

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF APPLICATIONS 38203)
AND 38204 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF UNNAMED SPRINGS IN)
PARADISE VALLEY, HUMBOLDT COUNTY,)
NEVADA.)

RULING

3280

GENERAL

I.

Application 38203 was filed on May 17, 1979, by Keith A. and Jean Thomas to appropriate 0.10 c.f.s. of water from an Unnamed Spring for irrigation and domestic purposes on 960 acres of land within Section 6, T.42N., R.40E., M.D.B.&M., and the W1/2 NW1/4, SW1/4, S1/2 SE1/4 Section 31, T.43N., R.40E., M.D.B.&M. The point of diversion is described as being within the NE1/4 NW1/4 Section 21, T.43N., R.40E., M.D.B.&M.¹

Application 38203 was protested² on May 7, 1980, by the United States of America, Forest Service, on the following grounds:

"Water has been used by stock in the area since 1890. Keith and Jean Thomas currently share the cattle and horse allotment with four other permittees. We do not feel it is in the interest of the other permittees or the Forest Service to

¹ Public record in the office of the State Engineer under Application 38203.

² Public record in the office of the State Engineer under Application 38203. At the public hearing before the State Engineer on July 26, 1984, the protestant, U.S. Forest Service, withdrew their protest to Application 38203. See transcript, Vol. II, p. 8.

have an individual control the water where several permittees are using the same source.

II.

Application 38204 was filed on May 17, 1979, by Keith A. and Jean Thomas to appropriate 0.10 c.f.s. of water from an Unnamed Spring for irrigation and domestic purposes on 960 acres of land within Section 6, T.42N., R.40E., M.D.B.&M. The point of diversion is described as being within the NE1/4 NW1/4 Section 21, T.43N., R.40E., M.D.B.&M.³

Application 38204 was protested⁴ on May 7, 1980, by the United States of America, Forest Service, on the following grounds:

"Water has been used by stock in the area since 1870. Keith and Jean Thomas currently share the cattle and horse allotment with four other permittees. We do not feel it is in the interest of the other permittees or the Forest Service to have an individual control the water where several permittees are using the same source.

III.

A public hearing in the matter of Application 38203 was held before the State Engineer on July 26, 1984, in Winnemucca, Nevada.⁵ The State of Nevada, Sierra Club and Wildlife

³ Public record in the office of the State Engineer under Application 38204.

⁴ See Footnote 3.

⁵ Transcript of public hearing before the State Engineer is available as public record in the office of the State Engineer.

Federation were granted standing as intervenors in the matter of Application 38203 and other applications before the State Engineer.⁶ Evidentiary presentations by the applicants and the Attorney General were introduced into the record in support of and in opposition to the pending applications. The State Engineer took administrative notice of various matters as more specifically set forth below.⁷

IV.

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" statute⁸ and his assertion that the granting of water 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

⁶ Intervention was sought by and granted to the State of Nevada, Sierra Club and Wildlife Federation. See transcript, Vol. I, p. 7 and Vol. II, p. 6.

⁷ 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, and Department of Agriculture, U.S. Forest Service, as well as any other public records available in the office of the State Engineer. See transcript of public hearing, July 26, 1984, pp. 10 and 12; transcript of public hearing, July 24, 1984, p. 9.

⁸ NRS 321.596 to 321.599, inclusive, (1981).

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. The Attorney General intervenes in the matter of Applications 38203 and 38204 in support of the granting of the applications.

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.⁹

V.

At the public hearing, the U. S. Forest Service withdrew

⁹ 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).

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. 2d 170, 104 S. Ct. 193 (1983).

their protest to Application 38203.¹⁰

VI.

The State Engineer made an on site field investigation of the sources of water under Applications 38203 and 38204 on October 16, 1985.¹¹

FINDINGS OF FACT

I.

The field investigation determined that the sources of water described and identified as Unnamed Springs under Applications 38203 and 38204 contribute to and are tributary to Buttermilk Creek which is a tributary to Indian Creek as set forth under the Little Humboldt River Decree.¹² The Little Humboldt River Decree further describes Indian Creek as a major tributary to the Little Humboldt River.¹³

II.

