell E. Potter on April 6, 1989, claiming to have appropriated the waters of Josie Pearl Springs 1 and 2 for mining, milling and domestic use, claiming a pre-statutory water right dating back to 1900. The State Engineer finds that with the exception of the subject application and the above mentioned certificate and proof, there are no additional active water rights claimed as appropriated water from Josie Pearl Spring on file within the State Engineer's Office.<sup>9</sup>

VII.

The State Engineer finds that Mr. Potter believes that as Josie Pearl is dead he is applying for the water she had a right to appropriate pursuant to water right Certificate 4486.<sup>10</sup> However, no evidence was provided at the hearing nor do the records of the Office of the State Engineer indicate any deed or assignment of Certificate 4486 from Josie Pearl to Mr. Potter,<sup>11</sup> or that Certificate 4486 has been forfeited or abandoned.

VIII.

Protestant Frances Nelson provided testimony to support her contention that the place of use described under Application 53108,

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<sup>9</sup> Proof 04815, official records in the Office of the State Engineer.

<sup>10</sup> Transcript, p. 14.

<sup>11</sup> Transcript, p. 17.

the NW $\frac{1}{4}$  SE $\frac{1}{4}$  Section 25 T.42N., R.27E., M.D.B.&M., is located upon land which is currently held by Mrs. Nelson and her associates as unpatented mineral millsites.<sup>12</sup> Protestant James H. Cole is now deceased, and his estate was represented by Julian Smith at the administrative hearing.<sup>13</sup> While Mr. Smith as legal counsel did a lot of testifying himself, he was not a sworn witness and did not present any evidence as to Mr. Cole's claim.<sup>14</sup> File No. 53108 includes correspondence from the BLM which indicates that Pine Forest Land and Livestock Company is the permitted user of the range allotment in the area of Josie Pearl Spring.<sup>1</sup> The State Engineer finds the Pine Forest Land and Livestock Company is the permitted range user of the grazing allotment in the area of Josie Pearl Spring.

IX.

The State Engineer finds that Mr. Potter did not provide any evidence to rebut the protests filed by James Cole, and Frances Nelson and Maxine Briggs, that Mr. Potter could not put the water to beneficial use because he has no property rights in the proposed place of use, nor any evidence to rebut the BLM's letter that Application 53108 applied for water rights on a parcel that is public land and Mr. Potter was not the owner of any mining claims at the identified location, nor had he filed any documents necessary to pursue mining operations on public lands.

X.

Testimony was provided by the protestant Laurence "Frenchie" Montero concerning Pine Forest Land and Livestock Company's claim to a vested right in and to all of the waters of Josie Pearl Spring and those springs within the immediate area. Mr. Montero claimed that such vested right came into being by the use by Pine Forest

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<sup>12</sup> Transcript, pps. 38-40.

<sup>13</sup> Transcript, p. 4.

<sup>14</sup> Transcript, pps. 27-32.

Land and Livestock of all the waters from said spring for the purpose of watering livestock and that such use has existed since prior to 1872.<sup>15</sup>

XI.

Additionally, Laurence Montero, contended that the waters of Josie Pearl Spring flow in such a manner and direction that they can be considered tributary to Leonard Creek, and as such are within the jurisdiction of the Leonard Creek Decree of which Pine Forest Land and Livestock is the sole owner of title.<sup>16</sup> On November 22, 1993, personnel from the Office of the State Engineer conducted a field investigation at Josie Pearl Spring in an effort to clarify several points brought forth during the course of the November 8, 1993, administrative hearing. Various diversions ranging from remnants of wooden pipes to small diameter plastic pipes were observed at the main collection pond below Josie Pearl Spring. A field inspection made at various points along the drainage from Josie Pearl Spring towards Leonard Creek failed to disclose any surface flow beyond the mouth of Pearl Canyon.<sup>17</sup> The State Engineer finds that Josie Pearl Spring is not mentioned in the Leonard Creek Decree,<sup>18</sup> and the waters of Josie Pearl Spring are not tributary to Leonard Creek.

XII.

