

EUREKA_028

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

IN THE MATTER OF APPLICATIONS)
38638, 40296, 40297, 40298 AND 40299)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF VARIOUS SURFACE)
SOURCES WITHIN THE PINE VALLEY)
HYDROGRAPHIC BASIN (053), EUREKA)
COUNTY, NEVADA.)

RULING
5729

GENERAL

I.

Application 38638 was filed on July 23, 1979, by Frank Paxton and Family and later assigned to Kenneth R. Buckingham to appropriate 0.1 cubic feet per second (cfs) of water from Gallagher Spring for stockwatering purposes (500 head of cattle) within the NW¼ NW¼ of Section 31, T.25N., R.51E., M.D.B.&M. The proposed point of diversion is described as being located within the NW¼ NW¼ of said Section 31.¹

II.

Application 40296 was filed on January 11, 1980, by Frank Paxton and Family and later assigned to Kenneth R. Buckingham to appropriate 0.1 cfs of water from Tonkin Basin Spring No. 1 for stockwatering purposes (1,000 head of cattle) within the NW¼ NE¼ of Section 2, T.23N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NW¼ NE¼ of said Section 2.²

III.

Application 40297 was filed on January 11, 1980, by Frank Paxton and Family and later assigned to Kenneth R. Buckingham to appropriate 0.1 cfs of water from Tonkin Basin Spring No. 2 for stockwatering purposes (1,000 head of cattle) within the NE¼ NE¼ of Section 2, T.23N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of said Section 2.³

¹ File No. 38638, official records in the Office of the State Engineer.

² File No. 40296, official records in the Office of the State Engineer.

³ File No. 40297, official records in the Office of the State Engineer.

IV.

Application 40298 was filed on January 11, 1980, by Frank Paxton and Family and later assigned to Kenneth R. Buckingham to appropriate 0.1 cfs of water from Rooster Canyon Springs No. 1 for stockwatering purposes (1,000 head of cattle) within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.24N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 21.⁴

V.

Application 40299 was filed on January 11, 1980, by Frank Paxton and Family and later assigned to Kenneth R. Buckingham to appropriate 0.1 cfs of water from Rooster Canyon Springs No. 2 for stockwatering purposes (1,000 head of cattle) within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, T.24N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 21.⁵

VI.

Applications 38638, 40296, 40297, 40298, 40299 were timely protested by the U.S.D.I., Bureau of Land Management (BLM) on the following grounds:^{1,2,3,4,5}

Application 38638:

This Un-named Spring is on public land administered by the Bureau of Land Management. The number and kind of animals currently using the water are 18 animal units per month (includes cattle and wild horses), and 33 deer year long. The season of use is year long.

Applications 40296, 40297, 40298 and 40299:

The water is not available for appropriation under state law because it is a public water reserve. The lands contained in this public water reserve were withdrawn by Executive Order 107 of April 17, 1926 (43 CFR 2311).

VII.

After all parties were duly noticed by certified mail,⁶ a public administrative hearing was held on June 2, 2004, regarding protested Applications 38638, 39107, 40296, 40297, 40298, and 40299 in Carson City, Nevada, before representatives of the Office of

⁴ File No. 40298, official records in the Office of the State Engineer.

⁵ File No. 40299, official records in the Office of the State Engineer.

⁶ Exhibit No. 1 and Transcript, public administrative hearing before the State Engineer, June 2, 2004, (hereafter "Transcript" and "Exhibits").

the State Engineer. The protest to Application 39107 was withdrawn by the BLM at the hearing; therefore, Application 39107 is not part of this ruling.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.503 provides that the State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock unless:

(a) The applicant for the permit is legally entitled to place the livestock on the lands for which the permit is sought, and:

- (1) Owns, leases or otherwise possesses a legal or proprietary interest in the livestock on or to be placed on the lands for which the permit is sought; or
- (2) Has received from a person described in subparagraph (1), authorization to have physical custody of the livestock on or to be placed on the lands for which the permit is sought, and authorization to care for, control and maintain such livestock;

(b) The forage serving the beneficial use of the water to be appropriated is not encumbered by an adjudicated grazing preference recognized pursuant to law for the benefit of a person other than the applicant for the permit; and

c) The lack of encumbrance required by paragraph (b) is demonstrated by reasonable means, including, without limitation, evidence of a valid grazing permit, other than a temporary grazing permit, that is issued by the appropriate governmental entity to the applicant for the permit.

In the hearing notice, the BLM was requested to provide information regarding the applicant's status as a grazing permittee within the places of use described under Applications 38638, 40296, 40297, 40298 and 40299. For each application, the BLM indicated that the springs are located on the JD Allotment and the current authorized range user/permittee is the Applicant, Kenneth Buckingham.⁷

The State Engineer finds that the Applicant is legally entitled to place livestock upon the public range described under Applications 38638, 40296, 40297, 40298 and 40299.

II.

Under Applications 38638, 40296, 40297, 40298 and 40299, the Applicant requested a period of use from January 1 to December 31. The State Engineer recognizes

⁷ Transcript, pp. 22, 31, 37-38, 51, 55.

that when a grazing permit is issued or re-issued the number of cattle and the time frame for grazing those cattle can be different than the amount of time applied for under a water right application. The State Engineer finds to accommodate these potential changes, water right permits for stockwatering are sometimes issued for year round use when the applicant indicates this time frame under Item #7 of the water right application.

