

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS)
37061, 37793, 37855, 38027, 38982,))
39415, 44005 AND 44023 FILED TO)
APPROPRIATE THE PUBLIC WATERS BY)
ROBERT R. WRIGHT CO.; BOIES)
RANCHES; McCORMICK BROS.; BLAIR AND)
JOSEPHINE B. JOHNS; FLYING "S" LAND)
AND CATTLE CO.; SALMON FALLS)
CATTLEMAN'S ASSN., INC.; LOYD)
SORENSEN; AND RONALD M. FLORANCE)
FOR SURFACE WATER SOURCES LOCATED)
IN ELKO COUNTY, NEVADA.)

RULING

GENERAL

I.

Application 37061¹ was filed on March 19, 1979, by Robert R. Wright Co. to appropriate 0.5 c.f.s. of water from Spring No. 19 for stockwatering purposes (500-1000 head of cattle) within the SE1/4 NE1/4 Section 36, T.39N., R.63E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 36, T.39N., R.63E., M.D.B.&M. Application 37061 was protested² on February 19, 1980, by the United States Department of Interior on the following grounds:

"That the water is not available for appropriation under state law because it is already federally reserved as a public water. Land containing this water was withdrawn by E.O. April 17, 1926 as Public Water Reserve No. 107 (43 CFR 2311)."

¹ Public record in the office of the State Engineer. See also State Engineer Exhibit 2 and 2A, public administrative hearing, June 13, 1984.

² Id.

II.

Application 37793³ was filed on April 10, 1979, by Boies Ranches to appropriate 0.5 c.f.s. of water from Spring No. 2 for stockwatering purposes (1000 head of cattle) within the SE1/4 SE1/4 Section 22, T.43N., R.62E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 22, T.43N., R.62E., M.D.B.&M. Application 37793 was protested⁴ on March 25, 1980, by the United States Department of Interior on the same grounds as set forth under the protest to Application 37061.

III.

Application 37855⁵ was filed on April 10, 1979, by McCormick Bros. to appropriate 0.5 c.f.s. of water from Spring No. 1 for stockwatering purposes (1000 head of cattle) within the NE1/4 SW1/4 Section 8, T.42N., R.58E., M.D.B.&M. The point of diversion is described as being within the NE1/4 SW1/4 Section 8, T.42N., R.58E., M.D.B.&M. Application 37855 was protested⁶ on March 28, 1980, by the United States Department of Interior on the same grounds as set forth under the protest to Application 37061.

³ Public record in the office of the State Engineer. See also State Engineer Exhibit 3 and 3A, public administrative hearing, June 13, 1984.

⁴ Id.

⁵ Public record in the office of the State Engineer. See also State Engineer Exhibit 4 and 4A, public administrative hearing, June 13, 1984.

⁶ Id.

IV.

Application 38027⁷ was filed on April 26, 1979, by Blair and Josephine B. Johns to appropriate 0.05 c.f.s. of water from Spruce Pond for stockwatering purposes (1000 head of cattle) within the SE1/4 NW1/4 Section 6, T.33N., R.64E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NW1/4 Section 6, T.33N., R.64E., M.D.B.&M. Application 38027 was protested⁸ on November 23, 1979, by the United States Department of Interior on the same grounds as set forth under the protest to Application 37061.

V.

Application 38982⁹ was filed on September 7, 1979, by Flying "S" Land and Cattle Company to appropriate 0.05 c.f.s. of water from North Squaw Creek Spring for stockwatering and domestic purposes (1000 head of cattle and 100 head of horses) within the SE1/4 SE1/4 Section 4 and NE1/4 NE1/4 Section 9, T.37N., R.66E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 4, T.37N., R.66E., M.D.B.&M. Application 38982 was protested¹⁰ on June 2, 1980, by the United States Department of Interior on the same grounds as set forth under the

⁷ Public record in the office of the State Engineer. See also State Engineer Exhibit 5 and 5A, public administrative hearing, June 13, 1984.

⁸ Id.

⁹ Public record in the office of the State Engineer. See also State Engineer Exhibit 6 and 6A, public administrative hearing, June 13, 1984.

¹⁰ Id.

protest to Application 37061.

VI.