The applicant is the successor in interest to certain decreed water rights set forth under the Little Humboldt River adjudication and decree. The decree provides, under Finding XIII:¹⁴

¹⁰ See Footnote 2.

¹¹ Report of Field Investigation is public record in the office of the State Engineer under Applications 38203 and 38204.

¹² In the Matter of the Determination of the Relative Rights in and to the Waters of the Little Humboldt River and Its Tributaries in Humboldt and Elko Counties - in the Sixth Judicial District Court, State of Nevada, In and For the County of Humboldt, No. 3157.

¹³ Id., Finding V, p. 8.

¹⁴ Id., p. 10.

"That all claimants herein having water for irrigation are entitled to use such water for stockwatering and domestic purposes. The right to the diversion and use of water for stockwatering and domestic purposes is to be continued by such claimants and such water users at any time during the year, and such diversions shall be according to the dates of priorities of such claimants, and such use is to be limited to the quantity of water reasonably necessary for stockwatering and domestic purposes; that for the stockwatering purposes the amount to be so diverted and used is not to exceed the rate of one-tenth of a cubic foot per second for each one thousand head of stock, said water being delivered on the lands; that during the irrigation season, the amount of water so diverted for irrigation purposes shall not be increased by any amount to be used for stockwatering and domestic purposes, but the quantity allotted and diverted for irrigation during the irrigating season includes water for stockwatering and domestic purposes." (Emphasis added.)

III.

The decree further provides under Finding XV:¹⁵

"That the waters of the stream system are fully

¹⁵ Id., p. 10.

appropriated and there is no surplus of water for irrigation during the irrigating season. No finding is made on the question of the storage of water." (Emphasis added.)

IV.

The grounds of the protests are without merit since the sources of water under Applications 38203 and 38204 are tributary to the Little Humboldt River and fully appropriated as set forth under the decree. The decree specifically provides that only claimants recognized under the decree are entitled to the use of waters thereof. Any user of water from the sources described herein must hold decreed water rights described and set forth under the decree.¹⁶

V.

The applicant is entitled to full use of the waters of the source set forth and described under Applications 38203 and 38204, subject to the terms and conditions of the Little Humboldt River Decree. The place of use described and set forth under Applications 38203 and 38204 is the same as described under certain rights set forth under the Little Humboldt River Decree. These lands are not entitled to receive water from the Little Humboldt River and tributaries in excess of the right described and set forth in the decree.¹⁷

¹⁶ Id., p. 75.

¹⁷ Id., p. 34, Proof No. 0604; p. 51, Proof Nos. 0665 and 0665A.

VI.

The applicants may, pursuant to their decreed rights, perpetuate or enhance the flow of the sources described in Applications 38203 and 38204 provided that such action does not affect or interfere with the availability and use of water from the system by other decreed rights.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.¹⁸

II.

There is no evidence that the protestant under Application 38204 holds ownership of any decreed water rights on the Little Humboldt River or tributaries.

III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:¹⁹

- 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.

¹⁸ NRS Chapters 533 and 534. Re: In the Matter of the Determination of the Rights of the Little Humboldt River, p. 75.

¹⁹ NRS 533.370.

IV.

The sources of water set forth and described under Applications 38203 and 38204 are tributary to the Little Humboldt River System.

V.

The Little Humboldt River and tributaries have been adjudicated and the limit and extent of the relative rights determined.

VI.

The Court has determined that the waters of the Little Humboldt River and tributaries are fully appropriated.

VII.

The applicant under Applications 38203 and 38204 is a successor in interest to decreed water rights set forth under the Little Humboldt River Decree and appurtenant to the lands described under the place of use of the subject applications.

VIII.

The protest to Application 38203 has been withdrawn.

IX.

The protest to Application 38204 must be overruled on the grounds it is without merit and that the protestant lacks standing since he holds no existing rights on the Little Humboldt River or tributaries.

X.

Applications 38203 and 38204 must be denied on the grounds that there is no unappropriated water in the source and the granting thereof would interfere with and adversely affect existing rights.

RULING

The protest to the granting of Application 38204 is herewith overruled on the grounds of lack of merit and standing. Applications 38203 and 38204 are herewith denied on the grounds that there is no unappropriated water in the source.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/bl

Dated this 9th day of
December, 1985.