III.

After an examination of the records of the Office of the State Engineer, the State Engineer finds that there are no additional water right permits or claims of vested or reserved rights filed at the proposed points of diversion.⁸

IV.

When the BLM asserts a protest claim based on a Public Water Reserve No. 107 for the water rights in springs and waterholes on the public domain, it is basing its claim on the doctrine of federal implied reservation of water rights, alleging that the right was established when the surrounding land was withdrawn by the Executive Order of April 17, 1926, Public Water Reserve No. 107 (PWR 107).

The United States Supreme Court "has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."⁹ "In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."¹⁰ "The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."¹¹ "Each time the United States Supreme Court has applied the implied-reservation-of-water doctrine; it has carefully examined both the asserted water right and the specific purposes for which the land was reserved,

⁸ Water Rights Township Plats, Township 23 North, Range 49 East, Township 24 North, Range 49 East and Township 25 North, Range 55 East, M.D.B.&M., official records in the Office of the State Engineer.

⁹ *Cappaert v. U.S.*, 426 U.S. 128, 138, 48 L.Ed.2d 523, 534, 96 S.Ct. 2062 (1976).

¹⁰ *Ibid.*

¹¹ *Cappaert*, 48 L.Ed.2d at 535.

and concluded that without the water the purposes of the reservation would be entirely defeated.”¹²

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. (Citation 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’ express 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 manner as any other public or private appropriator.¹³

“[T]he existence of a federal reservation does not in and of itself denote a reservation of water. Rather, there must be a determination of the precise federal purpose to be served, a determination that the purpose would be frustrated without water, and a determination of the minimum quantity of water required to fulfill the purpose.”¹⁴ The determination of an implied reserved water right cannot be accomplished without looking at the reason for the specific reservation. “Such an examination and tailoring of the reserved right is necessary ‘because the reservation is implied, rather than explicit, and because of the congressional intent in the field of federal-state jurisdiction with respect to allocation of water.’ ”¹⁵

For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water – the minimal need as set forth in *Cappaert* and *New Mexico* – required for such purposes.¹⁶

¹² *United States v. New Mexico*, 438 U.S. 696, 57 L.Ed.2d 1052, 1057, 98 S.Ct. 3012 (1978).

¹³ *Id.* at 1058.

¹⁴ *United States v. City and County of Denver*, 656 P.2d 1, 18 (Colo. 1982).

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 20.

The State Engineer finds in order to determine whether a PWR 107 reserved right protest claim may be valid, the State Engineer must determine: (1) the precise federal purpose to be served; (2) whether the federal purpose would be frustrated without water; and, (3) the minimum quantity of water required to fulfill the federal purpose.

V.

The BLM claims rights to the water sources applied for under these applications alleging the right to the water is based on the sources being public water reserves under PWR 107. Public Water Reserve 107 was established by an Executive Order of April 17, 1926, which provides that:

Every smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or 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 the Act of December 29, 1916 (39 Stat. 862) [Stock Raising Homestead Act], and in aid of pending legislation.

The authority noted for Public Water Reserve No. 107 was Section 10 of the Stock Raising Homestead Act of 1916 (SRHA),¹⁷ which provided that public lands containing water holes and other bodies of water might be reserved under the Pickett Act,¹⁸ for public purposes to be specified in the orders of withdrawal.

There are very few court decisions addressing public water reserves, but those that have addressed PWR 107 have upheld water rights under some PWR 107 claims. In 1982, the Colorado Supreme Court in *U.S. v. City and County of Denver*¹⁹ found:

That [the] executive order does not expressly state an intention to reserve water in public springs or waterholes or to withdraw it from appropriation under state law. *Cf. Cappaert v. United States*, supra (express reservation of water pool by proclamation). The water court, however, found that subsequent Department of Interior regulations enacted pursuant to 43 U.S.C. § 300 reserved an amount of water minimally necessary to

¹⁷ Formerly 43 U.S.C. § 300. 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 SRHA effective October 21, 1976, but withdrawals in force on the date of enactment remained in force until specifically changed in accordance with the Act.

¹⁸ Formerly 43 U.S.C. §§ 141-143.

¹⁹ 656 P.2d 1, 31-32 (Colo. 1983).

“prevent monopolization of vast land areas in the arid states by providing a source of drinking water for animal and human consumption.”

We agree that the federal government has reserved rights to provide a watering supply for animal and human consumption. The Stock Raising Homestead Act of 1916 gave the Department of Interior authority to regulate public springs and waterholes so that no person could monopolize or control vast areas of western land by homesteading the only available water supply. (Footnote omitted.) Regulations later enacted by the Department of Interior recognized the limited domestic drinking and stockwatering purposes of the 1926 reservation. (Footnote omitted.) It is also significant that the Department of Interior, under the legislation providing for public water reserves, construed its authority as only granting control of *access* to lands withdrawn. (Footnote omitted.) The law of prior appropriation still governs the allocation of excess waters. It appears to us that the reservation documents indicate no intent to reserve the entire yield of public springs and waterholes involved here. Nothing in the statute or its legislative history indicates a congressional intent to open public springs and water holes to the many public uses the United States is now claiming.