Application 39415¹¹ was filed on October 29, 1979, by Salmon River Cattleman's Association, Inc., to appropriate 0.10 c.f.s. of water from Devils Creek Springs for stockwatering purposes (800 head of cattle) within the SW1/4 SW1/4 Section 23, T.45N., R.66E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SW1/4 Section 23, T.45N., R.66E., M.D.B.&M. Application 39415 was protested¹² on August 13, 1980, by the United States Department of Interior on the same grounds as set forth under the protest to Application 37061.

VII.

Application 44005¹³ was filed on June 29, 1981, by Loyd Sorensen to appropriate 0.05 c.f.s. of water from Side Hill Spring for stockwatering and domestic purposes (600 head of cattle and 5000 head of sheep) within the SW1/4 NE1/4 and SW1/4 NW1/4 Section 18, T.31N., R.64E., M.D.B.&M. The point of diversion is described as being within the SW1/4 NW1/4 Section 18, T.31N., R.64E., M.D.B.&M. Application 44055 was protested¹⁴ on February 12, 1982, by the United States Department of Interior

¹¹ Public record in the office of the State Engineer. See also State Engineer Exhibit 7 and 7A, public administrative hearing, June 13, 1984.

¹² Id.

¹³ Public record in the office of the State Engineer. See also State Engineer Exhibit 8 and 8A, public administrative hearing, June 13, 1984.

¹⁴ Id.

on the following grounds:

"This water is required for multiple use management of the public lands and the source is a Public Water Reserve reserved under the authority of E.O. 107, April 17, 1926 and identified as CFR 2311. This water is therefore not available for appropriation under Nevada State Law."

VIII.

Application 44023¹⁵ was filed on June 29, 1981, by Ronald M. Florance to appropriate 0.10 c.f.s. of water from Buffalo Springs for stockwatering purposes (300 head of cattle) within the NE1/4 NE1/4 Section 11, T.43N., R.60E., M.D.B.&M. The point of diversion is described as being within the NE1/4 NE1/4 Section 11, T.43N., R.60E., M.D.B.&M. Application 44023 was protested¹⁶ on February 5, 1982, by the United States Department of Interior on the same grounds as set forth under the protest to Application 37061.

IX.

A public administrative hearing¹⁷ before the State Engineer in the matter of the subject applications to appropriate was held on June 13, 1984, in Elko, Nevada.

Evidentiary presentations by the applicants, protestants and

¹⁵ Public record in the office of the State Engineer. See also State Engineer Exhibit 9 and 9A, public administrative hearing, June 13, 1984.

¹⁶ Id.

¹⁷ Transcript of public administrative hearing is public record in the office of the State Engineer.

the Attorney General for the intervenor¹⁸ State of Nevada, were introduced into the record in support of and in opposition to the pending applications. Additionally, intervention¹⁹ was sought by and allowed to the State of Nevada, Sierra Club Legal Fund and the National Wildlife Federation. Extensive post-hearing written briefs were submitted to the State Engineer by the parties who had standing in the proceedings. The State Engineer took administrative notice of various matters, as more specifically set forth below.²⁰

X.

The protestant, United States Department of Interior - Bureau of Land Management, withdrew their protest to Applications 37061, 37793, 37855 and 39415 on June 13, 1984.²¹

XI.

In these proceedings, the State Engineer is represented by special counsel because his usual counsel, the Attorney General, found his office in a position - actual or potential - of conflicting interests. The "conflict" apparently stems from the Attorney General's interpretation of Nevada's "Sagebrush Rebellion" statute²² and his assertion that the granting of water

¹⁸ NRS 228.190; Transcript p.8, public administrative hearing, June 13, 1984.

¹⁹ See Sierra Exhibits 1 and 2. Transcript pp. 8 - 11, public administrative hearing, June 13, 1984.

²⁰ Transcript p. 13, public administrative hearing, June 13, 1984.

²¹ Transcript p. 21, public administrative hearing, June 13, 1984.

²² NRS 321.596 to 321.599, inclusive, (1981).

rights to the United States of America (or its agencies) under Nevada Water Law would contravene the "policy" of the Sagebrush Rebellion Act. In articulating this position,²³ the Attorney General has generally contended that the act and other applicable Nevada laws set forth "public policy" by which the State Engineer is bound, without regard to inconsistent federal law.

