

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

IN THE MATTER OF APPLICATION 71034)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF NINE-MILE SPRING WITHIN)
THE BUTTE VALLEY-SOUTHERN PART)
HYDROGRAPHIC BASIN (178B), WHITE)
PINE COUNTY, NEVADA.)

RULING

#5469

GENERAL

I.

Application 71034 was filed on April 13, 2004, by Stephen R. MacMillan to appropriate 0.1 cubic feet per second (cfs) of water from a spring source. The proposed manner and place of use is described on the application as being for quasi-municipal purposes within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, T.22N., R.62E., M.D.B.&M. The proposed point of diversion is located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 21.¹

II.

Although the spring source is not identified by name on the application, a review of the USGS Egan Canyon 7.5 Minute topographic map and a previous water right filing on this same spring source verify that this source is known as Nine-Mile Spring(s).²

III.

Application 71034 was timely protested by Herbert E. Stathes and Gordon V. Foppiano on the following grounds.¹

Herbert E. Stathes contends that "this water source known as nine mile spring has a pipeline to the South Egan seeding, in which I am a permittee to graze cattle. This spring is the only

¹ File No. 71034, official records in the Office of the State Engineer.

² File No. 57996, official records in the Office of the State Engineer.

natural water source for livestock. If this application is approved then there will not be water on this seeding - and cause a hardship."

Gordon V. Foppiano's protest describes a similar situation. "The water from the spring has been piped for many years to a Crested Wheat Seeding in Egan Basin and used to water livestock and wildlife. There is no other water on the seeding to use for the livestock and wildlife."

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to a water right application. The State Engineer finds that in the case of Application 71034 there is no need to supplement the records of the Office of the State Engineer relating to the application and its protests with additional information; therefore, an administrative hearing is not necessary.

II.

At face value, Application 71034 appears to be a simple request for an appropriation of surface water for use within the applicant's privately held property. The fact that it was protested is not uncommon, since increased development throughout the state has created a higher degree of competition for its limited surface-water resources. A problem, however, occurs when the grounds upon which the protests are based are closely examined. Each protestant contends that the spring source has been used to supply stock water to a federal grazing allotment. An informal field investigation in the matter of Application 57996, which was held on August 4, 1998, confirmed that the spring was configured for stock-water use and that a diversion of water for this use was occurring.²

The water rights law of Nevada provides a complete procedure for the appropriation of water. Before performing any work in connection with the proposed appropriation, the intending appropriator must make an application to the State Engineer for a permit to make the appropriation.

To verify that the stock-water use observed during the 1998 field investigation was allowed under a valid water right permit, a search was made of the relevant records of the Office of the State Engineer. This examination failed to identify any valid permits, certificates or claims of vested right that allowed an appropriation of water to occur from Nine-Mile Spring. The State Engineer finds that with the exception of Application 71034, there are no active water right filings associated with Nine-Mile Spring as Permit 57996 has been cancelled.²

III.

If it is determined that a spring source is tributary to a larger stream system, the issue of existing rights must be expanded to include any downstream users. Utilizing the appropriate topographic map, the State Engineer finds that the flow generated by Nine-Mile Spring is not tributary to any other surface water sources.³

IV.

The proposed place of use requested by Application 71034 is described on the application and depicted on its supporting map as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21, T.22N, R.62E., M.D.B.&M. The 40 acres that comprise this area are bordered on all sides by public land that is administered by the federal government. An explanation as to why a spring that is located on private land was developed to support a federal grazing allotment is found in a copy of a November 6, 1991, letter that was sent by the Ely

³ Kerns Mountains, Nevada-Utah, 1:100,000 Surface Management Status Map, BLM Edition, 1997.

field office of the Bureau of Land Management (BLM) to a previous landowner. This letter is contained within the record of correspondence maintained under Application 71034 and states that at one time Nine-Mile Spring was thought to be located upon public land. The BLM acknowledged that this assumption was wrong and that the stock improvements on the spring were constructed in error on private land. The BLM also expressed a hope that an agreement could be reached with the owners of the land that would allow a continued use of the spring for watering livestock.¹ The State Engineer finds that the protestants are appropriating water to support a federal grazing allotment from a spring source that is located upon land that neither they nor the federal government control.

V.

The protest to Application 71034 is based upon the contention that its approval would conflict with existing water rights that appropriate water from Nine-Mile Spring. It has been found that there are no active water right permits or claims of vested right attached to this spring; therefore, the protest issues can be overruled.

VI.

Before a water right application that requests a new appropriation of water from a surface source can be considered for approval, it must be determined that there is sufficient unappropriated water available at the source.⁴ A flow rate of approximately 1.0 gallon per minute, which equates to 0.0022 cfs was observed during the August 4, 1998, field investigation. Based upon this observation, the State Engineer finds that any permit derived from the subject application would be limited to a diversion rate not to exceed 0.0022 cfs.

⁴ NRS 533.370(4).

VII.

Any water permit that requests an appropriation of surface water for a manner of use other than domestic must be approved with the provision that sufficient water will remain at the source to satisfy a customary use of the water by wildlife.⁵ The State Engineer finds that the approval of Permit 71034 will be conditioned with this requirement.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁴

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

III.

The State Engineer concludes that there is sufficient unappropriated water at Nine-Mile Spring to support the applicant's manner of use.

IV.

No other active water right filings exist at the subject source nor is it tributary to a larger stream system. The State Engineer concludes the approval of Application 71034 will not conflict with existing water rights.

⁵ NRS 533.367

⁶ NRS chapter 533.

RULING

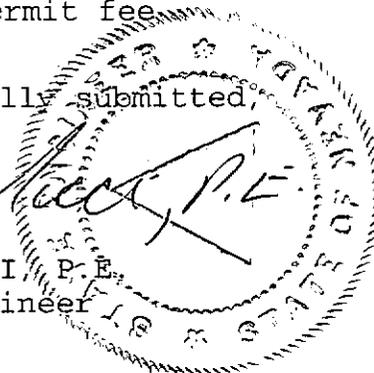
The protests to Application 71034 are hereby overruled and Application 71034 is approved subject to:

1. a diversion rate of 0.0022 cfs of water;
2. existing water rights;
3. the payment of the statutory permit fee.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer



HR/MDB/jm

Dated this 12th day of
January, 2005.