Public water reserves began before the creation of PWR 107. In order to determine whether a PWR 107 protest claim may support a PWR 107 reserved right water claim on any particular water source, the State Engineer begins his analysis by examining the history of public water reserves in order to set forth a basic understanding of this type of federal implied reserved water right claim. Public water reserves grew out of the use of the public lands for grazing.

“It was an axiom of ‘cow country,’ “ . . . “that water controlled the range.” (Footnote omitted.) And what was true for the western range livestock industry in the late nineteenth century still holds for ranchers in the twenty-first century. Today the struggle for control of water on public lands is as fierce as it was over a hundred years ago. However, rather than pitting rancher against rancher, it is now ranchers and the federal government who vie for control and ownership of water. . . .²⁰

The first public water reserves were created in 1912 by the Department of Interior (DOI) as a means of preventing the monopolization of public rangelands by ranchers who were quickly gaining control of various streams, springs and water holes throughout the West. . . .²¹

²⁰ *THE STATE OF THE LAW: Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 68 (2001).

²¹ *Id.* at 68.

A close look at public water reserve policy reveals how it initially sought to maintain the status quo of free and unrestricted grazing on the public domain by preserving access to water needed by those who grazed livestock. At the time, however, the policy was used to assure homesteaders of water in more arid regions, preserve watering places for travelers crossing deserts, and to protect the domestic water supply for communities. (Footnote omitted.)

The issuance of Public Water Reserve No. 107 transformed public water reserve policy into a conservation measure. The withdrawal order still sought to protect ranchers and settlers from the monopolization that could occur as a consequence of private acquisition of water sources, but as of 1926 it also sought to ensure that water would be reserved to the federal government when Congress enacted legislation providing for the regulated use of the public range. . . .²²

In 1926, grazing on the public domain was open and free to all those wishing to graze livestock on those lands. It was this policy of unrestricted grazing that resulted first in the establishment of a public water reserve policy, and then the issuance of Public Water Reserve No. 107. . . .²³

In 1926, it appeared that a grazing measure might finally be enacted . . . [and i]t is in this context that the DOI decided to make a radical change to the public water reserve policy. . . . On April 17, 1926, upon the recommendation of SOI [Secretary of Interior] Work, President Calvin Coolidge signed Public Water Reserve No. 107. This withdrawal, unlike its predecessors, did not specifically identify the public lands being reserved. It was a 'blanket' withdrawal. . . .²⁴

It was a sweeping withdrawal that had significant meaning then and continues to have to this day.

The reasons behind the making of Public Water Reserve No. 107 are not all known. In sending the order to the President, SOI Work used the same justifications that had been used when the public water reserve policy was inaugurated in 1912. Work told the president:

The control of water in the semiarid regions of the west means control of the surrounding grazing areas, possibly in some regions of millions of acres, and in view of the pending bill to authorize the leasing of grazing lands upon the unreserved public domain, it is believed important to retain title to and supervision of such springs and water holes

²² *Id.* at 69.

²³ *Id.* at 70.

²⁴ *Id.* at 109-110.

on the unreserved public lands as have not already been appropriated. Private parties have used various lieu selection and scrip acts as a vehicle of acquiring small areas around these springs and water holes, thus withdrawing them from the common use of the general public, this prime essential to stock grazing, and for this reason, as well as the pendency of the grazing legislation mentioned, it is believed advisable to make a temporary general order of withdrawal. . . (Footnote omitted.)²⁵

In the months after Public Water Reserve No. 107 was signed by the President, first assistant SOI Finney explained the order on several occasions. Senator John B. Kendrick was one of the first individuals to ask for a reason why the withdrawal had been made. (Footnote omitted.) In response, Finney told the senator:

The order was designed to preserve for the general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is construed to withdraw those springs and water holes capable of providing enough water for general use watering purposes. It is not construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. . .²⁶

“As for the authority for such a sweeping withdrawal, the First Assistant Secretary pointed to the provisions of the Stock Raising Homestead Act.”²⁷ At that time the more desirable portions of the public domain, from an agricultural or grazing standpoint, had all been disposed of, and as to the less valuable and more nearly arid areas remaining, the public control of water holes in the interest of the general public was even more desirable. Also should a grazing bill be enacted affecting all or part of the public domain, it appeared it was thought to be desirable if the water holes could be retained under the same control and subject to the same use as may be provided in whatever sort of grazing law Congress may have seen fit to enact.

Passage of the Taylor Grazing Act in 1934 spelled the end to the chaos that had destroyed the public range. The purpose of the law was “to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.” (Footnote omitted.) This legislation would

²⁵ *Id.* at 110-111.

²⁶ *Id.* at 111.

²⁷ *Id.* at 113.

usher in a new era for the public domain that would significantly affect public water reserve policy.

