

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS)
42920, 42922, 42923, 43156, 43157,))
43392, 43393, 43394, 43395, 43740,))
43741, 43742, 44398 AND 46934 FILED))
BY THE U.S. FOREST SERVICE TO))
APPROPRIATE THE PUBLIC WATERS OF))
SURFACE WATER SOURCES IN HUMBOLDT,))
WHITE PINE AND ELKO COUNTIES,))
NEVADA.)

RULING

GENERAL

I.

Application 42920¹ was filed on December 5, 1980, by the United States of America - Forest Service to appropriate 0.01 cubic feet per second (hereinafter "c.f.s.") of water from Pine Creek Spring for recreational purposes within a portion of the SE1/4 NW1/4 Section 33, T.46N., R.58E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NW1/4 Section 33, T.46N., R.58E., M.D.B.&M. Under remarks of the application, the applicant states that "Water is to provide drinking water at Pine Creek Campground. Estimated annual consumptive use is 94,500 gallons".

II.

Application 42922² was filed on December 5, 1980, by the United States of America - Forest Service to appropriate 0.10

¹ Public record in the office of the State Engineer under Application 42920. See also State Engineer's Exhibits 2 and 2A, public administrative hearing, July 24, 1984, Elko, Nevada.

² Public record in the office of the State Engineer under Application 42922. See also State Engineer's Exhibits 3 and 3A, public administrative hearing, July 24, 1984, Elko, Nevada.

c.f.s. of water from North Wildhorse Spring #2 for recreational purposes within the SW1/4 NE1/4, NW1/4 SE1/4 Section 9, T.44N., R.54E., M.D.B.&M. The point of diversion is described as being within the NW1/4 NW1/4 Section 3, T.44N., R.54E., M.D.B.&M. In a letter³ dated September 10, 1981, the applicant states that the estimated annual consumptive use under this application is 374,000 gallons. The water is to be used as a potable water supply for a public campground.

III.

Application 42923⁴ was filed on December 5, 1980, by the United States of America - Forest Service to appropriate 0.010 c.f.s. of water from North Wildhorse Spring #1 for recreational purposes within the SW1/4 NE1/4, NW1/4 SE1/4 Section 9, T.44N., R.54E., M.D.B.&M. The point of diversion is described as being within the NW1/4 SW1/4 Section 3, T.44N., R.54E., M.D.B.&M. In a letter⁵ dated September 10, 1981, the applicant states that the estimated annual consumptive use under this application is 374,000 gallons. The water is to be used as a potable water supply for a public campground.

³ See public record under Application 42922, office of the State Engineer.

⁴ Public record in the office of the State Engineer under Application 42923. See also State Engineer's Exhibits 4 and 4A, public administrative hearing, July 24, 1984, Elko, Nevada.

⁵ See public record under Application 42923, office of the State Engineer.

IV.

Application 43392⁶ was filed on March 26, 1981, by the United States of America - Forest Service to appropriate 0.04 c.f.s. of water from Upper Cherry Spring for livestock and wildlife purposes within portions of the SE1/4 NW1/4 Section 12, NW1/4 SE1/4 Section 14, and SE1/4 NE1/4 Section 15, T.25N., R.56E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NW1/4 Section 12, T.25N., R.56E., M.D.B.&M. Under remarks of the application, the applicant states that water will be provided for "1250 sheep, 290 cattle, 40 horses and 360 deer".

V.

Application 43393⁷ was filed on March 26, 1981, by the United States of America - Forest Service to appropriate 0.015 c.f.s. of water from Cherry Spring for stockwater and wildlife purposes within the SW1/4 SW1/4 Section 12, T.25N., R.56E., M.D.B.&M. The point of diversion is described as being within the SW1/4 SW1/4 Section 12, T.25N., R.56E., M.D.B.&M. The application proposes to provide water for 1250 sheep, 290 cattle, 40 horses and 360 deer.

⁶ Public record in the office of the State Engineer under Application 43392. See also State Engineer's Exhibits 5 and 5A, public administrative hearing, July 24, 1984, Elko, Nevada.

⁷ Public record in the office of the State Engineer under Application 43393. See also State Engineer's Exhibits 6 and 6A, public administrative hearing, July 24, 1984, Elko, Nevada.

VI.

Application 43394⁸ was filed on March 26, 1981, by the United States of America - Forest Service to appropriate 0.12 c.f.s. of water from Waterspout Spring for livestock and wildlife purposes within portions of the SW1/4 NW1/4 Section 6, T.25N., R.57E., M.D.B.&M.; NW1/4 NW1/4 Section 1; NE1/4 NE1/4 Section 12; NW1/4 NW1/4 Section 11; SE1/4 SW1/4, SE1/4 NE1/4 Section 9; SE1/4 NE1/4 Section 3; and NW1/4 SE1/4 Section 4, T.25N., R.56E., M.D.B.&M. The point of diversion is described as being within the SW1/4 NW1/4 Section 6, T.25N., R.57E., M.D.B.&M. The application proposes to provide water for 1250 sheep, 290 cattle, 40 horses and 360 deer.

VII.

Application 43395⁹ was filed on March 26, 1981, by the United States of America - Forest Service to appropriate 0.03 c.f.s. of water from Pete Holm Spring for stockwater and wildlife purposes within the SE1/4 SW1/4 Section 5, T.25N., R.56E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SW1/4 Section 5, T.25N., R.56E., M.D.B.&M. The application proposes to provide water for 290 cattle, 3200 sheep, 75 horses and 360 deer.

⁸ Public record in the office of the State Engineer under Application 43394. See also State Engineer's Exhibits 7 and 7A, public administrative hearing, July 24, 1984, Elko, Nevada.

⁹ Public record in the office of the State Engineer under Application 43395. See also State Engineer's Exhibits 8 and 8A, public administrative hearing, July 24, 1984, Elko, Nevada.

VIII.

Application 43740¹⁰ was filed on May 15, 1981, by the United States of America - Forest Service to appropriate 0.10 c.f.s. of water from Roads End Spring for recreation (domestic) purposes within portions of the SW1/4 SW1/4 Section 31, T.32N., R.59E., M.D.B.&M. The point of diversion is described as being within the SE1/4 SE1/4 Section 36, T.32N., R.58E., M.D.B.&M. Under remarks of the application, the applicant states that the intent of the application is to provide "...drinking water at the Road's End Recreation Area and Trailhead". The annual consumptive use is estimated at 108,000 gallons.