While the State Engineer is bound by and has great respect for the laws of Nevada and owes due deference to its Attorney General, he is not at liberty to disregard federal law while applying Nevada law in these proceedings, or to prefer Nevada law over applicable federal law.²⁴

²³ The Attorney General formally appears in these proceedings in support of the granting of the subject applications and as counsel of record for the State of Nevada. The Attorney General appeared at previous proceedings before the State Engineer as counsel of record for the Department of Agriculture of the State of Nevada. The Department has protested certain water rights applications filed by federal agencies which were the subject of those proceedings. The State Engineer, at the motion and request of the Attorney General, took administrative notice of the record developed at those proceedings and granted leave to intervene in the name of the State of Nevada pursuant to NRS 228.190 (1981). See transcript pp. 8-13, public administrative hearing, June 13, 1984.

²⁴ Nev. Const. Art. 15, §2 (1982); U.S. Const. Art. VI, Cl. 2 (1976). See United States v. City and County of Denver, 656 P.2d 1, 17 (Colo. 1982) (In view of the supremacy clause and property clause of the U.S. Constitution and binding constructions by the U.S. Supreme Court, the State does not have "an unfettered right ...to determine all federal claims to the use of water [in that state by the law of that state]".) The State Engineer, like other public officers, has taken a solemn oath to "support, protect and defend the Constitution and Government of the United States, and the Constitution and government of the State of Nevada...." NRS 282.020 (1979). The Federal Constitution and the Acts of Congress are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2 (1979).

(Continued)

FINDINGS OF FACT

I.

The claims set forth in the protests of the Bureau of Land Management, U. S. Department of the Interior (BLM), for the water rights in springs and water holes on the public domain are, in part, claims for federal reserved water rights under Public Water Reserve No. 107 (PWR 107) and as such are, along with reserved rights for mineral springs and stock driveways, the principle reserved water rights claimed for BLM-managed public lands.²⁵

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 (SRHA), 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".²⁶ The legislative history of SRHA § 10 strongly indicates that its purpose was to reserve water for

24 (Continued)

The Courts have not hesitated to remind the State Engineer of his constitutional responsibilities. "We are assured that the United States will receive notice of each change application, and may participate, under Nev. Rev. Stat. §§ 533.110 - 533.130 in proceedings before the State Engineer who is, under our Constitution bound to follow federal law." United States v. Alpine Land & Reservoir Co., 503 F.2d (D. Nev. 1980), Modified, 697 F.2d 851, 858 (9th Cir. 1983), Cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 78 L. ed. 2nd 170, 104 S. Ct. 193 (1983).

25 Solicitor's Opinion, M-36914, 86I.D. 553, 578 (June 25, 1979) (hereinafter "Krulitz").

26 43 U.S.C. § 141 repealed 1976.

public use and to prevent monopoly.²⁷ In 1925, the Department of the Interior published Circular No. 1028,²⁸ containing regulations which, as later codified,²⁹ survived until withdrawn in 1981.³⁰ These regulations (which until 1976³¹ construed PWR 107) contemplated appropriation, pursuant to state law, of water from sources reserved by PWR 107.³² The State Engineer

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

28 51 L.D. 186 (1925).

29 See 43 C.F.R. Subpart 2311 (1979).

30 46 F.R. 5805 (Jan. 19, 1981).

31 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.

32 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 U.S. 696, 699-701 (1978).

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

II.

A PWR 107 water right is a federal reserved water right.³³

Whether or not water has been reserved in a particular case, and if so, the quantity reserved, are federal questions requiring application of federal law.³⁴

The federal reserved right created by PWR 107 has a priority date of April 17, 1926, the date of the Executive Order, if the spring or water hole was then in existence. Public springs and water holes which came into existence through natural causes after that date and before October 21, 1976, were withdrawn or reserved as of the date of their coming into existence.³⁵ The reservation was a general, continuing withdrawal; it is not necessary that the source have been identified or designated by an official finding to accomplish the withdrawal.³⁶

The primary purpose of the reservation was to prevent

³³ Congress, exercising its powers under the Property Clause, delegated withdrawal authority to the President, who thereby created PWR 107.

³⁴ United States v. District Court, Eagle County, 401 U.S. 520 (1971); Cappaert v. United States, 426 U.S. 128, 145 (1976); Krulitz, supra, N.25, 86 I.D. at 585.