Under the Taylor Grazing Act, the SOI was authorized to set aside eighty million acres of the remaining “vacant, unappropriated, and unreserved” public domain, exclusive of Alaska, (footnote omitted) as grazing districts. (Footnote omitted.) Under Section 3 of the law, the SOI was authorized to lease the public lands within grazing districts to “such bona fide settlers, residents, and other stock owners” under such rules and regulations as he established. (Footnote omitted.) Preference was to be given to those who lived in or adjacent to the districts who were “land owners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of the lands. . .” (Footnote omitted.)²⁸

The DOI recognized from the beginning that effective management of the Taylor Grazing Act would be, among other things, dependent upon water. (Footnote omitted.) The axiom that water controlled the range did not change with the passage of the law. This fact was recognized not only by the DOI, but by ranchers as well. Thus, after the passage of the Taylor Grazing Act, the policy of withdrawing public water reserves continued. The new law, however, brought about several changes. The first was the transfer of land classification and public water reserves responsibilities from the USGS (footnote omitted) to the newly created Division of Grazing in March 1935. (Footnote omitted.) The most important change, of course was how public water reserves were viewed. One of the rationales for making the withdrawals, particularly Public Water Reserves No. 107, was in anticipation of grazing control legislation. This occurred with the Taylor Grazing Act’s passage; now it had to be determined what role the public water reserves were to play in the administration of grazing under the provisions of that law. . .²⁹

It was not until the 1980s that public water reserves took on a renewed importance. One reason was the abandonment of the position that waters on public lands with grazing districts were protected. In 1979, the Solicitor for the DOI, Leo Krulitz, issued an opinion in which he stated “the Taylor Grazing Act did not reserve any land from the public domain, but rather authorized the Secretary to manage the public lands for grazing . . . Therefore, no reserved water rights were created by the Act.” (Footnote omitted.)

This opinion made Public Water Reserve No. 107 important again, for through it the BLM could reserve and protect federal water rights on the public lands. The importance of the measure became obvious in cases

²⁸ *Id.* at 128.

²⁹ *Id.* at 129.

like Idaho's Snake River Basin adjudication, where 11,000 water right claims filed by the BLM relied upon Public Water Reserve No. 107. (Footnote omitted.) However, despite the importance of public water reserves to the federal government, the BLM no longer has a section in its manual devoted to public water reserves. (Footnote omitted.)³⁰

PWR 107 allowed for public use of the water reserved to be in accordance with the Stock Raising Homestead Act and in aid of pending legislation. In 1979, SOI Krulitz indicated that Section 10 of the Stock Raising Homestead Act was part of a congressional plan to implement a system of stockraising homesteads in the western United States. A House Committee on Public Lands described the purpose of Section 10 of SHRA as a new section, which authorized 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 the large surrounding tracts or country, so that no person could monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.³¹ SOI Krulitz opined that it was obvious that the purpose for which public water holes and springs were withdrawn included stockwatering and human consumption (among other uses later discarded by subsequent Solicitor Coldiron and courts).³²

In 1982 the Colorado Supreme Court³³ agreed that the Stock Raising Homestead Act of 1916 gave the Department of the Interior the authority to regulate public springs and waterholes so that no person could monopolize or control vast areas of western land by homesteading the only available water supply, and the use of the water was limited to domestic drinking and stockwatering purposes.

In 1983 Solicitor Coldiron³⁴ found the reasoning of the Colorado Supreme Court to be persuasive, modified SOI Krulitz's analysis, and determined that the purposes for

³⁰ *Id.* at 136.

³¹ See, Solicitor's Opinion, M-36914, 86 I.D. 553, June 25, 1979; H.R. Rep. No. 35, Jan. 11, 1916, 64th Cong. 1st Sess.

³² See, Solicitor's Opinion, M-36914 (Supp. II), 90 I.D. 81, Feb. 16, 1983. Solicitor Coldiron found that the judicial interpretation found in the case of the *U.S. v. City and County of Denver*, 656 P.2d 1 (Colo. 1982) that the implied reservation was only applicable to "important" springs, and for the narrow purpose of human and animal consumption was consistent with the United States Supreme Court's holding in *United States v. New Mexico*, 438 U.S. 696 (1978), and that Solicitor Krulitz was wrong in his analysis that the entire yield of the source was reserved.

³³ *United States v. City and County of Denver*, 656 P.2d 1, 31-32 (Colo. 1982).

³⁴ See, Solicitor's Opinion, M-36914 (Supp. II), 90 I.D. 81, Feb. 16, 1983.

which springs and water holes were withdrawn were relatively narrow and specific, and only included stockwatering and human consumption on important springs and water holes. And, in 1998, the Supreme Court of Idaho³⁵ held that PWR 107 provided a valid reservation of water rights by the federal government for the limited purpose of stockwatering by permittees under the Taylor Grazing Act. The Idaho Supreme Court found that the United States had persuasively argued that such a reservation of stock water was needed to ensure the perpetual use of water for stockwatering purposes by whichever member of the public happened at any time to have the grazing permit for the lands containing the relevant springs and water holes. The United States argued that if the water was available for private appropriation individuals could monopolize the water rights for their permanent exclusive use, thereby precluding stockwatering access to those holding the grazing permits.³⁶

The principle purpose of public water reserves, unless otherwise specified in the order making the withdrawal, was the protection of watering places for livestock. This point was made by First Assistant Secretary Edward Finney in 1927 in a memorandum to SOI Work. Finney, who probably understood public water reserve policy better than any individual in the DOI, noted that the basic authority for making public water reserves was Section 10 of the Stock Raising Homestead Act of 1916, and the wording seemed "to indicate that the primary, if not only, purpose [of public water reserves] was to provide watering places for livestock." (Footnote omitted.)³⁷

The State Engineer finds the precise federal purpose to be served under a PWR 107 claim is stockwatering and human consumption by grazing permittees and the federal purpose would be frustrated without the water.

VI.

