

IN THE MATTER OF APPLICATIONS )  
TO APPROPRIATE THE PUBLIC WATER )  
BY AGENCIES OF THE FEDERAL )  
GOVERNMENT. )

R U L I N G

GENERAL

In the past three years the Federal agencies, particularly the Bureau of Land Management and United States Forest Service, have filed several hundred applications 1/ to appropriate the public waters for various uses, including stockwatering, wildlife, recreation and domestic use. The filing of the applications precipitated substantial controversy which resulted in the State Engineer holding public hearings to receive public comment and testimony at the following times and places:

July 26, 1982, at 7:00 P.M., Conference Room, Extension Office, Humboldt County Fair Grounds, Winnemucca, Nevada.

July 27, 1982, at 7:00 P.M., District Court Room, Elko County Court House, Elko, Nevada.

August 26, 1982, at 7:00 P.M., District Court Room, White Pine County Court House, Ely, Nevada.

October 4, 1982, at 7:00 P.M., District Court Room, Nye County Court House, Tonopah, Nevada.

October 5, 1982, at 7:00 P.M., District Court Room, Lincoln County Court House, Pioche, Nevada.

October 20, 1982, at 7:00 P.M., Washoe County Commission Auditorium, Reno, Nevada.

The transcripts of these hearings are available in the Office of the State Engineer as a matter of public record.

The hearings produced a record of considerable objection to the approval of these applications to appropriate by the Federal agencies based generally on the following grounds: 2/

1. The Federal agencies cannot legally qualify as applicants under Nevada Statute.
2. The granting of these applications would be legally in conflict with certain provisions of NRS Chapter 321, commonly known as the "Sagebrush Rebellion" legislation.
3. The granting of water rights to the Federal agencies would weaken the legal hold the ranchers and farmers have on the public range as relates to grazing rights. Therefore, the approval of the applications would not be in the public interest.

4. The approval of the applications would threaten the availability of water for such other uses as mining and irrigation, etc., and would further weaken the state's control over wildlife, recreation and urban development, and therefore would not be in the public interest.

5. The approval of the applications threatens the state's sovereignty under the U.S. Constitution.

6. The Federal agencies cannot legally demonstrate the ability to place the water to beneficial use through privately owned stock and wildlife controlled and under the jurisdiction of the State of Nevada.

7. The approval of the applications would provide the Federal agencies with control over water sources that would allow the water to be removed from the area of the sources, thereby adversely effecting the access of stock and wildlife to water.

One other comment must be made regarding the record of the public hearings. Public comment and testimony <sup>3/</sup> centered on Federal agency policy and various solicitors' opinions that have led to a general feeling of mistrust and conceived mismanagement of federally controlled public lands. This ruling will not address any matter not directly related to the pending applications to appropriate the public waters.

#### FINDINGS OF FACT

##### I

Do Federal agencies qualify under Nevada Statutes as applicants to appropriate the public waters.

NRS 533.010 specifically qualifies the "United States" as an applicant under the definition of "person". It follows that the United States is legally represented by various Federal agencies.

##### II

Would the granting of applications to appropriate the public waters to Federal agencies be legally in conflict with NRS 321.596 thru 321.599 (Sagebrush Rebellion Legislation).

The state's control and authority over the public waters is set out under NRS Chapters 533 and 534, which include the statutory procedure for appropriations and adjudications. The provisions of NRS. 321.596 thru 321.599 do not represent any mandate on repeal of that control and authority nor does it preclude or disqualify Federal agencies any legal standing as applicants as set forth under the Water Law. These provisions represent a statutory claim to ownership of certain public lands ... A claim which will be subject ultimately to judicial and/or congressional declaration. Should the State of Nevada be successful in asserting its ownership of the public lands, then it would follow that water rights and improvements appurtenant thereto would pass into state ownership as appurtenances to the land.

### III

Will the granting of water rights to the Federal agencies weaken the legal hold the ranchers and farmers have on the public range as relates to grazing rights.