IX.

Application 43741¹¹ was filed on May 15, 1981, by the United States of America - Forest Service to appropriate 0.30 c.f.s. of water from Thomas Spring for recreation purposes within portions of the SW1/4, SW1/4 SE1/4 Section 14; and portions of the NE1/4 NW1/4, NW1/4 NE1/4 Section 23, T.32N., R.58E., M.D.B.&M. The point of diversion is described as being within the NW1/4 NE1/4 Section 23, T.32N., R.58E., M.D.B.&M. Under remarks of the application, the applicant states that "Water is to provide drinking water to Thomas Canyon Campground and the summer home area. There are 11 summer homes. Estimated annual consumptive

¹⁰ Public record in the office of the State Engineer under Application 43740. See also State Engineer's Exhibits 9 and 9A, public administrative hearing, July 24, 1984, Elko, Nevada.

¹¹ Public record in the office of the State Engineer under Application 43741. See also State Engineer's Exhibits 10 and 10A, public administrative hearing, July 24, 1984, Elko, Nevada.

use for the campground is 528,000 gallons plus 405,000 gallons for the summer homes for a total of 933,000 gallons".

X.

Application 43742¹² was filed on May 15, 1981, by the United States of America - Forest Service to appropriate 0.025 c.f.s. of water from Terraces Spring for recreation (domestic) purposes within portions of the NW1/4 NW1/4 Section 30 and SW1/4 SW1/4 Section 19, T.32N., R.59E., M.D.B.&M. The point of diversion is described as being within the SW1/4 NW1/4 Section 30, T.32N., R.59E., M.D.B.&M. Under remarks of the application, the applicant states that "Water is to provide drinking water to the Terraces Picnic Area". Estimated annual consumptive use is 75,600 gallons.

XI.

Application 43156¹³ was filed on January 29, 1981 by the United States of America - Forest Service to appropriate 0.010 c.f.s. of water from Lye Creek Spring for recreation purposes within the NW1/4 NW1/4 Section 23, SW1/4 SW1/4 Section 14, T.44N., R.39E., M.D.B.&M. The point of diversion is described as being within the NW1/4 NW1/4 Section 23, T.44N., R.39E., M.D.B.&M. Under remarks of the application, the applicant states that "The development is to provide potable water to Lye Creek Campground which has six family and one group unit".

12 Public record in the office of the State Engineer under Application 43742. See also State Engineer's Exhibits 11 and 11A, public administrative hearing, July 24, 1984, Elko, Nevada.

13 Public record in the office of the State Engineer under Application 43156. See also State Engineer's Exhibits 5 and 5A, public administrative hearing, July 26, 1984, Winnemucca, Nevada.

XII.

Application 43157¹⁴ was filed on January 29, 1981, by the United States of America - Forest Service to appropriate 0.015 c.f.s. of water from Longmont Spring for stockwatering purposes within the NW1/4 NW1/4 Section 22, T.44N., R.39E., M.D.B.&M. The point of diversion is described as being within the NW1/4 NW1/4 Section 22, T.44N., R.39E., M.D.B.&M. The applicant proposes to provide water for 1330 head of cattle.

XIII.

Application 44398¹⁵ was filed on September 4, 1981, by the United States of America - Forest Service to appropriate 0.02 c.f.s. of water from Angel Lake Spring for recreation purposes within portions of the SE1/4 SE1/4 Section 4, SW1/4 SW1/4 Section 3, T.36N., R.61E., M.D.B.&M. The point of diversion is described as being within the NE1/4 NE1/4 Section 9, T.36N., R.61E., M.D.B.&M. Under remarks of the application, the application states that "The water is to provide drinking water at Angel Lake Campground. It is collected from a fissure in the rock face by an open bulkhead/collection box. Estimated annual consumptive use is 553,500 gallons".

14 Public record in the office of the State Engineer under Application 43157. See also State Engineer's Exhibits 6 and 6A, public administrative hearing, July 26, 1984, Winnemucca, Nevada.

15 Public record in the office of the State Engineer under Application 44398. See also State Engineer's Exhibits 12 and 12A, public administrative hearing, July 24, 1984, Elko, Nevada.

XIV

Application 46934¹⁶ was filed on May 20, 1983, by the United States of America - Forest Service to appropriate 0.02 c.f.s. of water from Angel Creek Spring for recreation and domestic purposes within portions of the E1/2 SE1/4 Section 2, T.36N., R.61E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 10, T.36N., R.61E., M.D.B.&M. Under remarks of the application, the applicant states "The purpose of the diversion is to provide drinking water to Angel Creek Campground. Estimated annual consumptive use is 360,000 gallons".

XV.

No statutory authorized protests, as provided under NRS 533.365, were filed against the applications described herein. The State of Nevada was granted standing as an intervenor-protestant in the matter of Applications 43392, 43393, 43394, 43395 and 43157.¹⁷

VI.

Public administrative hearings¹⁸ before the State Engineer

¹⁶ Public record in the office of the State Engineer under Application 46934. See also State Engineer's Exhibits 13 and 13A, public administrative hearing, July 24, 1984, Elko, Nevada.

¹⁷ The Attorney General formally appears in these proceedings as counsel of record for the Department of Agriculture of the State of Nevada and for the State of Nevada. The Department has protested certain water rights applications filed by federal agencies. The Attorney General was granted leave to intervene in the name of the State of Nevada pursuant to NRS 228.190 (1981). See footnote 19.

¹⁸ See transcripts of public hearings, public record in the office of the State Engineer.

in the matter of the subject applications to appropriate were held on and at the following dates and places:

July 24, 1984 - Elko, Nevada

July 26, 1984 - Winnemucca, Nevada

Evidentiary presentations by the applicants and the Attorney General were introduced into the record in support of and in opposition to the pending applications. Additionally, intervention 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.¹⁹

XVII.