Even though Public Water Reserve No. 107 is described as a blanket withdrawal, the State Engineer must still determine whether the reservation applies to the specific source claimed. State Engineer Morros, in State Engineer's Ruling No. 3219,³⁸ held that

³⁵ *United States v. Idaho*, 959 P.2d 449 (Idaho 1998), cert. denied, 143 L.Ed2d 233 (1999).

³⁶ *United States v. Idaho*, 959 P.2d at 452-453.

³⁷ *THE STATE OF THE LAW: Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 144 (2001).

³⁸ State Engineer's Ruling No. 3219, dated July 26, 1985, official records in the Office of the State Engineer.

subject to valid existing rights, the reservation applies to a spring or water hole that was in existence on April 17, 1926, or to a spring or water hole that came into existence through natural causes after April 17, 1926, and before October 21, 1976,³⁹ with a reserved date of the date the spring or waterhole came into existence. Further, that the reservation was a general, continuing withdrawal and it was not necessary that the source have been identified or designated by an official finding to accomplish the withdrawal.⁴⁰ The State Engineer does not agree it is a continuing withdrawal, but rather it was a blanket withdrawal as of April 17, 1926.

Historical documents indicate PWR 107 did not withdraw all water sources. The circular instructions issued by the GLO relating to the withdrawal stated that the order:

Was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes. (Footnote omitted.)⁴¹

In 1979 SOI Krulitz⁴² found that for PWR 107 purposes, the term "spring" means a discrete natural flow of water emerging from the earth at a reasonably distinct location. The term "water hole" meant a dip or hole in the earth's surface where surface or ground water collects and which may serve as a watering place for man or animals. SOI Krulitz found that the Executive Order only applied to "important springs," and does not withdraw artificially developed sources of water or man-made structures. SOI Krulitz agreed that the reservation was not to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals, and that it withdraws only those sources capable of providing enough water for general use for watering purposes. The

³⁹ Date of Federal Land Policy and Management Act.

⁴⁰ State Engineer's Ruling No. 3219 at 10.

⁴¹ *THE STATE OF THE LAW: Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 117 (2001).

⁴² See, Solicitor's Opinion, M-36914, 86 I.D. at 553, 588 (June 25, 1979).

Department of Interior's most recent pronouncement on springs and waterholes was codified in 43 C.F.R. § 2311.0-3 (a) (2) (1980):

"2. Purpose of Withdrawal. The Executive Order of April 17, 1926, was designed to preserve for general public use and benefit unreserved public lands containing water holes or other bodies of water needed or used by the public for watering purposes. It is not therefore to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. It withdraws those springs and water holes capable of providing enough water for general use for watering purposes."

The DOI also took a position of not including all water sources that clearly supplied more water than a family needed. In his letter to California's Division of Water Rights Commissioner Spry noted that the Order of April 17, 1926, was "not intended to affect springs and water-holes which are manifestly not used or needed presently or in the future for public watering purposes. (Footnote omitted). . ." "He also excluded watering places which were inaccessible to the public. There was one other significant limitation to the effect of Public Water Reserve No. 107: It was held not to include perennial streams. This interpretation of the withdrawal order came from the DOI's solicitor."⁴³

The State Engineer finds PWR 107 claims can only be made on important springs capable of providing enough water for general use for watering purposes, and the reservation is not to be construed as applying to or reserving from homestead or other entry lands having small springs or water holes affording only enough water for the use of one family and its domestic animals. The State Engineer finds the spring must have a discrete, natural flow of water emerging from the earth at a reasonably distinct location. It cannot be a seep or a wet spot. The State Engineer finds if the water source is inaccessible it will not qualify as a PWR 107. The State Engineer finds the reservation is not to be construed as applying to a source that only becomes important through artificial development or man-made structures.

⁴³ *THE STATE OF THE LAW: Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Env'tl. L. 67, 118-119 (2001).

VII.

In order to determine if a spring is important it must first be determined if the source flows a quantity greater than that needed for a single family and its domestic animals.

What constitutes only enough water for one family and its domestic animals? The chief of the Division of water rights in California's Department of Public Works posed this question to the commissioner of the GLO soon after Public Water Reserve No. 107's issuance. In a response endorsed by First Assistant SOI Finney, Commissioner William Spry stated:

As made clear by Circular 1066, the withdrawal is not intended to affect 'lands having small springs or water-holes affording only enough water for the use of one family and its domestic animals' It may be said, further, that the withdrawal is not intended to affect springs and water-holes which are manifestly not used or needed presently or in the future for public watering purposes. But as these questions are matters of fact, to be determined, each upon its own merits, it follows that no fixed rule may be set as to the minimum amount of water necessary to except them from the operation of the withdrawal order It is probable, however, that in most cases, the amount of water, in gallons, necessary for a family and its domestic animals, would be based largely, if not entirely upon the rules adopted by the various States within which the waters occur. (Footnote omitted.)⁴⁴

Nevada State Engineer Morros held that a public water reserve claim does not operate on sources of water that flow under a minimum threshold of 1,800 gallons per day, as this is the quantity determined under Nevada water law as being sufficient for a single family and its domestic animals (a domestic unit).⁴⁵ In the Monitor Valley Adjudication,⁴⁶ Nevada State Engineer Turnipseed referenced State Engineer Morros' decision, but determined that the quantification 1,800 gpd is not a requirement to qualify as a PWR 107. However, he did not establish a minimum flow that a spring source must have to qualify as a PWR 107, but it could not be a seep or wet spot.