³⁵ Krulitz, supra, N.25, 86 I.D. at 586.

³⁶ Id.

monopolization of the public lands by persons, who but for the reservation, might appropriate under state law the only water supply available in the vicinity for domestic and stockwatering purposes. Thus, the purpose was to exempt (effective April 17, 1926) some quantity of water at the reserved sources from appropriation under state law.³⁷

III.

Small sources, such as springs or water holes capable of serving only a single family and its livestock, were excluded from PWR 107.³⁸

Principals of priority apply to PWR 107 withdrawals in that the reservation cannot divest or displace a water right vested³⁹ under Nevada law prior to the April 17, 1926, withdrawal date.⁴⁰ To the extent that appropriations which vested under Nevada law after the 1926 withdrawal date conflict with a PWR 107 reserved right, such appropriations are subject to the reserved right.⁴¹ Appropriations made after the 1926 withdrawal date from locations outside reserved land, but from flows to or from a reserved source are effective, but are subject to the 1926

³⁷ United States v. Denver, 656 P.2d 1, 33 (Colo. 1982).

³⁸ Krulitz, supra, N.25 at 580.

³⁹ "Vested" is used here in the customary property law sense, meaning perfected, rather than in the word-of-art sense often employed in water law where it refers to water rights acquired by prior appropriation and diversion to beneficial use before the advent of statutes governing appropriations.

⁴⁰ Krulitz, supra, N.25, 86 I.D. at 586.

⁴¹ Id.

priority of the reservation.⁴²

IV.

The PWR 107 withdrawal is operative as to both tributary and nontributary sources.⁴³

PWR 107 is not operative upon artificially developed sources where the developer held a valid, vested or appropriative water right under Nevada law at the time of the development. Nor is it operative upon pre-1926 artificially developed sources after their abandonment,⁴⁴ although it does attach to water in natural sources upon abandonment of pre-1926 priorities obtained under state law.⁴⁵

V.

The purposes for which water was reserved under PWR 107 are limited to domestic and stockwatering uses. The quantity reserved from a particular source is the minimum quantity required to prevent monopolization of the land and water source.⁴⁶ The entire quantity of water in or the entire flow from the source was not reserved unless necessary to accomplish that primary purpose.⁴⁷

42 Id.

43 United States v. Denver, 656 P.2d 1, 33 (Colo. 1982); Krulitz, supra, N.25, 86 I.D. at 585; contra, Hyrup v. Kleppe, 406 F. Supp. 214 (D. Colo. 1976).

44 Krulitz, supra, N.25, 86 I.D. at 585.

45 Id. at 588.

46 United States v. Denver, 656 P.2d 1, 32-33 (Colo. 1982); Solicitor's Opinion, M-36914 (Supp. II) 90 I.D. 81 at 83 (Feb. 16, 1983) (hereinafter "Coldiron").

47 Coldiron, supra, N.46 at 83.

Water in PWR 107 sources is available for private appropriation under Nevada law to the extent of any excess over the minimum quantity required to satisfy the primary purpose of the reservation, and to the extent the private applicant can gain lawful access to the source. Private individuals, whether members of the public for whose benefit PWR 107 was created or appropriators of excess water from the source under state law, may not restrict access of other members of the public or other appropriators to the source⁴⁸ nor may they restrict access to wildlife that customarily use the source.⁴⁹

VI.

A federal reserved water right is entitled to priority as of the date of the reservation, as determined from the reserving documents, narrowly construed.⁵⁰ Thus the priority date of PWR 107 rights for those sources which were subject to the Executive Order--i.e., of the character described and in existence at that time--is April 17, 1926. The United States need prove nothing more to entitle it to recognition by the State Engineer of its 1926 priority date. That a particular source was not known, identified, listed, or made the subject of an official finding that it was reserved until after the reservation date, is

⁴⁸ United States v. Denver, 656 P.2d 1, 32, N.50 (Colo. 1982); Hitchcock v. Lovelace, 47 Cal. App. 2d 818, 119 P.2d 151 (1941).

⁴⁹ NRS 533.367.