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" statute²⁰ and his assertion that the granting of water

¹⁹ See transcript of public hearing, June 12, 1984, pp. 13 - 28, Sierra Club Exhibits 1 and 2. Transcript of public hearing, July 26, 1984. The State Engineer took administrative notice of the record (including post-hearing briefs) in the matter of previous public hearings relating to applications to appropriate filed by the Department of Interior - Bureau of Land Management as well as any other public records available in the office of the State Engineer. See transcript of public hearing, July 26, 1984, p. 10; transcript of public hearing, July 24, 1984, p. 9.

²⁰ 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, 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.²¹

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.²²

²¹ Regretably, the Attorney General and the State Engineer disagree on what constitutes the public policy or the public interest which must be considered by the Engineer in ruling upon water rights applications. The Attorney General would narrow the scope of these concepts to what he believes is the mandate of the Sagebrush Rebellion statute, but the Engineer believes he must look to the total blend of all applicable law - state and federal - to ascertain the public interest and public policy as it exists at any relevant time.

²² 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 Nevada 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.

In his opinion and post-hearing briefing, the Attorney General manifests an anxiety for the "displacement of state authority and therefore sovereignty". He argues that a distinction must be drawn between federal water needs for "proprietary" purposes and those rights which could or would be utilized for "governmental" purposes. While he acknowledges that proprietary use is permissible, he insists that governmental use offends Nevada's policy to gain control and to assert her sovereignty over the public lands within her boundaries. He contends that approval of applications to appropriate the public waters for governmental purposes would be in violation of state law and "public policy". From this, he concludes that the risk can be avoided by denying the applications if they are in furtherance of governmental purposes. The error of these conclusions is apparent and is evidenced by the very authorities

22 (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., 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).

cited by the Attorney General.²³ Theories of state sovereignty flowing from the admission of states on the basis of equal footing cannot alter the plain facts of federalism in a dual-government society. The admission of a state does not deprive Congress of the power to legislate for the protection of the

23 The State Engineer reluctantly must extend factual determination in this matter to the provisions of NRS 321.596 through 321.599, inclusive, in order to clear the underbrush in the proprietary/governmental purpose distinction advanced by the Attorney General. In addressing this issue, the State Engineer is mindful that the Sagebrush Rebellion statute asserts no claim over forest reserves, but the Attorney General perceives a policy set forth in that statute as extending to certain beneficial uses represented by applications herein. The Attorney General finds this distinction in the case of Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885). (See A.G.O. No. 83-15). The A.G.O. cites that Supreme Court opinion for the general proposition that property acquired by the United States for furthering governmental purposes is necessarily exempt from state control, whereas property not used for governmental purposes, but held by the United States only as a proprietor, is subject to state control. The Attorney General then reaches the conclusion that Nevada's sovereignty will be impaired if Nevada permits the United States to appropriate water for governmental purposes, generally on the premise that the rights are now in the hands of the sovereign which puts the water beyond the reach of the state and jeopardizes the resolution of Nevada's claim to the public lands.

Before considering whether the distinction is embedded in decisions of the U.S. Supreme Court, it is well to note that the distinction is engrafted onto Nevada statute law. As examples:

1. Nevada denies that it ever effectively disclaimed ownership of the public domain within Nevada. NRS 321.596(5).
 2. Nevada asserts that, if it did disclaim ownership, the disclaimer was a void condition precedent to statehood. NRS 321.596(2)(a), citing Pollard v. Hagen, 44 U.S. (3 Haw.) 212 (1845).
 3. Nevada claims that federal jurisdiction over lands held for purposes other than governmental ones is limited to that of an ordinary proprietor. NRS 328.075(2).
- (Continued)

public lands or federal reservations.²⁴

The Federal District Court in Nevada has held that land in the public domain passes to the United States' ownership on the admission of the state to the union; that no state legislation may interfere with Congress' power over the public domain; and that the suspicion "that a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power"²⁵ (emphasis added). The Attorney General's argument here

23 (Continued)

4. The United States must apply to the state for consent to use lands for proprietary purposes "relating to retention and management" of public lands. NRS 328.065(4).

5. The United States must apply to the state engineer to appropriate water on public lands. NRS 328.065.

6. The state engineer must reject applications where the use of water "threatens to prove detrimental to the public interest". NRS 533.370(3).

The proprietary/governmental distinction drawn in Fort Leavenworth, supra, and other cases under Art. I, § 8, Cl. 17, or otherwise, involving the federal acquisition of land within a state or the cession of land by a state to the United States, e.g., Paul v. U. S., 371 U.S. 245, 83 S.Ct. 426 (1963); Macomber v. Bose, 401 F.2d 545 (9th Cir. 1968), if it is still applicable at all, is not applicable to public domain lands. The presence or absence of federal jurisdiction obtained through a state's consent or cession is unrelated to Congress' powers under the Property Clause, U.S. Const. Art. IV §3, Cl., United States v. Brown, 552 F.2d 2 (7th Cir. 1977), Cert. den. 431 U.S. 949 (1977). Under the Property Clause, Congress exercises power both of a proprietor and of a legislature over the public domain, Kleppe v. New Mexico, 426 U.S. 529, 540 (1976). Minnesota v. Block, 660 F.2d 1240, 1248 (8th Cir. 1981), Cert. den. 455 U.S. 1007 (1982).

²⁴ Minnesota v. Block, 660 F. 2d. 1240, 1252 (8th Cir. 1981), Cert. den. 455 U.S. 1007 (1982); Camfield v. U.S., 167 U.S. 518, 527 (1897).

²⁵ State of Nevada ex rel. State Bd. of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981), Aff'd. 699 F.2d 486 (9th Cir. 1983).

is the same line disposed of by that court and by the Ninth Circuit in its affirmance. A state may give expression to state interests in state law, but not in a manner which is inconsistent with congressional directives concerning federal lands.²⁶

This finding is not intended to suggest that the state lacks jurisdiction to entertain, grant or deny federal applications for water rights, to administer rights once granted, or to attach procedural or substantive limitations to federal appropriative water rights based on state law principles, such as the rule of priority or the requirement that unappropriated water be available for appropriation. Neither is it intended to suggest that a federal non-reserved appropriative right exists which would pre-empt state laws, procedures and priorities.

