

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS 50781,) 50783, 50784, 50785, 50786, 50787, 50789 AND) 59790 FILED TO CHANGE THE POINT OF) DIVERSION, PLACE OF USE AND MANNER) OF USE OF THE WATERS OF THE NORTH) FORK OF THE HUMBOLDT RIVER) HERETOFORE APPROPRIATED UNDER) HUMBOLDT RIVER CLAIM NO. 00563 IN THE) NORTH FORK AREA, HUMBOLDT COUNTY,) NEVADA.)

RULING

GENERAL

Application 50781 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.5 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.42N., R.53E.; T.43N., R.53E.; T.42N., R.54E. and T.43N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the SE1/4 SE1/4 Section 32, T.43N., R.54E., M.D.B.&M.¹

Application 50783 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.5 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.42N., R.53E.; T.43N., R.53E.; T.42N., R.54E. and T.43N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the NE1/4 SE1/4 Section 31, T.43N., R.54E., M.D.B.&M.¹

Application 50784 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.5 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.42N., R.53E.; T.43N., R.53E.; T.42N., R.54E. and T.43N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the NE1/4 NE1/4 Section 2, T.42N., R.53E., M.D.B.&M.¹

¹ Public record in the office of the State Engineer. The prior use of Applications 50781, 50783, 50784, 50785, 50786, 50787, 50789 and 59790 was for irrigation and stockwatering purposes from the North Fork of the Humboldt River or its tributaries and are represented by the claims as indicated. These rights have been decreed to the various users in what is commonly called the Humboldt River Decree No. 2804 or Bartlett Decree entered October 20, 1931, and the Edwards Decree entered October 7, 1935, in the Sixth Judicial District Court, County of Humboldt, State of Nevada.

Application 50785 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.5 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.42N., R.53E.; T.43N., R.53E.; T.42N., R.54E. and T.43N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the NE1/4 SW1/4 Section 2, T.42N., R.53E., M.D.B.&M.¹

Application 50786 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.5 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.42N., R.53E.; T.43N., R.53E.; T.42N., R.54E. and T.43N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the NE1/4 SW1/4 Section 2, T.42N., R.53E., M.D.B.&M.¹

Application 50787 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.5 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.42N., R.53E.; T.43N., R.53E.; T.42N., R.54E. and T.43N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the SW1/4 NW1/4 Section 12, T.42N., R.53E., M.D.B.&M.¹

Application 50789 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.1 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.39N., R.53E.; T.40N., R.53E.; T.41N., R.53E.; T.39N., R.54E.; T.40N., R.54E., and T.41N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the NE1/4 SE1/4 Section 5, T.40N., R.54E., M.D.B.&M. (Stump Creek).¹

Application 50790 was filed on April 3, 1987, by Freeport-McMoRan Gold Company to change the point of diversion, place of use and manner of use of 0.1 c.f.s. of water from the Humboldt River, North Fork, heretofore appropriated under Humboldt River Claim No. 00563. The proposed use is for mining, milling and domestic purposes within portions of T.39N., R.53E.; T.40N., R.53E.; T.41N., R.53E.; T.39N., R.54E.; T.40N., R.54E., and T.41N., R.54E., M.D.B.&M. The proposed point of diversion is described as being within the SE1/4 SE1/4 Section 20, T.40N., R.54E., M.D.B.&M. (Mahala Creek).¹

Applications 50781, 50783, 50784, 50785, 50786, 50787, 50789 and 59790 were timely protested on July 13, 1987, by the United States of America, Forest Service, on the following grounds:²

"The United States of America, through the agency of the Forest Service, is already using the water to support its land management responsibilities; and there is no unappropriated water in the Humboldt River basin."

² Public record in the office of the State Engineer.

FINDINGS OF FACT

I.

The State Engineer finds that the above applications are applications to change the point of diversion, place and manner of use of existing rights set forth in the Humboldt River Decree.

II.

The State Engineer finds that the protestant, the U. S. Forest Service, holds no existing water rights on the source that could be effected by the proposed changes.³

III.

"Except as provided in NRS 533.372 and this section, the State Engineer shall approve an application submitted in proper form which contemplates putting the water to beneficial use and which proposed use or change do not conflict with existing rights or prove detrimental to the public interest."⁴ There is no evidence that the changes of point of diversion, manner and place of use proposed by the subject applications would conflict with existing rights or be detrimental to the public welfare.

IV.

The policies set forth in certain acts⁵ 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 the citizen's of the United States. The State Engineer has ruled that the U.S. Forest Service under 16 U.S.C.S. 527⁶ has federal statutory authority to appropriate water for secondary uses on the forest reserve. The questions of federal reserved rights and priority of those rights necessary to accomplish the primary purpose of the reservation is well settled.⁷ The decreed rights proposed to be changed by the subject application's bear priority dates as early as 1890⁸ which predate any priority of the forest reserve.⁹ The subject application's seek to change the

³ There are no water rights on the source of record in the State Engineer's office in the name of the protestant.

⁴ NRS 533.370.

⁵ 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.

⁶ See State Engineer's Ruling No. 3242 dated October 4, 1985, in the matter of Application's 42920 et al. Public record in the office of the State Engineer.

⁷ Cappaert v. United States, 426 U.S. 128 (1976); United States v. New Mexico, 438 U.S. 696 (1978); California v. United States, 438 U.S. 695 (1978); United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

⁸ See "Humboldt River Water Distribution" "Part II - Priority Tables" December, 1964. Public record in the office of the State Engineer.

⁹ United States v. New Mexico, 438 U.S. (1978). Solicitor's Opinion, M-36914 (Supp. I) Non-Reserved Water Rights - - United States Compliance with State Law, 88 I.D. (1981). Solicitor's opinion, M-36914 (Supp. II) 90 I.D. (1983).

point of diversion, place and manner of use of existing rights and do not represent application for new appropriations. The State Engineer finds that the protests of the U.S. Forest Service are without merit.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.¹⁰

II.

The prior uses for the above changes are decreed by the Humboldt River Decree and the State Engineer finds that the new points of diversion and new uses are within the decreed amounts of water allowed and will have no effect on other decreed users, either upstream or downstream.

III.

The State Engineer concludes that the protests are without merit. If, in fact the protestant is using water, they are doing so illegally since they have no water rights of record on the sources described under the subject change applications.

RULING

The protest to Applications 50781, 50783, 50784, 50785, 50786, 50787, 50789 and 59790 is hereby overruled on the grounds that the protests lack merit and on the grounds that the protestant has no water rights of record that could be impaired by the approval of the subject change applications. Applications 50781, 50783, 50784, 50785, 50786, 50787, 50789 and 59790 are hereby approved subject to prior rights and subject to the provisions of the Humboldt River Decree.

Respectfully submitted,


PETER G. MORROS
State Engineer

PGM/MT/jjk

Dated this 19th day of
January, 1988.

¹⁰ NRS Chapter 533