⁵⁰ United States v. Denver, 656 P.2d 1, 31 (Colo. 1982).

immaterial to the date of its priority.⁵¹

Under Nevada law, the priority of "vested rights"⁵² dates from the time water is first diverted with intent to place it to beneficial use, provided the water is applied to beneficial use within a reasonable time.⁵³ Under the 1905 and later appropriation statutes, the priority of a "permitted" or "certificated" right relates back to the date of filing the application.⁵⁴ The doctrine of relation applies to works constructed with diligence,⁵⁵ or under extensions of time granted

51 "The withdrawal took effect as to all subdivisions of 'vacant, unappropriated, unreserved public lands containing waters described in the order', as of April 26, 1926, the subsequent interpretative memorandum being no more than an official finding that a certain tract is of the character and has the status defined in the order and is subject thereto."

John v. Hyrup, 15 IBLA 412, 417 GFS (Misc) 44 (1974). In some circumstances the priority may have a date later than April 17, 1926, but not later than October 21, 1976, (the effective date of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702 et seq.). For example, if a water hole or spring came into existence by natural means after April 26, 1926, and before October 21, 1976, PWR 107's withdrawal would attach, with a priority date identical to the date of creation of the source. Krulitz, supra, N.25, 86 I.D. at 587-588.

52 "Vested rights" here refers to water rights acquired by prior appropriation and diversion to beneficial use at a time before enactment of the appropriation statutes. See Waters of Horse Springs v. State Engineer, 99 Nev. 776, 778, 671 P.2d 1131 (1983).

53 In re Manse Spring, 66 Nev. 280, 286, 108 P.2d 311 (1940).

54 "[If the water right is pursued with diligence], the right relates to the time when the first step was taken to secure it." Bailey v. State Engineer, 95 Nev. 378, 384, 594 P.2d 734, (1979), quoting with approval from Ophir Mining Co. v. Carpenter, 4 Nev. 534, 543-44 (1869). The "first step" under NRS 533.325 - 533.435 is the filing of the application to appropriate. See NRS 533.355 (1981).

55 Bailey v. State, 95 Nev. 378, 384, 594 P.2d 734 (1979).

by the State Engineer in his discretion.⁵⁶ The Legislature has declared livestock watering on the public domain to be a beneficial use,⁵⁷ and the Attorney General has opined that the facts necessary to establish a vested right for watering range livestock on springs and water holes on the public domain are the same as those for appropriation and diversion of water of a stream system.⁵⁸

VII.

Throughout these proceedings the Attorney General has contended the United States may not assert a reserved right for stockwatering purposes because it is not in a position--owning no livestock in its own right--to put stockwater to beneficial use. This issue may be disposed of without drawing labored analogies to carrier ditch companies, municipalities, water districts and other distributors/appropriators of water under state law. The manner of use in this context, like the inception, priority, and nature of the reserved right, is exempt from the requirements of state law.⁵⁹ We are dealing not with a true appropriative right, but with a priority-indexed exercise of federal power. Consequently, historical use or intent to use need not attend the right, just as non-use does not extinguish it. The implied

⁵⁶ A.G.O. 212 (Aug. 1, 1918).

⁵⁷ NRS 533.485 - 533.510 (1983).

⁵⁸ A.G.O. 270 (June 28, 1927). See "Water Law Newsletter", Vol. XVII, No. 1, 1984, at 6 (Water of Horse Springs v. State Engineer, 99 Nev. 776, 671 P.2d 1131 (1983)).

⁵⁹ United States v. Denver, 656 P.2d 1, 34 (Colo. 1982).

Congressional intent (backed by the power conferred by the property and supremacy clauses of the federal Constitution) to reserve the waters and exempt them from appropriation⁶⁰ operates independent of substantive state law.⁶¹ Once quantified, the reserved right is outside the state appropriative system.⁶²

VIII.

In these proceedings the United States asserts, and the Attorney General denies, that PWR 107 reserved water for consumption by wildlife. Other than the Krulitz opinion,⁶³ nothing construing the documents which created PWR 107 suggests an intent to reserve water to sustain fish or wildlife.⁶⁴ The Supreme Court of Colorado,⁶⁵ after emphasizing the "primary purpose" test of United States v. New Mexico,⁶⁶ considered that

⁶⁰ Winters v. United States, 207 U.S. 564, 577 (1908).

⁶¹ Krulitz, supra, N.25, 86 I.D. 571.