The State of Nevada may not fabricate a federal-state conflict and then resolve it under a state "public policy" or law to the practical disadvantage of the federal government.²⁷ More particularly, a state may not, in effect, refuse to consider or entertain an application for an appropriative water right on the

²⁶ California v. United States, 438 U.S. 645, 675, 98 S.Ct. 2985 (1978); Kleppe v. New Mexico, supra.

²⁷ As an example, the fundamental theme of the Attorney General "public policy" argument is submerged in the theory that the federal "government has breached its trust obligation to pursue an orderly program of public land disposal. Rather, it has retained the lands, managed them, extracted revenue from them and as a result, now asserts jurisdiction and power over the state's political and sovereign life that it does not have in other states". The scenario goes on to say that "needless grants to the federal government of the state's remaining supplies of water would not only be inconsistent with state policy to conserve water for needed purposes, it would undoubtedly aggravate the division of powers problems between the state and federal authorities". A.G.O. 83-15. (Emphasis added.)

theories advanced by the Attorney General, i.e. that approval of a federal water right for use on federal lands for governmental purposes would unlawfully displace state sovereignty, even though approval of an application for a water right for proprietary purposes would not. There is no basis in federal decisions for such a distinction as applied to federal activities on federal lands and, indeed, the federal decisions make it clear that it is precisely when federal governmental interests are at stake that the Supremacy Clause comes into play. The State Engineer finds no substantial or conclusive evidence that Nevada's sovereignty will be impaired by approval of the subject applications and no legal basis to deny the applications on the basis of any "proprietary/ governmental" dichotomy.

The State's control and authority over the public waters is set forth in Nevada Revised Statutes Chapters 533 and 534 which prescribe the statutory procedures for appropriation and adjudication of the public waters. NRS 321.596 through 321.599, inclusive, intimate no repeal or diminution of that control and authority, nor do these sections purport to preclude or limit federal agencies as applicants for water rights under state water law. The "Sagebrush Rebellion" statute asserts a claim to ownership of certain public lands--a claim which will be subject ultimately to judicial and/or congressional determination. 28

28 The Attorney General, in addressing this issue, opines: "To suggest that water rights granted to the United States would pass to the State with a disposal of the public lands to the State, therefore, is misleading, even if true, because it is the act of reuniting the land and water for management purposes which will fulfill the prophecy that for the future the federal government will exercise dominion and sovereignty over both". A.G.O. 83-15. (Emphasis added.) The "Sagebrush Rebellion" statute asserts no claim over U.S. Forest Reserves. See NRS 321.546(2); 321.5963(2)(c) (1983).

II.

NRS 533.010 and 534.010(1)(a) specifically qualify the United States and its agencies as "persons" who may appropriate water. That the United States is legally represented by various federal agencies, such as the Bureau of Land Management and the Forest Service, in water rights applications (or protests) in no way impairs the standing of the United States as a qualified applicant.²⁹

III.

Throughout these proceedings, the Attorney General has challenged the standing or capacity of the United States to hold an appropriative right for stockwatering purposes primarily because it is not in a position -- owning no livestock in its own right -- to put stockwater to beneficial use. He seeks denial of the instant applications under the provisions of NRS 533.045.

²⁹ AB 200, enacted as 1985 Statutes of Nevada, Chapter 127, was approved and effective April 29, 1985. Section 54 of the Act amends NRS 533.010 to read as follows:

"As used in this chapter, 'person' includes the United States and this state."

Section 55 of the Act amends paragraph (e) of sub-section 1 of NRS 534.010 to read as follows:

"'Person' includes any municipal corporation, power district, political subdivision of this state or any state and an agency of the United States government."

The 1985 Act was one "relating to statutory interpretation, providing a definition of the term 'person' applicable to Nevada Revised Statutes as a whole...." The new general definition of "person" prescribed by the Act excludes "a government, governmental agency or political subdivision of a government". 1985 Statutes of Nevada, Chapter 127, Section 1. It does not alter the pre-1985 substance of NRS 533.010 or 534.010(1)(e).

NRS 533.045 provides that:

"When the necessity for the use of water does not exist, the right to divert it ceases and no person shall be permitted to divert or use the waters of this state except at such times as the water is required for a beneficial purpose." (Emphasis added.)

Nevada Water law clearly establishes stockwatering as a beneficial use no less than irrigation, municipal, recreational, mining and other beneficial uses.³⁰

The Attorney General relies upon NRS 533.045 for the proposition that the federal government, owning no livestock, has no need for water rights for stockwatering purposes, and seeks to defeat the government at the application stage of the appropriation procedure. At that stage, the applicant has not yet been required by Nevada law to prove diversion or placement of the water to beneficial use. The application manifests the applicant's intent to divert and place water to beneficial use. No applicant under NRS Chapter 533 is required to prove beneficial use at the time of application, but only at a later time in the appropriative process.³¹ If, at the time prescribed in the permit for submitting proof of beneficial use, it appears that a permittee is delinquent or lacking in due diligence, the State Engineer may take appropriate action, including

³⁰ NRS 533.490(1) (1979).

³¹ NRS 533.380 (1983).

cancellation of the permit.³² Denial of an application at the threshold, based on an unfounded suspicion that the applicant may fail to place the water to beneficial use, is not warranted.

IV.

The Attorney General does not deny that the United States is an entity upon whom Nevada law³³ confers the right to appropriate water. Federal entities may acquire water rights "as would any

³² NRS 533.395, 533.410 (1983).

³³ NRS 533.325 (1979). "Any...person, as defined in NRS 533.010..., desiring to appropriate any of the public waters...shall...make an application to the state engineer for a permit to make the same."

NRS 533.010, before amendment by the 1985 Nevada Legislature, read: "As used in this chapter, 'person' includes a corporation, an association, the United States, and the state, as well as a natural person." See Footnote 29 for version effective April 29, 1985.

NRS 328.065(2) (1981). "An officer of an agency or instrumentality of the United States:

2. Shall apply to the state engineer pursuant to Title 48 of NRS to appropriate water on the public lands or other federal lands of this state. The state engineer has continuing jurisdiction over any acquisition by the United States of the water of the State of Nevada, whether by purchase, gift, condemnation, appropriation pursuant to the state's water laws or otherwise, and whether appurtenant to lands acquired by or retained by the United States."