⁴⁴ *Id.* at 118.

⁴⁵ State Engineer's Ruling No. 3219, dated July 26, 1985, official records in the Office of the State Engineer.

⁴⁶ Order of Determination, In the Matter of the Determination of the Relative Rights in and to the waters of Monitor Valley – Southern Part (140-B), Nye County, Nevada.

In the hearing on these applications, the BLM took the position that it did not have to quantify its claim of reserved right, because the claim was not being addressed in a general adjudication; therefore, it presented very little evidence in support of its protest claim. However, the BLM was protesting these specific applications on the grounds of a PWR 107 claim, and in reference to some springs said there was water available for appropriation above its stated reserved claim,⁴⁷ even though the claims were not quantified. The reluctance of the BLM to quantify its claims does not preclude the State Engineer from acting on the subject applications. In fact, the State Engineer finds that NRS § 533.365 requires that he consider the merits of the protest claims. The State Engineer finds that NRS § 533.370(7) requires that he make findings of fact and conclusions of law regarding the protest claims.

In addressing the question as to how much water would be needed by a single family and its domestic animals one needs to place the question relative to the time the executive order was created. To survive in the wilds of Nevada in 1926, the average family probably consisted of 5 to 7 members. These people would need drinking water, bathing, cooking and cleaning water. They would have most likely had several horses, several cows, chickens and possibly other domestic animals. They would have had to have a garden of perhaps an acre or so and that garden would have needed a flow of water sufficient to grow crops within the average four month growing season in Nevada. In some areas of the State, they would have had to have some type of meadow or pasture irrigated for cutting hay for the domestic animals to survive the winter and that also would require a quantity of flow sufficient to irrigate said pasture in the same approximate four month growing season. Such a spring would require a fairly substantial flow. The State Engineer finds this summary supports State Engineer Morros' determination that the source had to flow in excess of 1,800 gallons per day, at a minimum, which is the statutory amount established for a single-family dwelling and its domestic animals under Nevada water law.

The State Engineer finds since the protestant presented no substantial evidence as to whether these spring sources are important sources, as to what quantity is needed by a single family and its domestic animals for general watering purposes, as to why these

⁴⁷ Transcript, pp. 52 and 58.

sources should qualify for a claimed PWR 107 reserved right source, the BLM did not provide substantial evidence to support its claim requesting denial of the proposed applications.

VIII.

In this case, the BLM also asserted that animal consumption included wildlife. In 1979, SOI Krulitz "was of the opinion that other purposes included 'water for growing crops and sustaining fish and wildlife' and to provide for 'flood, soil, fire and erosion control,' contending that such control 'was essential to protect the public and to allow new patentees and settlers on the public domain to make a viable living in this arid and semi-arid region of the Nation.'" (Footnote omitted.)⁴⁸

Historical evidence fails to support Krulitz's contentions [of the purposes of a public water reserve.] (Footnote omitted.) While it is true that many public water reserves were made to assist settlers, this was to provide them with water for domestic uses. Soon after the first public water reserves were set aside in 1912, the DOI took the position that lands that had agricultural value were not to be withdrawn. Furthermore, if water from public water reserves was to be for "watering crops," that implies diversion of water for irrigation. One of the intents of making the withdrawals was to prevent appropriation of water through diversion. . . . Nor were any public water reserves set aside for wildlife purposes. In fact, when asked to cooperate in the improvements of springs on the public lands for wildlife purposes, the GLO contended that it had no authority and that any improvement had to be for stock watering purposes. (Footnote omitted.)⁴⁹

Other than the Krulitz opinion,⁵⁰ nothing construing the documents that created PWR 107 suggests an intent to reserve water for wildlife. The Supreme Court of Colorado considered that the reserving documents could fairly be read to only reserve water for "animal and human consumption."⁵¹ Nowhere in the reserving documents does there appear Congressional or Presidential concern for reserving water for wildlife under PWR 107.

⁴⁸ *THE STATE OF THE LAW: Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 143 (2001).

⁴⁹ *Id.* at 143.

⁵⁰ 86 I.D. at 571.

⁵¹ *United States v. County of Denver*, 656 P.2d 1, 31 (Colo. 1982).

Accordingly, the State Engineer finds that the prescribed narrow reading of those documents would exclude wildlife as a purpose of the reservation and the purposes for which water was impliedly reserved under PWR 107 are limited to human and stockwatering consumption by grazing permittees. However, under NRS § 533.367, wildlife that customarily uses the water must continue to have access to it. The State Engineer finds wildlife watering is not a primary purpose of a PWR 107 and no use should be recognized for wildlife watering under a claim of PWR 107.

IX.

The State Engineer finds since the protestant presented no evidence as to what is the minimum quantity of water necessary for a PWR 107 claim; the BLM did not provide substantial evidence in support of its request that the applications be denied.

X.