⁶² United States v. Denver, 656 P.2d 1, 34-35 (Colo. 1982).

⁶³ Krulitz, supra, N.25 at 851.

⁶⁴ BLM's counsel attached to its Post-Hearing Reply Brief herein a copy of a Memorandum ("Request for Clarification of Solicitor's Opinion of Feb. 16, 1983--'Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107'" (Aug. 23, 1984)), issued subsequent to the hearings in these proceedings over the signature of the Associate Solicitor for Energy and Resources, purporting to expand Coldiron's interpretation of PWR 107 to reserve water for consumption by wildlife "if on a case-by-case basis [BLM] determines that it is essential to maintain reserved water rights for wildlife consumption". The State Engineer does not find this recent document applicable here. Water for wildlife is available under NRS 533.367 (1983). For this reason and for the reasons stated in the text, the State Engineer adheres to the construction there stated.

⁶⁵ United States v. Denver, 656 P.2d 1, 34-35 (Colo. 1982).

⁶⁶ 438 U.S. 696 (1978).

the reserving documents could fairly be read only to reserve water for "animal and human consumption".⁶⁷

Bearing in mind the anti-monopoly purpose of the reservation, it is appropriate, in reading the phrase just quoted, to limit animals to domestic livestock. Nowhere in the reserving documents does there appear Congressional or Presidential concern for reserving water for wildlife under PWR 107. Accordingly, the State Engineer finds that the prescribed narrow reading of those documents would exclude that purpose from the reservation.

This is not to say that water may not be reserved for wildlife in these proceedings under Nevada law. Indeed, from those sources in which a surplus of water exists after satisfaction of the federal reserved right and any other vested appropriative rights, the State Engineer is empowered to condition further use of the water from such sources on the user's ensuring that "wildlife which customarily uses the water will have access to it".⁶⁸

IX.

Application 38027 for the waters of Spruce Pond seeks to establish an appropriative right on a source of water upon which the protestant claims a PWR 107 right and the applicant claims a

⁶⁷ United States v. Denver, 656 P.2d 1, 31 (Colo. 1982).

⁶⁸ NRS 533.367 (1981).

vested right⁶⁹ where use was initiated prior to 1905. Evidence⁷⁰ also indicates that the source of natural flow has been enhanced and maintained by man's efforts over the years. Additionally, the protestant seeks to establish a PWR 107 right for the same domestic livestock for which the applicant claims a need.⁷¹ Evidence⁷² establishes that the flow of the spring is minimal and has historically been maintained by the applicant for stockwatering needs. Approval of Application 38027, considering the applicant's claim of a vested right for the same use, would not waive the validity of that claim or would not serve the purpose of determining the validity of the PWR 107 right. The applicant should, in view of his claim, file a proof of appropriation to establish his claim of senior priority to the continued use of water from this source. If the vested right claim of the applicant is valid, the PWR 107 right becomes inoperative based on a prior and existing right and the minimal flow of water available at the source. If the vested right claim of the applicant is invalid, the PWR 107 right would be operative if the source did contain or yield the minimal quantity of water reserved for the purpose of PWR 107. Testimony of a BLM

⁶⁹ See Affidavit of Dr. Blair G. Johns filed July 9, 1984, under Application 38027, public record in the office of the State Engineer.

⁷⁰ Protestant's Exhibits 2A through 2E, inclusive. Testimony of Donn E. Seibert, transcript pp. 58-83, public administrative hearing, June 13, 1984.

⁷¹ Id. testimony of Donn E. Siebert.

⁷² Id. The flow of the spring is "estimated" at 1/4 to 1/2 gallon per minute or a maximum of 720 gallons per day.

witness⁷³ alludes to guidelines of 210 gallons per day as the minimum threshold; the same witness testified that these guidelines had been abolished by BLM, but not replaced. This fact results in a "vacuum" of federal guidance as to the minimum quantity of water reasonably necessary to serve the daily requirements of a "single family and its livestock".⁷⁴ Nevada law has set a daily limit on "domestic use" and diversion from domestic wells.⁷⁵ The State Engineer relies on this long-standing definition for quantification of domestic use in the absence of federal directive and finds that the PWR 107 right is not operative on the source described under Application 38027.

X.