The Attorney General has elsewhere acknowledged that the United States is a qualified appropriator under Nevada water law: "Under this statutory scheme [NRS chapters 533 and 534] the federal government is treated as any other claimant when acquiring water rights through the application and permit system. NRS 533.010." A.G.O. 81-1 (1981).

other private claimant within the various states".³⁴ The State Engineer may approve any application if it contemplates (1) the application of the water to a beneficial use, (2) there is unappropriated water in the proposed source, (3) the proposed use will not impair existing rights, and (4) the appropriation is in the public interest.³⁵

V.

The Attorney General, in his opening brief (September 4, 1984), states that Nevada would not oppose federal agency applications for water for national forest campgrounds, for wild horse watering by the BLM, or for the irrigation by the BLM of reseeded areas of the range, but that Nevada does oppose federal appropriations for the watering of livestock of the government's permittees, for wildlife and in place fisheries, and for recreational and aesthetic purposes.

Setting aside the objections based on sovereignty and proprietary-governmental distinctions, the effect of granting the federal applications to appropriate water for the contested uses warrants discussion since the Attorney General argues that:

- (1) the applications in this proceeding represent

³⁴ Solicitor's Opinion, M-36914 (Supp. I) Non-Reserved Water Rights--United States Compliance with State Law, 88 I.D. 1055, 1065 (1981). (Hearinafter Coldiron). The effect of Congress' historic deference to state water law is the creation of a presumption that, in the absence of evidence to the contrary, Congress intended that federal agencies acquire water rights in accordance with state law. Federal "Non-Reserved" Water Rights, Legal Memorandum, U.S. Dept. of Interior, Office of Legal Counsel (June 16, 1982) at 72.

³⁵ NRS 533.030(1) and 533.370(3) (1983).

only a small portion of the Nevada water rights applications that the federal government intends to file and that, consequently, vast quantities of water will be permanently removed from state administration, precluding other uses by private appropriators;³⁶

(2) the "public interest" is one abstract criteria that the State Engineer must consider when acting on applications to appropriate; the Attorney General espouses a "public policy" of substantial restriction on the right of federal agencies to hold state-sanctioned water rights on public lands, (this question will be further dealt with in subsequent findings);

(3) the fact that stockwatering rights are privately held should not impede resource management by the federal agencies but would still enable the state to retain at least a modicum of control or have a voice in such resource management decisions; and

(4) a primary aim of the federal government is to reassert control over water resources located on

³⁶ Protestant's Exhibit No. 4, public administrative hearing June 12, 1984, Elko, Nevada. Testimony of Tom Ballow, transcript pp. 76-137. Nevada state agencies are, of course, free to make applications to the State Engineer for recreational purposes including wildlife and fisheries use. NRS 533.010(2), (1983). Their failure to do so in a given case does not justify denial of federal applications for such uses.

public lands -- to reunify land and water under federal jurisdiction.

The record disposes of the speculation surrounding the water rights applications the Bureau of Land Management intends to file and reflects a relatively modest number (in comparison to water rights held by private appropriators for the same uses) of anticipated applications statewide involving primarily the development of new ground water sources and seeking minimal quantities of water. The record in the State Engineer's office further reflects an even more modest number of applications filed by the U.S. Forest Service. The State of Nevada has long advocated that federal agencies must recognize and comply with state water law.³⁷

It is conceivable that a junior appropriator might 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 deny the federal applications in favor of private speculation on future demands and availability of water for irrigation, mining,

³⁷ State Engineer's Exhibit No. 23, public administrative hearing, June 12, 1984, Elko, Nevada. The records of the State Engineer's office reveal that since 1905 in excess of 50,000 applications to appropriate or claims of vested rights for all uses have been filed. Specifically, in reviewing almost 19,000 applications to appropriate filed since 1976, approximately 13% involve stockwatering uses by private appropriators.

The Attorney General, in developing his arguments, speculates on "vast" amounts of water coming under control of the federal government by approval of the applications the federal agencies have filed. He characterizes this as being detrimental to the public interest but perceives no impairment or detrimental effect if these waters are appropriated by private interests.

municipal or any other uses, would not only violate the doctrine but place the same burden on the private appropriator. Any potential conflict with existing rights or availability of unappropriated water in the source is simply factual.

There is no substantial or conclusive evidence that the applications represent any "cannibalization" of the states water resource. On the contrary, they contemplate beneficial and statutory use of those resources.

The record in these proceedings does not deal with the question of the subject applications being held privately. The two-pronged question simply is: first, did Congress or the courts preclude the Forest Service from acquiring water rights on unappropriated water on forest lands for secondary uses; and secondly, is a "public policy" of substantial restriction on federal agencies to hold state sanctioned water rights for such uses in the public interest?

The Attorney General, in his post-hearing brief of October 1st, 1984, addresses the question rather awkwardly in that he speculates on the creation of a federal water allocation system within the forest range management structure which would displace the state's jurisdiction and system of water rights administration. Such speculation is idle because the state, in granting water rights to a federal agency for purposes secondary to a project or reservation, is able to impose appropriate conditions.³⁸

³⁸ Federal "Non-Reserved" Water Rights, Legal Memorandum, U.S. Dept. of Justice, Office of Legal Counsel, (June 16, 1982) at 69-70.

In evaluating the subject applications the State Engineer has, in the case of each beneficial use, considered whether Congress has authorized water to be appropriated for that use and if so, whether Congress has directed that water be appropriated, state law notwithstanding. The Taylor Grazing Act³⁹ authorizes the issuance and exercise of grazing privileges on public domain lands and the State Engineer finds nothing in this legislation that precludes or directs the federal agencies to acquire water rights for stockwatering purposes. This act does not appear to have any applicability to lands set aside in the creation of national forest reserves under the Organic Administration Act, later supplemented by the Multiple-Use Sustain-Yield Act.⁴⁰ The policies set forth in these acts provided that national forests were to be established and administered for the primary purposes of improving and protecting the forest, securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. Congress further set forth a policy that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, wildlife and fish purposes.

³⁹ Taylor Grazing Act, 43 U.S.C. 315(b).

⁴⁰ Organic Administration Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 473 et seq. (1976 Ed.). Multiple-Use Sustain-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 et seq.