The State Engineer finds in determining whether a claim of a PWR 107 reserved right may have validity, the following criteria should be considered:

1. The federal reserved right created by PWR 107 has a priority date of April 17, 1926, the date of the Executive Order, and only applies to a spring or waterhole that was in existence on April 17, 1926.
2. It is not necessary that the source has been identified or designated by an official finding to accomplish the withdrawal.
3. PWR 107 claims cannot divert or displace a water right vested under Nevada law prior to April 17, 1926.
4. PWR 107 claims do not apply to small springs or waterholes affording only enough water for the use of one family and its domestic animals. It withdraws only those important springs and waterholes capable of providing enough water for general use for watering purposes.
5. PWR 107 claims can only be made on springs that have a discrete natural flow of water emerging from the earth at a reasonably distinct location. It does not apply to a seep or wet spot, and the spring must flow more than 1,800 gallons per day.
6. PWR 107 claims do not act upon a source of water that only becomes important through artificial development or man-made structures.

7. PWR 107 claims are to serve the federal purpose of human and stockwatering consumption for grazing permittees.
8. The quantity of water reserved from a particular source is the minimum quantity required to prevent monopolization of the water and to meet the primary purpose of the reservation.
9. PWR 107 claims do not apply to springs or waterholes that are inaccessible to domestic livestock or are of unsatisfactory quality to satisfy the need for human and stockwatering consumption.
10. PWR 107 claims do not pertain to the watering of wildlife.
11. Not more than one PWR 107 claim can be made within any 40-acre parcel and any two PWR 107 claims must be more than ¼ mile apart.

XI.

Application 38638 for the use of the waters of Gallagher Spring was protested by the BLM on the grounds the spring is on public lands administered by the BLM and the spring is used by cattle, wild horses, and deer on a yearlong basis. At the hearing, the BLM witness was asked about the protest grounds and indicated that the grounds of the protest were not clear.⁵²

Although the BLM witness was unable to clarify the grounds of the protest, it appears that Application 38638 was protested, in part, on the grounds that water from the spring is needed by wildlife. Nevada water law requires that sufficient water must be retained at the spring under NRS § 533.367 to support a customary use of the water for wildlife.

The State Engineer finds that sufficient protection exists for wildlife use at Gallagher Spring in accordance with NRS § 533.367. The State Engineer also finds that the BLM was unable to clarify the grounds of its protest or offer any testimony or evidence in support of the protest.

XII.

Application 40296 is for the use of the waters of Tonkin Basin Spring No. 1. Tonkin Basin Spring No. 1 is described as a large grassy spring area with water flowing to a natural channel below the spring area. Nevada Division of Water Resources

⁵² Transcript, p. 67.

personnel measured the flow of the spring at 35.9 gallons per minute (gpm) in July of 1999. The measurement was taken using a small weir in the natural channel below the spring area. The source is on public land. The BLM measured the spring on May 20, 2004, by estimating the flow at the down gradient end of the spring area at approximately 4 gpm. The BLM further described the spring as a saturated area approximately 1.5 acre in size with heavy growth of meadow and aquatic vegetation. There appeared to be active use of the spring by wildlife and past use by cattle. Human consumption at the spring was described as unlikely without some improvement to the spring area such as a pipe or spring drop box.⁵³

Noting that the estimate of flow could be much higher, even taking the lower estimate of 4 gpm made by the BLM, this converts to a daily flow 5,760 gallons per day. Thus, the spring would have sufficient flow to qualify as flowing more than 1,800 gallons per day making it possible that it could be considered an important spring. However, if water from the spring flows more than ¼ mile it would flow outside the 40-acre parcel, thus, the purpose of preventing monopolization of the water source is not met.

The State Engineer finds that Tonkin Basin Spring No. 1 may meet the criteria for establishing a PWR 107 claim; however, the validity of the PWR 107 claim must be determined by an adjudication. The State Engineer finds the BLM did not present any evidence as to what the minimum quantity might be that is necessary under a PWR 107 claim, but finds that is probably not a very large quantity of water. Considering the flow of this spring, there is water in excess of that minimum flow available for appropriation under this application.

XIII.

Application 40297 applies to use the waters of Tonkin Basin Spring No. 2, which is described as an unimproved small spring area. In July of 1999 Nevada Division of Water Resources personnel estimated the flow of the spring at 2 gpm. The source is on public land. The BLM estimated the flow of the spring at the springhead to be an average estimate of 1.5 gpm, and this converts to a daily flow 2,160 gallons per day. Thus, the spring would have sufficient flow to qualify as flowing more than 1,800 gallons per day, making it possible that it could be considered an important spring.

⁵³ Transcript, pp. 24, 25, 26, 30 and 31.

The State Engineer finds that Tonkin Basin Spring No. 2 may meet the criteria for establishing a PWR 107 claim; however, the validity of the PWR 107 claim must be determined by an adjudication. The State Engineer finds the BLM did not present any evidence as to what the minimum quantity might be that is necessary under a PWR 107 claim, but finds that is probably not a very large quantity of water. Considering the flow of this spring, there is water in excess of that minimum flow available for appropriation under this application.

XIV.

Application 40298 applies to use the waters of Rooster Canyon Springs No. 1, which is described as a developed spring with a 2-inch pvc pipe delivering water to a metal trough. Nevada Division of Water Resources personnel measured the flow using a bucket and stop watch at 22.5 gpm, in July of 1999. The source is on public land. The BLM measured the water flow into the first trough, where the pipe ends, at about 20 gpm. The flow at the springhead was estimated at 10 gpm, and this converts to 14,000 gallons per day. Thus, the spring would have sufficient flow to qualify as flowing more than 1,800 gallons per day, making it possible that it could be considered an important spring. Further, the BLM noted it would not claim the full flow of the spring under a PWR 107 claim; therefore, there is water available for appropriation. However, if water from the spring flows more than ¼ mile it would flow outside the 40-acre parcel, thus, the purpose of preventing monopolization of the water source is not met.