The source under Application 44005 (Side Hill Spring, aka Side Hill Spring No. 1) is subject to an existing right under Permit 23859, Certificate 8065,⁷⁶ for mining and domestic purposes with a priority of May 17, 1967. The record⁷⁷ provides evidence on the amount of water available at the source, the

⁷³ Testimony of Ed Evatz pp. 51-56, public administrative hearing, June 13, 1984.

⁷⁴ See Krulitz, supra, N.25 at 580.

⁷⁵ NRS 534.010(c) (1983) defines "domestic use" in a fashion similar to "a single family and its livestock". NRS 534.180(1) limits diversion to 1800 gallons per day.

⁷⁶ Public record in the office of the State Engineer. See also State Engineer's Exhibit No. 10, public administrative hearing, June 13, 1984.

⁷⁷ Protestant's Exhibits 5A through 5G, inclusive; testimony of Donn E. Siebert pp. 103-117, "estimated" the flow at the source at 7-1/2 gallons per minute; testimony of Raymond Lister pp. 117-127, transcript of public administrative hearing, June 13, 1984.

existence of stockwatering facilities and the possibility of abandonment and forfeiture of the rights under Permit 23859, Certificate 8065. The State Engineer finds that action on Application 44005 must be withheld pending further determination on the abandonment and forfeiture of the right under Permit 23859, Certificate 8065.

XI.

The source under Application 44023 (Buffalo Springs, aka Unnamed Spring No. 5) is subject to Permit 8281, Certificate 2140⁷⁸ for stockwatering purposes with a priority of August 10, 1927. The record⁷⁹ also establishes that the source is subject to discharging variable amounts of water. The State Engineer finds that there is unappropriated water available at the source subject to the PWR 107 right and Permit 8281, Certificate 2134.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.⁸⁰

⁷⁸ Public record in the office of the State Engineer. See also State Engineer's Exhibit No. 11, public administrative hearing, June 13, 1984.

⁷⁹ Protestant's Exhibits 6A through 6K inclusive; testimony of Donn E. Siebert pp. 135-146 "estimated" the flow of the spring at 2 gallons per minute in 1980 and 45 gallons per minute in 1984, transcript of public administrative hearing, June 13, 1984.

⁸⁰ NRS Chapters 533 and 534.

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁸¹

- 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.

III.

The PWR 107 water right is a federal reserved water right with a priority of April 17, 1926.

IV.

The purposes for which water was reserved under PWR 107 are limited to domestic and stockwatering uses in a quantity necessary to accomplish the purposes of the reservation.

V.

The PWR 107 water right does not reserve water for wildlife.

VI.

The PWR 107 water right is subject to any valid existing rights as of April 17, 1926.

VII.

The PWR 107 right is not operative on sources that provide only the minimum quantity of water reasonably necessary to serve the daily requirements of a "single family and its livestock";

⁸¹ NRS 533.370.

therefore, the PWR 107 right is not operative on the source under Application 38027.

VIII.

Subject to the minimal quantity of water reserved by PWR 107 for its limited purposes and any other existing rights, the granting of Applications 38982 and 44023 will not interfere with or impair existing rights.

IX.

The sources under Applications 37061, 37793, 37855, 38027 and 39415 are not subject to the PWR 107 water right; therefore, subject to any other existing rights, the granting of these applications will not interfere with or impair existing rights.

X.

The granting of Applications 37061, 37793, 37855, 38027, 39415, 38982 and 44023 will not be detrimental to the public interest.

XI.

There is unappropriated water available at the sources set forth under Applications 37061, 37793, 37855, 38027, 39415, 38982 and 44023.

XII.

Action on Application 44005 must be withheld pending a determination on the abandonment and forfeiture of existing rights on the source.

RULING

Applications 37061, 37793, 37855 and 39415 are herewith granted and permits will be issued subject to existing rights

upon receipt of the statutory permit fees.

The protests to the granting of Applications 38982 and 44023 are herewith overruled to the extent that, upon receipt of the statutory permit fees, permits will be granted, subject to existing rights, including PWR 107 rights.

The protest to the granting of Application 38027 is herewith overruled on the grounds that the PWR 107 right is not operative on the source. A permit will be issued subject to existing rights upon receipt of the statutory permit fees.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/bl

Dated this 26th day of
July, 1985.