Clearly, the Forest Service, under U.S.C. § 526,⁴¹ has federal statutory authority to appropriate water for the stated purposes, but the State Engineer perceives no overriding "congressional directive" to do so or any congressional intent to preclude or impede the U.S. Forest Service from development and use of unappropriated water from sources on federal land for the secondary purposes enumerated, consistent with state water law. The State Engineer cannot justify denial of Forest Service applications, nor does the record of evidence support any public policy to that extent, simply to benefit unknown future private appropriators, or on the pretext that "vast quantities" of water would not be unavailable to future private appropriators.

The State Engineer now turns to the courts⁴² for some authoritative guidance and with the clear understanding that the question of federal reserved rights necessary to accomplish the

⁴¹ 16 U.S.C. § 527 states:

"Established and protection of water rights

There are hereby authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests.

(Sept. 21, 1944, c. 412, Title II, § 213, 58 Stat. 737.)"

⁴² United States vs. New Mexico, 438 U.S. (1978). United States v. City and County of Denver, 656 P.2d (Colo. 1982).

primary purpose of the reservation, is well settled.⁴³ The U.S. Supreme Court, in New Mexico, held that:

"This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of Federal-State jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. (Citations omitted.) Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' expressed deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same

⁴³ Cappaert v. United States, 426 U.S. (1976); United States v. New Mexico, 438 U.S. 1089; California v. United States, 438 U.S. (1978); United States v. City and County of Denver, 656 P.2d (Colo. 1982). In reviewing New Mexico and the issues involved, the State Engineer can find no basis for an interpretation that the court even considered, let alone decided, whether the United States could establish stockwatering rights where such rights were recognized and established in compliance with state law. The court only decided the federal reservation doctrine claim for stockwater use.

manner as any other public or private appropriation." (Underlining added.)⁴⁴

The Colorado Supreme Court, in Denver further held that:

"We are convinced that the 'implied-reservation-of-water doctrine' must be narrowly construed. Additional federal water rights in Colorado may reduce water available to satisfy long-held adjudicated water rights, especially in streams which have been fully appropriated. When Congress passed MUSYA, it was aware of the reserved rights doctrine. See e.g. Federal Power Commission v. Oregon, 349 U.S. 435, 75 S.Ct. 882, 99 L.Ed. 1215 (1955; Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 136 (1899). Congress, however, chose not to reserve additional water explicitly. In the face of its silence, we must assume that Congress intended the federal government to proceed like any other appropriator and to apply for or purchase water rights when there was a need for water. The federal government has the power to act in condemnation proceedings if it wishes to obtain water outside the state appropriation system for

⁴⁴ United States v. New Mexico, supra 438 U.S. at 701-702.

additional national forest purposes.⁴⁵

(Underlining added, footnotes omitted.)

The State Engineer, in exercising his discretion to ascertain the nature and scope of "public interest" within the meaning of NRS 533.370(3) (1981), finds that the "contrary inference" theory⁴⁶ of the court is sound and must lead to the conclusions that Congress, in recognition and compliance with state water law and procedures,⁴⁷ did intend the United States could appropriate water for "secondary" uses on forest reservations, even in the absence of an overriding congressional directive.

This is further supported by the fact that congressionally authorized land-management authority, which the Forest Service exercises, is a public trust responsibility for the benefit of the people of the United States.

Federal grazing privileges available to farmers and ranchers

⁴⁵ United States v. City and County of Denver, 656 P.2d 1, 19 (Colo. 1982).

⁴⁶ The Attorney General relies on United States v. New Mexico, 438 U.S. 696, 715 (1978), for the proposition that the United States is disqualified as an appropriator because issuance of appropriation permits to it would result in reduction of water available to private appropriators. New Mexico is not authority for that proposition. The approval of any appropriation, whether private or governmental, will necessarily reduce the amount of unappropriated water available.

⁴⁷ For example, the savings clause of FLPMA, Section 710(g), 43 U.S.C.A. § 1701, Note, maintains the status quo in the relationship between the states and the United States and preserves the right of the United States to use water for congressionally-recognized and mandated purposes set forth in federal legislation providing for the management of the public domain, pursuant to state substantive and procedural law for these purposes. See also 16 U.S.C. 526 (Footnote 41).

are primarily determined by discretionary decisions⁴⁸ of the federal 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 terrain, precipitation, soil, climate and other factors largely independent of the existence or non-existence of water sources. The quantity of forage available is not related to or influenced by vested ownership of water rights. The existence of domestic livestock and wildlife on the public lands and forest reserves are dependent to a degree on adequate water sources but are more dependent on forage and habitat.

The State Engineer can find no basis or foundation that would dictate a finding that the United States may not appropriate water for permittees' or wildlife uses on federal reservations. To the contrary, the federal agencies may, and indeed must, apply to the state to secure appropriative water rights needed to meet multiple-use management objectives set forth by Congress in land management statutes and for secondary purposes on federal reservations.⁴⁹

It is appropriate, therefore, that the State Engineer now proceed -- under state law and procedures -- to evaluate the subject applications to determine whether permits may issue.⁵⁰

⁴⁸ Organic Administration Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 473 et seq. (1976 Ed.). Multiple-Use Sustain-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. § 528 et seq.

⁴⁹ Sierra Club v. Watt, 659 F.2d 203, 205 (D.C. Cir. 1981).

⁵⁰ This procedure is consistent with Congress' intent as interpreted by the U.S. Supreme Court in United States v. New Mexico, 43 U.S. 696, 702 (1978); Coldiron, supra, 88 I.D. 1064 (1981).

In so doing, the State Engineer is faced with the responsibilities of enforcing Nevada law, hopefully in a manner calculated to avoid confronting the federal agencies with a compelling reason to seek congressional relief, a judicial expansion of the reservation doctrine or a recycled assertion of a federal "non-reserved" doctrine.

VI.