Grazing privileges available to farmers and ranchers are primarily determined by discretionary decisions of the land managers, hopefully based on the forage available on the land and on the general condition of the range. Forage and range conditions are determined by precipitation, soil, climate and other factors largely independent of the existence or non-existence of watering sources. The quantity of forage is not likely to be determined by the owner of record on a stockwater permit. The development of new watering sources represented by many of the applications is perceived as opening up greater areas for grazing and more efficient use of existing areas, which in turn should reduce grazing pressure in the vicinity of existing watering sources, thus increasing the quantity and quality of grazing privileges as a whole. The State Engineer makes this finding with some caution as relates to the existing holders of grazing privileges. The public hearings drew comment concerning the possibility of competitive bidding for grazing privileges which would adversely affect the existing range user, especially in the case of the range user holding ownership to base property in his grazing area. The indispensability of grazing privileges to a viable ranching operation in the same area cannot be ignored where it is closely associated with state sanctioned water rights. The Nevada Legislature addressed this concern with the passage of NRS 533.485 thru 533.510. NRS 533.495 specifically provides that subsisting rights (grazing rights) will not be impaired. Conditions attached to the issuance of permits under the pending applications would preclude the utilization of water rights to the detriment and impairment of the range user where that detriment and impairment can be established.

IV

Will the granting of water rights to the Federal agencies threaten the availability of water for other uses.

The foundation of the Nevada Water Law is the doctrine of prior appropriation. The amounts of water represented in the Federal applications are minimal and must be supported by a demonstrated need and means to accomplish beneficial use. The issuance of any permit will be subject to existing rights and any consideration of denial will be made on factual determination.

It is conceivable that a junior appropriator could have his application denied or his right curtailed to protect a senior right held by a Federal agency. That, of course, is the essence of prior appropriation and protection of existing rights. To disqualify the Federal applications on the basis of speculating on future demands and availability of water for irrigation, mining, wildlife and other uses would not only violate the doctrine but place the same burden on the private appropriator.

V

Will the granting of water rights to the Federal agencies threaten the state's sovereignty.

While NRS 533.325 makes it clear that the United States may appropriate water pursuant to NRS Chapter 533, it is argued that as a practical matter in doing so Nevada cedes some of its sovereignty. The legal arguments both pro and con on the issue of state sovereignty are so voluminous as to be beyond the scope of this ruling. The U.S. Supreme Court 4/ in recent decisions has indicated deference to state water law except in cases of reserved or implied reserved rights. To preclude the Federal agencies from the opportunity of acquiring state issued water rights in support of congressionally mandated responsibilities on the basis of impugning state sovereignty would only serve an unimpeachable and compelling reason 5/ for judicial or congressional creation of non-reserved rights. The U.S. Supreme Court has ruled 6/ that state-imposed conditions can be placed on water rights issued to Federal agencies, which is a more desirable alternative to the possible event and success of Federal agencies obtaining rights for the same uses independent of state law and of the conditions the state can lawfully attach to permits. Additionally, recognition of and compliance with state water law by Federal agencies can only serve to strengthen the State of Nevada's sovereignty. It is ironic that for years the State of Nevada has claimed that its sovereignty was being impuned by lack of recognition and compliance with state law by the Federal agencies.

VI

Can the Federal agencies demonstrate the ability to place the public waters to beneficial use through privately owned stock and wildlife controlled and under the jurisdiction of the State of Nevada.

The State Engineer has strongly advocated the joint filing for stockwatering rights by the Federal agencies and range users as a viable alternative to protect the interests of both parties. Comparison relating to ownership of stock can be drawn in that if a limitation on the issuing of permits is dependent on ownership, then the State Engineer would have to consider denial of permits to public utilities, general improvement districts, municipalities, state agencies, irrigation districts and other legal entities who do not own the land where beneficial use occurs or who cause the water to be placed to beneficial use by other persons or by animals they do not own.

The feared weakening of state control over wildlife is best responded to by pointing out the provisions of NRS 533.367 which ensures wildlife access to water from springs and seeps it customarily uses. Wildlife are simply unimpressed by the identity of whoever might hold rights to the sources they use. State control over wildlife is achieved primarily by regulating hunting and fishing. Many of the Federal applications will tend to enhance wildlife propagation by creating new watering sources and give the state more wildlife to control. The State Department of Wildlife has filed no protests nor voiced opposition to the federal filings for wildlife use.

## VII

Will the approval of applications to Federal agencies allow water to be removed from the area of the sources, thereby adversely effecting the access of stock and wildlife to water.

The statutory procedure for acquiring appropriative water rights in the State of Nevada is set out under Chapter 533 NRS. Each application is required to have a described point of diversion (described by 40-acre subdivision and course and distance tie) and place of beneficial use. The diversion and place of use of the water is therefore limited to that described under the application. In considering an application for approval, the State Engineer may determine the effects of access for stock and wildlife and will consider the merits of any protest that may be filed against the granting of the application based on adverse effects on access. NRS 533.367 further provides:

"Before a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, he must ensure that wildlife which customarily uses the water will have access to it."