The State Engineer finds that the quantity of water from Josie Pearl Spring is somewhere between 1.5 - 5.0 gallons per minute, for a total of approximately 2,160 - 7,200 gallons per day of water

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<sup>15</sup> Transcript, pps. 43, 50-51.

<sup>16</sup> Transcript, pps. 41.

<sup>17</sup> Report of Field Investigation, public records in the office of the State Engineer filed under Permits 23410 and 53108.

<sup>18</sup> Transcript, p. 48.

being produced from the spring.<sup>19</sup> Under Certificate 4486, Josie Pearl or her heirs, are entitled to divert up to 1,440 gallons of water per day year round. Pine Forest Land and Livestock Company claims a pre-statutory right to water livestock. As livestock use approximately 20 gallons per day per head of cattle, the spring can only support somewhere between 36 - 288 head of cattle exclusive of Josie Pearl's certificated diversion for domestic use.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action.<sup>20</sup>

II.

Beneficial use is the basis, the measure and the limit of the right to use the water of the State of Nevada.<sup>21</sup> Mr. Potter did not provide any evidence of a right to use the lands at the identified place of use for milling or mining purposes, and did not rebut the BLM's claim that Mr. Potter has no right to use the public lands at the proposed location. The State Engineer concludes that the issue of control of federal lands by means of unpatented mineral millsites is a non-water related issue; therefore, is not subject to a determination by the State Engineer. The State Engineer further concludes that no evidence provided shows that Mr. Potter has any right to the use of the area identified as the place of use under Application 53108. As such, no evidence supports that Mr. Potter is able to put the water to beneficial use as applied for under Application 53108.

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<sup>19</sup> Report of Field Investigation No. 409, August 18, 1970, Report of Field Investigation No. 934, December 21, 1993, official records in the Office of the State Engineer.

<sup>20</sup> NRS Chapter 533.

<sup>21</sup> NRS 533.035.

III.

The State Engineer concludes, based upon the information gathered during the field investigations, that Josie Pearl Spring is not tributary to Leonard Creek by virtue of only the flow generated from said spring; that in order for the water of Josie Pearl Spring to reach the Leonard Creek channel they would have to be commingled with a significant snow melt or heavy rainfall event, subsequently Josie Pearl Spring is not governed by the Leonard Creek Decree.

IV.

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

- 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.<sup>22</sup>

V.

The State Engineer concludes, based on Laurence "Frenchie" Montero's evidence, that his family has resided in the area for three generations and used the springs to water livestock since approximately 1872, that while the claim is one to an unquantified pre-statutory vested water right, it is supported by substantial evidence. The State Engineer concludes that as the spring can only support somewhere between 36 - 288 head of cattle and Josie Pearl's allowed diversion, there is no unappropriated water available to support Application 53108.

VI.

The State Engineer also concludes that as there is no unappropriated water available in Josie Pearl Spring, to issue a permit on Application 53108 would cause a conflict with existing rights.

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<sup>22</sup> NRS 533.370.

VII.

The State Engineer concludes that as of this date Josie Pearl's Certificate 4486 has not been declared forfeited or abandoned.

VIII.

Before either approving or rejecting an application, the State Engineer may require such additional information from the current owner of record as will enable him to properly guard the public interest.<sup>23</sup>

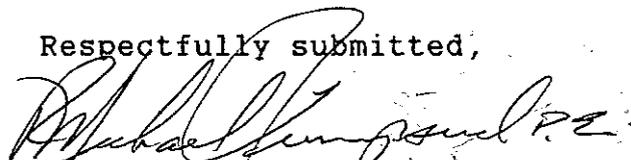
IX.

The applicant has failed to submit the information requested to the State Engineer's Office. The State Engineer concludes that without the additional data, sufficient information is not available to properly guard the public interest.

RULING

The protests to Application 53108 are upheld and Application 53108 is hereby denied on the grounds that there is no water available for appropriation, that the proposed application would interfere with existing water rights, and that where requested information is not supplied by the applicant, it would be detrimental to the public interest to grant the proposed application.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/ab

Dated this 30th day of  
November, 1995.

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<sup>23</sup> NRS 533.375.