

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

IN THE MATTER OF APPLICATIONS 39416 )  
AND 39427 FILED TO APPROPRIATE WATER )  
FROM SURFACE SOURCES IN THE SALMON )  
FALLS CREEK DRAINAGE BASIN (3-40), )  
ELKO COUNTY, NEVADA. )

RULING

# 4705

GENERAL

I.

Application 39416 was filed on October 29, 1979, by Salmon River Cattlemen's Association, Inc., to appropriate 0.1 cubic feet per second (cfs) of water from Outhouse Spring for stockwatering of 300 head of cattle within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  and the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 32, T.44N., R.64E., M.D.B.&M. The point of diversion is described as being within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 32.<sup>1</sup>

II.

Application 39427 was filed on October 29, 1979, by Salmon River Cattlemen's Association, Inc., to appropriate 0.1 cfs of water from Coyote Hole Spring for stockwatering of 500 head of cattle within the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T.43N., R.64E., M.D.B.&M. The point of diversion is described as being within the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 36.<sup>2</sup>

III.

The subject applications were timely protested on August 13, 1980, by the United States Bureau of Land Management generally on the grounds that the water is required for multiple use management of the public land and the source is a public water reserve which

---

<sup>1</sup> File No. 39416, official records in the office of the State Engineer.

<sup>2</sup> File No. 39427, official records in the office of the State Engineer.

was reserved for public use under the authority of Executive Order 107 on April 17, 1926, and as identified in 43 CFR 2311. The water is, therefore, not available for appropriation under Nevada State Law.

**FINDINGS OF FACT**

I.

The grounds for the United States Bureau of Land Management's protests has been extensively and fully considered and ruled upon in prior proceedings.<sup>3</sup>

II.

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 (SHRA), formerly 43 U.S.C. § 300, which provided that public lands 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."<sup>4</sup> The legislative history of SRHA § 10 strongly indicates that its purpose was to reserve water for public use and to prevent monopoly.<sup>5</sup> In 1925, the Department of the

---

<sup>3</sup> See State Engineer's Ruling No. 3219 on Application 37062, et al., issued on July 26, 1985, official records in the office of the State Engineer.

<sup>4</sup> 43 U.S.C. § 141 repealed, 1976.

<sup>5</sup> "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 the

Interior published Circular No. 1028,<sup>6</sup> containing regulations which, as later codified,<sup>7</sup> survived until withdrawn in 1981.<sup>8</sup> These regulations (which until 1976<sup>9</sup> construed PWR 107) contemplated appropriation, pursuant to state law, of water from sources reserved by PWR 107.<sup>10</sup> 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 reserved by PWR 107 for its limited

---

vicinity." H.R. Rep. No. 35, Jan. 11, 1916, 64th Cong., 1st Session.

<sup>6</sup> 51 L.D. 186 (1925).

<sup>7</sup> See 43 C.F.R. Subpart 2311 (1979).

<sup>8</sup> 46 F.R. 5805 (Jan. 19, 1981).

<sup>9</sup> 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 SHRA effective October 21, 1976, but left withdrawals then existing in place. See Krulitz, supra, N. 25, 86 I.D. at 588.

<sup>10</sup> 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 and contains a spring or water hole, and all 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 [SHRA], 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. 25, 86 I.D. at 580, citing Jack A. Medd, 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).

purposes, water in PWR 107 sources may be available for appropriation under state law.

III.

The springs that are the subject of this ruling are on public land. Assuming that the State Engineer has accurate and up to date land status maps provided by the U.S. Bureau of Land Management, these springs arise 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 land from which these springs rise has never been withdrawn for the purpose of a public water reserve (PWR 107).

IV.

The Colorado Supreme Court further interpreted the Stock Raising Homestead Act and the purpose, limit, and extent of public water reserves.<sup>11</sup> They state 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. The State Engineer finds that many of the applications protested by the BLM based on PWR's are alongside and tributary to perennial streams, therefore, it would be impossible for a homesteader to monopolize or control vast areas of land.

---

<sup>11</sup> City and County of Denver v. United States, 656 P.2d 1 (Colo. 1982).

V.

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.<sup>12</sup> 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.

These sources of water fall within the Salmon Falls Creek (a.k.a. Little Salmon River) Basin. The surface water rights of the Salmon Falls Creek and its tributaries have been adjudicated, however, only the irrigation rights have been quantified.<sup>13</sup> The State Engineer finds that the stockwatering rights on these sources may have vested prior to 1905 and have much earlier priority dates than April 10, 1979, when the subject applications were filed.

VII.

On June 13, 1984, the State Engineer held a hearing on a similar application filed by the same applicant and for the same

---

<sup>12</sup> 90 Interior, Dec. 81, 83 (1983).

<sup>13</sup> See Salmon Falls Creek Adjudication, Salmon River Settlement Agreement, May 20, 1952.

use. The protestant filed a protest on the same 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. 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.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.<sup>14</sup>

##### II.

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

- 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

---

<sup>14</sup> NRS Chapter 533.

<sup>15</sup> NRS Chapter 533.370(3).

the prior reserved right. Conversely if the sources do not qualify for reserved status, any permits granted on the sources would only be later in priority to any other vested rights that may exist. In either case there is unappropriated water at the source. Only after a general adjudication of all 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 applications would not interfere with existing rights.

VI.

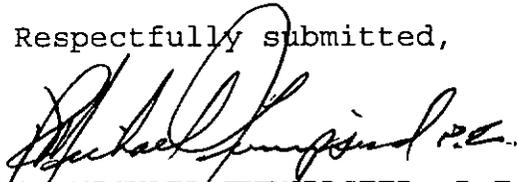
The State Engineer concludes that stockwatering is a beneficial use and that the applicant is the current range user, therefore, the approval of said applications would not threaten to prove detrimental to the public interest.

**RULING**

The protests to Applications 39416 and 39427 are hereby overruled and said applications are hereby approved subject to the following conditions:

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

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/cl

Dated this 1st day of  
March, 1999.