In addition, NRS 533.345 provides:

"Every application for a permit to change the point of diversion, manner of use or place of use of water already appropriated shall contain such information as may be necessary to a full understanding of the proposed change, as may be required by the State Engineer."

The State Engineer finds that under statutory criteria he cannot speculate on whether private appropriators can or will provide for the types of uses applied for by the Federal agencies. In reaching a conclusion and decision in any controversy, more than one public interest may be identified. The State Engineer must then weigh one interest against the other in reaching a determination.

In many cases, there are presently no existing sources or existing rights from which wildlife and stock may take water. Conditions may dictate that the water be diverted to adjacent areas in order to provide these watering sources. In considering these applications for approval, an evaluation and determination will be made individually as to any adverse effects on existing rights and if the granting of the application is in the public interest.

#### CONCLUSIONS

##### I

Federal agencies qualify under Nevada Statute as applicants to appropriate the public waters.

##### II

The granting of applications to appropriate the public waters to Federal agencies would not conflict with the provisions of NRS Chapter 321.

##### III

The granting of applications to appropriate the public waters will not conflict with the subsisting existing rights of range users nor conflict with the policy set forth in NRS 533.495 with adequate terms and conditions imposed on approval.

##### IV

The granting of applications to appropriate the public waters by Federal agencies would be subject to existing rights on the source.

V

There is no evidence that the granting of applications to appropriate the public waters by Federal agencies would threaten or otherwise adversely effect the state's sovereignty. On the contrary, it is concluded that recognition and compliance with state water law will strengthen state sovereignty.

VI

Each application filed by the Federal agencies will be considered on its own merits as to the ability of the appropriator to place the water to beneficial use.

RULING

Federal agencies are legal applicants under the Nevada Water Law and each application to appropriate pending before the State Engineer will be considered for approval or denial based on its own merits consistent with protection of existing rights, statutory compliance, the public interest and consideration of any protests filed in compliance with the Statute.

Respectfully submitted,



PETER G. MORROS  
State Engineer

PGM/br

Dated this 26th day of  
JULY, 1983.

## FOOTNOTES

1. Public record in the office of the State Engineer.
2. Transcript of hearings before the State Engineer.
3. Transcript of hearings before the State Engineer.
4. Cappaert vs. United States et al., 426 U.S. 128 (1976);  
United States vs. New Mexico, 438 U.S. 697 (1978);  
California vs. United States, 438 U.S. 645 (1978).
5. Solicitor William H. Coldiron's Opinion, September 11, 1981. In the conclusions reached in the Opinion it was held that:

"Within this framework, there is an insufficient legal basis for the creation of what has been called federal "non-reserved" water rights, especially in the wake of the Supreme Court pronouncements in United States v. California and New Mexico v. United States. I must conclude therefore that there is no federal "non-reserved" water right. Federal entities, including, without limitation, the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, may not, without congressionally created reserved rights, circumvent state substantive or procedural laws in appropriating water. Rather, consistent with the express language in the New Mexico decision, federal entities must acquire water as would any other private claimant within the various states.

Nothing in this Opinion limits federal procurement of water by other legally authorized means, if state water law prohibits the appropriation of water for the federally specified purpose. Specifically, condemnation, purchase or exchange may be used as a basis for acquiring water for use on federal lands."

Opinion of Assistant U.S. Attorney General Theodore B. Olson, Federal "Non-Reserved" Water Rights. Under conclusions it was held that:

"Although we have not undertaken an independent analysis of the various federal land management statutes, we believe that, as a practical matter, because statutes authorizing management of the public domain probably do not provide a basis for assertion of federal water rights, the federal rights that can be asserted are limited to federal reserved rights and rights implied from specific congressional directives, if the concept of "reserved" rights is understood to apply as well to acquired federal lands that are part of a federal reservation. This does not mean that the federal government is helpless to acquire the water it needs to carry out its management functions on federal lands. If that water cannot be acquired under state law or by purchase or condemnation of existing rights, the remedy lies within the power of Congress. The Supremacy Clause provides Congress ample power, when coupled with the commerce power, the Property Clause, or other grants of federal power, to supersede state law. The exercise of such power must be explicit or clearly implied, however, and federal rights to water will not be found simply by virtue of the ownership, occupation, or use of federal land, without more."

FOOTNOTES (CONTINUED)

6. California vs. United States, 438 U.S. 645 (1978).