It is urged that Prosole⁵¹ prevents the United States from being an appropriator because the ultimate water user must be the holder of a water right. Intervenors point out that Prosole does not stand for the proposition for which it is cited and that to treat the government landowner who owns no livestock as an agent for its permittee or licensee is backward thinking. (See reply brief of Intervenors Sierra Club, etc., p. 14, Oct. 22 1984.) An important public interest issue, as to the relationship between water supplier and water user, is protection of the water user (whatever semantics of ownership may be involved) from being cut off from his source of supply. Labored analogies to carrier ditch companies, municipalities, water districts and other distributors/appropriators of water under state law, in the context of uses or ownership of livestock, is not necessary for the purpose of determining the ability of the applicant to place water to beneficial use. Requiring an ownership determination of livestock before approving an application would create a chaotic process when considered in the context of, as an example, a fee

⁵¹ Prosole v. Steamboat Canal Co., 37 Nev. 154, 140 P. 720 (914).

landowner who owns no livestock but seeks to appropriate water for the use of tenants or contract livestock growers on his land.

VII.

Testimony presented at the public administrative hearing, to the effect that the value of the base property of a ranching or farming operation may be affected by federal ownership of water rights, was inconclusive.⁵² The availability and administration of grazing privileges on the public lands or forest reserves are a matter of federal law. The State Engineer, as a long standing policy, has limited approval of private applications for stockwatering rights on public domain and forest reserves to the federal permittee, and has done so in the historical absence of federal recognition and compliance with state water law. The records of the State Engineer's office will disclose that many hundreds of water rights (both vested and appropriative) for the contested uses have been granted to private appropriators over the years on both public domain lands and forest reserves. There is no evidence that these rights have impaired the public interest or welfare; and the State Engineer is unable to justify any conclusive distinction to be made purely on the basis of ownership of a water right or ownership of livestock.

⁵² Testimony of William J. Guisti, Elko County Assessor, transcript pp. 67-72; testimony of Elbert G. Davis, transcript pp. 139-155; testimony of Edward B. Buckner, transcript pp. 165-167; testimony of John Carpenter, transcript pp. 167-170; testimony of Marla Boies Griswold, transcript pp. 170-181; testimony of DeLloyd Satterthwaite, transcript pp. 199-215; testimony of Bruce B. Hall, transcript pp. 216-213, public administrative hearing, June 12, 1984, Elko, Nevada.

The State Engineer finds that the development of new watering sources, whether by the federal agency or the federal permittee, is beneficial in promoting new areas for grazing and more efficient use of existing areas, all of which in turn should reduce grazing pressure in the vicinity of existing watering sources, thus increasing the quantity and quality of grazing resources as a whole.

The applications subject to this ruling represent requests for minimal quantities of water which have little or no potential benefit, other than for stockwatering, in support of grazing and wildlife habitat maintenance. Except for obvious seniority under the doctrine of prior appropriation, there is no compelling evidence that the granting of the applications would prejudice or impair private appropriators who may, in the future, seek rights for the same or similar uses in the same area.

VIII.

Public interest is a flexible concept, primarily designed to promote strong public policy concepts and the public welfare. Nevada, like the other western states, has staunchly defended her right to control and administer her most vital resource, but the public interest is not served by impeding congressionally mandated resource management by the federal agencies, especially if those agencies recognize and comply with state water law.

Nevada has a limited, finite quantity of water to serve all purposes, and that meager supply is being subjected to ever increasing competitive demands. This is nothing new. It has been the "name of the game" since appropriative water law was

adopted in the western states. Because the water is scarce, it is an important principle of public policy that all the water be applied to beneficial use, and in the public interest. The development of sources of water and uses contemplated by the United States are beneficial uses and in the public interest. If the United States is a prior appropriator, it must be treated with the same respect as all other prior appropriators.

It is also true, as the Attorney General contends, that the United States may be a more formidable competitor than a private party. It has abundant money and can print more; it is clothed with sovereign immunity and has the inherent sovereign power of eminent domain; it is exalted by the Supremacy Clause of the U.S. Constitution; and in addition, the court system has fashioned a number of water rights doctrines (for example, the reservation doctrine) which enhances the government's advantages. All of these are inherent in our dual system of government and are not likely to be altered in administrative proceedings before a state agency. Nothing in the statute requires - much less authorizes - that the State Engineer engage in speculation that some undefined future use may be more beneficial or more in the public interest than the beneficial use contemplated by a current water right application.

The Attorney General has not only failed to meet the test of conclusive and substantial evidence that the public interest would be impaired, but has failed to provide even marginal evidence of impairment.

XI.

These findings are not inconsistent with the policy of other western states regarding appropriations of public waters for similar uses, consistent with water law of the respective states.⁵³

XII.

The Attorney General has taken the position (1) that a physical diversion of the water is essential to any appropriation, and (2) the "public trust doctrine" precludes the State Engineer from granting applications relating to wildlife uses.

Nevada case law has long since dispensed with any requirement for a physical diversion of water from the source as a prerequisite to a valid appropriation. Steptoe Livestock Co. v. Gulley⁵⁴ holds that a cow's gullet is a sufficient diversion works, and a recent decision of the U.S. District Court for the District of Nevada made clear that no diversion is required for an appropriation to maintain instream flows.⁵⁵ The legislature in 1969 declared that "(t)he use of water...for any recreational

⁵³ State Engineer's Exhibit No. 14, public administrative hearing, July 24, 1984, Elko, Nevada. Specifically, the State of Utah restricts private appropriators from holding stockwatering rights on the public domain and forest reserve in favor of the federal agencies.

⁵⁴ 53 Nev. 163, 173, 295 P. 772 (1931); accord; Waters of Horse Springs v. State Engineer, 99 Nev. 776, 778, 671 P.2d 1131 (1983).

⁵⁵ United States v. Alpine Land & Reservoir Co., 503 F.2d 877 (D. Nev. 1980), Modified, 697 F.2d 851 (9th Cir. 1983), Cert. denied sub nom. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 104 S. Ct. 193 (1983).

purpose is...a beneficial use".⁵⁶

The State Engineer does not view the lack of any physical diversion of the waters as an impediment to the appropriation sought by the Forest Service, or private appropriators, for that matter.

Nor is the "public trust doctrine" a barrier to such an appropriation. That doctrine has largely been limited in its application to navigable bodies of water and tidelands.⁵⁷ The State Engineer views the doctrine as offensive to the law of prior appropriation⁵⁸ and thus contrary to the public policy of Nevada, as declared by its legislature in NRS Chapter 533. But if the "public trust doctrine" has any viability in Nevada, it would appear to support, rather than oppose, certain of the Forest Service applications.