The State Engineer finds that Rooster Canyon Springs No. 1 may meet the criteria for establishing a PWR 107 claim; however, the validity of the PWR 107 claim must be determined by an adjudication. The State Engineer finds the BLM did not present any evidence as to what the minimum quantity might be that is necessary under a PWR 107 claim, but finds that is probably not a very large quantity of water. Considering the flow of this spring, there is water in excess of that minimum flow available for appropriation under this application.

XV.

Application 40299 applies to use the waters of Rooster Canyon Springs No. 2, which is described as an undeveloped spring, tributary to an unnamed stream, which in turn is tributary to Denay Creek. Nevada Division of Water Resources personnel visited

the site in July of 1999, but a flow measurement was not taken. The source is on public land. The BLM describes the spring area as covering about 1.5 acres in area on an alluvial terrace bench, a stream bench. There are two small auxiliary springs in addition to the main springhead. The flow at the main springhead was estimated at about 0.5 cfs (~224.4 gpm) on May 25, 2004, and this converts to 323,136 gallons per day. Thus, the spring would have sufficient flow to qualify as flowing more than 1,800 gallons per day, making it possible that it could be considered an important spring under a PWR 107 claim. But there is a question as to whether this flow could be considered as creating its own perennial stream. The spring flows into a channel down the Rooster Canyon drainage. The flow goes about two miles down through the old Tonkin Ranch area and continues into the lower drainage pasture area past the ranch to the east. The BLM witness was asked if the water eventually flows down to Denay Creek and the answer was affirmative. However, the witness also indicated that he did not believe the stream system was perennial. The water usage at the spring was described as the same as that at the Tonkin Springs, livestock and wildlife.⁵⁴

The State Engineer finds that Rooster Canyon Springs No. 2 may not meet the criteria set forth in this ruling of a PWR 107 claim; however, the validity of the PWR 107 claim must be determined by an adjudication. The State Engineer finds the BLM did not present any evidence as to what the minimum quantity might be that is necessary under a PWR 107 claim, but finds that is probably not a very large quantity of water. Considering the flow of this spring, there is water in excess of that minimum flow available for appropriation under this application.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵⁵

⁵⁴ Transcript, pp. 54-60.

⁵⁵ NRS chapter 533.

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁵⁶

- 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 stockwatering is a beneficial use, there is unappropriated water at the sources, and the applicant is the current range user under the federal grazing allotment; therefore the approval of Applications 38638, 40296, 40297, 40298 and 40299 would not conflict with existing rights or threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes the purpose for which water was reserved under PWR 107 is general public use limited to human and stockwatering consumption by grazing permittees and if a source has a legitimate PWR 107 claim, on it, it is only the minimal quantity of water necessary to accomplish the purpose of the reservation.

V.

The State Engineer concludes the protest filed under Application 38638 states no specific issue to be addressed and therefore is without merit.

The State Engineer concludes there is unappropriated water at the sources and the proposed uses will not conflict with existing rights. The State Engineer concludes that the granting of Applications 38638, 40296, 40297, 40298 and 40299 would not conflict with any minimal quantity of water that may be reserved by PWR 107, if such reserved rights exist at the sources.

⁵⁶ NRS § 533.370 (5).

VI.

The statutory requirements mandated under NRS § 533.367 assure that the granting of new appropriations of water from spring sources will not interfere with the customary use of the water by wildlife. The State Engineer concludes that any permit approved under Applications 38638, 40296, 40297, 40298 and 40299 would be issued in accordance with NRS § 533.367, thereby allowing sufficient water to be retained at the source.

The State Engineer concludes the PWR 107 claim does not reserve water for wildlife.

VII.

The State Engineer concludes the Protestant did not prove its claims of PWR 107 rights on these sources and there is insufficient evidence in this record to determine if the water sources described under Applications 38638, 40296, 40297, 40298 and 40299 meet the criteria of a PWR 107. However, the extent and validity of the reserved claims may only be determined after a general adjudication of all water rights, if and when such proof of claims are filed and adjudicated. If the PWR 107 claims are determined to be valid, it shall be recognized as such and any permit granted would be subject to the prior reserved rights. The State Engineer concludes the Protestant failed to show that the proposed use of water would interfere with its unquantified and unproven PWR 107 claim.

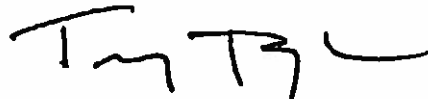
VIII.

The purpose of the Executive Order creating PWR 107 was to prevent competing range users from monopolizing the public range through the control of isolated and important springs. With the advent of grazing allotments controlled by the BLM, such competition has been eliminated. Under the current system, only authorized range users possessing a grazing permit issued by the BLM are authorized on designated allotments. The State Engineer concludes that to issue a stockwater right to an authorized range user is consistent with the primary purpose of use of water under a PWR 107 claim.

RULING

The protests to Applications 38638, 40296, 40297, 40298 and 40299 are hereby overruled and said applications are approved subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tracy Taylor', with a long horizontal flourish extending to the right.

TRACY TAYLOR, P.E.
State Engineer

TT/SJT/TW/jm

Dated this 27th day of

April, 2007.