

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

IN THE MATTER OF APPLICATION 46565)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF HORSE TRAP SPRINGS)
WITHIN THE PINE VALLEY)
HYDROGRAPHIC BASIN (53), EUREKA)
COUNTY, NEVADA.)

RULING

#5904

GENERAL

I.

Application 46565 was filed on January 24, 1983, by Frank Paxton and Family, and later assigned to Kenneth R. Buckingham, to appropriate 0.10 cubic foot per second of water from Horse Trap Springs for stock-watering and domestic purposes within the SW¼ NE¼ of Section 12, T.23N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the SW¼ NE¼ of said Section 12.¹

II.

Application 46565 was timely protested by the U.S.D.I., Bureau of Land Management (BLM) on the following grounds:¹

This spring is a public water reserve as defined by Executive Order No. 107, April 17, 1926.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of Nevada. The State Engineer finds that in the case of protested Application 46565, there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

¹ File No. 46565, official records in the Office of the State Engineer.

II.

Before any diversion of water may be made from a well, the appropriator must make application to and obtain from the state engineer, a permit to appropriate the water.² An examination of the records of the Office of the State Engineer, show that there is no additional water right permits, proofs or claims filed at the proposed point of diversion.³

The State Engineer finds that there are no existing water rights at the proposed point of diversion, beyond the Protestant's unsubstantiated claim of a Public Water Reserve No. 107 (PWR 107).

III.

In 2003, the Nevada Legislature amended NRS § 533.503 to provide, in part, that:

The State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock unless:

- (a) The applicant for the permit is legally entitled to place the livestock on the lands for which the permit is sought, and:
 - (1) Owns, leases or otherwise possesses a legal or proprietary interest in the livestock on or to be placed on the lands for which the permit is sought; or
 - (2) Has received from a person described in subparagraph (1), authorization to have physical custody of the livestock on or to be placed on the lands for which the permit is sought, and authorization to care for, control and maintain such livestock;
- (b) The forage serving the beneficial use of the water to be appropriated is not encumbered by an adjudicated grazing preference recognized pursuant to law for the benefit of a person other than the applicant for the permit; and
- (c) The lack of encumbrance required by paragraph (b) is demonstrated by reasonable means, including, without limitation, evidence of a valid grazing permit, other than a temporary grazing permit, that is issued by the appropriate governmental entity to the applicant for the permit.⁴

By letter dated June 25, 2008, the Applicant was asked to provide additional information in order to assure compliance with NRS § 533.503. The Applicant responded in a timely manner and provided a copy of a grazing permit issued by the BLM for the Grass Valley and J D Ranch

² NRS § 534.050 (3).

³ Nevada Division of Water Resources' Water Rights Database, Special Hydrographic Abstract, August 26, 2008.

⁴ NRS § 533.503.

grazing allotments. The grazing permit indicates that the Applicant is the authorized ranged user on the J D Allotment for 903 cattle.¹

The State Engineer finds that the Applicant is entitled by the proper federal agency to place livestock upon the public range described under Application 46565.

IV.

The Protestant was asked to provide additional information supporting its claim of a PWR 107, including the flow of the spring and how the spring meets the criteria for a PWR 107 claim as set forth in State Engineer's Ruling No. 5729. In response, the BLM indicated that it would provide a spring flow measurement, but it would not supply any detailed discussion of the criteria set forth for PWR 107 sources in the context of State Engineer's Ruling No. 5729.¹

The State Engineer finds that the Protestant has failed to provide substantial evidence in support of its protest.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁶

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

III.

The State Engineer concludes that stock watering is a beneficial use and the Applicant is the current range user of the federal grazing allotment; therefore, the approval of Application 46565 would not threaten to prove detrimental to the public interest.

⁵ NRS chapter 533.

⁶ NRS § 533.370 (5).

IV.

The State Engineer concludes the Protestant did not prove its claim of a PWR 107 right on this source. The extent and validity of the reserved claim may only be determined after a general adjudication of all water rights, if and when such proof of claims are filed and adjudicated. If the PWR 107 claim is determined to be valid, it shall be recognized and any permit granted would be subject to the prior reserved right. The State Engineer concludes the Protestant failed to show that the proposed use of water would interfere with its un-quantified and unproven PWR 107 claim.

V.

The State Engineer concludes the purpose for which water was reserved under PWR 107 is general public use limited to human and stock-water consumption by grazing permittees and if a source has a legitimate PWR 107 claim on it, it is only the minimal quantity of water necessary to accomplish the purpose of the reservation.⁷

VI.

The State Engineer concludes that the granting of Application 46565 will not conflict with any minimal quantity of water required that may be reserved by PWR 107, if such reserved right exists at the source.

VII.

The purpose of the Executive Order creating PWR 107 was to prevent competing range users from monopolizing the public range through the control of isolated and important springs. With the advent of grazing allotments controlled by the BLM, such competition has been eliminated. Under the current system, only authorized range users possessing a grazing permit issued by the BLM are authorized on designated allotments. The State Engineer concludes that to issue a stock-water right to an authorized range user, is consistent with the primary purpose of use of water under a PWR 107 claim.⁷

⁷ State Engineer's Ruling No. 5729, official records in the Office of the State Engineer.

RULING

The protest to Application 46565 is hereby overruled and the application is approved subject to existing rights and payment of the statutory permit fee.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 13th day of

November, 2008.