XIII.

The Attorney General asserts that consumption of water by wildlife is not a beneficial use under Nevada law; that wildlife

⁵⁶ NRS 533.020(2) (1983). See McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (1976) (Construing a statute similar to NRS 533.020(2) to dispense with a requirement for artificial diversion).

⁵⁷ See e.g., Illinois C.R. Co. v. Illinois, 146 U.S. 387 (1892); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

⁵⁸ In National Audubon Society v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709 (1983), the Supreme Court of California held that vested appropriative rights on streams tributary to Mono Lake might be reconsidered at any time and terminated without compensation to the owners of such rights, if found to be inimicable to the purposes for which California held the waters "in trust". The State Engineer is loath to believe, and absent legislative or judicial mandate, will not believe that this doctrine prevails in Nevada.

is a natural use which does not require appropriation. This must be dismissed. The Nevada Legislature has acknowledged the need to maintain access by wildlife to watering sources it customarily uses.⁵⁹ The State Engineer has historically recognized wildlife use as a beneficial use. He has ruled that little, if any, distinction exists between stockwatering and wildlife use as it relates to the watering of animals.⁶⁰ Testimony at the public administrative hearing supports the cooperative efforts of federal and state authorities to enhance wildlife habitat and well being through the development of additional water sources.⁶¹ As a practical matter, wildlife is simply unimpressed with the record ownership or stated beneficial use associated with a water right on a given source and, absent any physical

⁵⁹ NRS 533.367 (1981). This statute applies specifically to natural springs and seeps and is not applicable to developed ground water sources.

⁶⁰ Transcript, pp. 182-198, public administrative hearing, June 13, 1984, Elko, Nevada, public record in the office of the State Engineer.

⁶¹ Statement of William A. Molini, Director of the Nevada Department of Wildlife. Transcript pp. 289-296, public administrative hearing, June 13, 1984. Certainly an application by the Nevada Department of Wildlife for water to be used for consumption by wildlife would signify a use beneficial to the purposes of that agency and one in furtherance of the public interest. That the subject application is by a federal agency for the same beneficial use, should support no distinction. The Attorney General's opposition is further based on and he opines:

"It is not unusual for a state to claim ownership to various aspects of its natural resources. Thus, the State claims ownership to the wildlife within the State (NRS 501.100) even though the United States Supreme Court has held that a state does not 'own' the wild creatures within its borders. Hughes v. Oklahoma, 441 U.S. 322 (1979)." (See A.G.O. No. 83-15.)

restrictions to access, will benefit from the development of the water sources under the subject applications.

XIV.

The sources described under Applications 43741 and 43742 are tributary to the Humboldt River which has been declared fully appropriated by the court during the irrigation season.⁶² The approval of Applications 43741 and 43742 would, therefore, conflict with existing rights.

XV.

There is no evidence to suggest lack of unappropriated water in the sources described in the subject applications set forth herein with the exception of Applications 43741 and 43742.

XVI.

There is no substantial or conclusive evidence that the granting of the applications set forth herein will adversely affect or conflict with existing rights, with the exception of Applications 43741 and 43742.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.⁶³

⁶² In the Matter of the Determination of the Relative Rights of Claimants and Appropriators of the Waters of the Humboldt River Stream System and its Tributaries, No. 2804, Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt (Oct. 20, 1931), Finding 44. The sources under Applications 43740, 43741 and 43742 were the subject of a field investigation on September 25, 1985. See public record in the office of the State Engineer under Applications 43740, 43741 and 43742 for report of field investigation.

⁶³ 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:⁶⁴

- 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.

There is unappropriated water available in the sources that are described and set forth under Applications 42920, 42922, 42923, 43392, 43393, 43394, 43395, 43740, 44398 and 46934. There is no evidence that the granting of these applications will interfere or conflict with existing rights.

IV.

The sources set forth and described under Applications 43741 and 43742 are tributary to the Humboldt River which has been declared fully appropriated by the Court. The applications, therefore, must be denied on the grounds that there is no unappropriated water in the source and to grant the applications would conflict with and impair existing rights.

V.

The State Engineer concludes that there is no basis or foundation under applicable law to support the position of the

⁶⁴ NRS 533.370.

Attorney General that the applications set forth herein should be denied on the grounds that they are for uses which are for governmental purposes. The denial of an application to appropriate for a use, as to which a federal agency has congressional directive to conduct the government's business and protect federal interests, would bring the State of Nevada into direct confrontation with the federal government. Such a confrontation would be governed by the Supremacy Clause of the U.S. Constitution. The State Engineer further concludes that denial of the applications on this basis, or on the basis that state sovereignty is impugned, in the absence of substantial and conclusive evidence would only serve to provoke judicial or congressional creation of non-reserved rights or the broadening of the federal reservation doctrine. All such action would be contrary to the public interest of the State of Nevada.

VI.

When federal and state policy are properly taken into account, it becomes clear that the granting of the Applications 42920, 42922, 42923, 43392, 43393, 43394, 43395, 43740, 44398 and 46934 will not be detrimental to the public interest and welfare.

VII.

The granting of the applications will not conflict with the provisions of NRS 321.596 through 321.599.

RULING

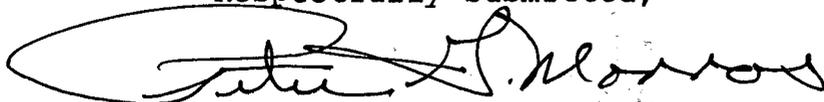
Applications 43741 and 43742 are herewith denied on the grounds that there is no unappropriated water in the source and the granting thereof would impair and conflict with existing

rights.

Applications 42920, 42922, 42923, 43156, 43740, 44398 and 46934 will be granted upon receipt of statutory permit fees, subject to existing rights.

The protest of intervenor-protestant State of Nevada to the granting of Applications 43392, 43393, 43394, 43395 and 43157 is herewith overruled and Applications 43392, 43393, 43394, 43395 and 43157 will be granted upon receipt of statutory permit fees, subject to existing rights.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter G. Morros", is written over a large, hand-drawn oval. The signature is fluid and cursive.

PETER G. MORROS
State Engineer

PGM/bl

Dated this 4th day of
October, 1985