

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

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

IN THE MATTER OF THE DETERMINATION  
OF THE RELATIVE RIGHTS IN AND TO  
ALL WATERS OF DIAMOND VALLEY,  
HYDROGRAPHIC BASIN NO. 10-153,  
ELKO AND EUREKA COUNTIES, NEVADA.

**EUREKA COUNTY'S OBJECTIONS TO BLM's PUBLIC  
WATER RESERVES IN PRELIMINARY ORDER OF DETERMINATION**

EUREKA COUNTY, by and through its undersigned counsel, ALLISON MacKENZIE, LTD., pursuant to NRS 533.145 and the Letter from the State Engineer dated August 31, 2018, files its Objections to the Bureau of Land Management's ("BLM") Public Water Reserves in the Preliminary Order of Determination issued in this matter on August 30, 2018. The following Objections are verified by the Affidavit of Jake Tibbitts, Natural Resource Manager for the Eureka County Department of Natural Resources, agent for EUREKA COUNTY, filed herewith and incorporated herein by reference. EUREKA COUNTY is the owner of record of water rights claimed by Proofs of Appropriation Nos. V04501-V04510 and numerous groundwater rights in the Diamond Valley Hydrographic Basin. In support of this Objection, EUREKA COUNTY provides the Field Investigative Report and Analysis of the BLM's Public Water Reserves in the Preliminary Order of Determination attached hereto as **Exhibit "A"** and incorporated herein by reference.

In the event objections are filed which may impact the findings of the State Engineer with respect to the BLM's claims of PWRs made in this proceeding, Eureka County requests that it have the opportunity and reserves its right to review such objections so as to be able to provide evidence and respond to them in the Administrative Hearing.


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STATE ENGINEERS OFFICE  
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Respectfully submitted this 7<sup>th</sup> day of November, 2018.

ALLISON MacKENZIE, LTD.  
402 North Division Street  
Carson City, NV 89703  
Telephone: (775) 687-0202  
Email: [kpeterston@allisonmackenzie.com](mailto:kpeterston@allisonmackenzie.com)

By:   
KAREN A. PETERSON, Esq.  
Nevada State Bar No. 366  
  
Attorneys for EUREKA COUNTY

ALLISON MacKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: [law@allisonmackenzie.com](mailto:law@allisonmackenzie.com)

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of **ALLISON MacKENZIE, LTD.**, Attorneys at Law, and on this date, I caused to be delivered the foregoing document(s) as follows:

The Honorable Jeff Sessions  
Attorney General  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

USDI Bureau of Land Management  
1340 Financial Blvd.  
Reno, NV 89502

USDI Bureau of Land Management  
3900 E. Idaho Street  
Elko, NV 89801

USDI Bureau of Land Management  
50 Bastian Road  
Battle Mountain, NV 89820

Beck Family Trust  
289 La Costa Avenue  
Dayton, NV 89403

James E. & Vera L. Baumann  
P.O. Box 308  
Eureka, NV 89316

Daniel S. Venturacci  
8500 Schurz Highway  
Fallon, NV 89406

Bailey Family Trust, et al.  
P.O. Box 29  
Eureka, NV 89316

David Little  
Little Paris Sheep Company  
HC30, Box 346  
Spring Creek, NV 89815

Bingham Revocable Living Trust,  
dated April 8, 1999  
340 Juniper Hill Road  
Reno, NV 89519

Norman C. & Kindy L. Fitzwater  
P.O. Box 15  
Eureka, NV 89316

D Bar Land & Livestock LLC  
David C. & Leora A. Betschart  
HC 62 Box 62141  
Eureka, NV 89316

Chad D. & Rosie J. Bliss  
P.O. Box 585  
Eureka, NV 89316

Merkley Ranches Inc.  
HC 30, Box 400-17  
Spring Creek, NV 89815

DATED this 7<sup>th</sup> day of November, 2018.

  
NANCY FONTENOT

4820-8736-6266, v. 1

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402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com

# Exhibit "A"

## **Field Investigative Report and Analysis of the BLM's Public Water Reserves in the Preliminary Order of Determination in Support of Eureka County's Objections**

1. While Eureka County supports efforts to expedite the Diamond Valley Adjudication, this should not come at the expense of reviewing and verifying the claims thoroughly and with great care and accuracy. The general approach by the State Engineer in making a determination on the BLM Public Water Reserves 107 (PWR 107) appears to have been merely to accept the BLM's Public Water Reserves at face value with very little, if any, review or verification. We argue that proper and thorough review and analysis would have determined that most, if not all, of the 27 PWRs the State Engineer found as valid are in actuality not valid. This has created many issues and erroneous findings in the Preliminary Order of Determination that could have been easily avoided if a more thorough review had been performed for ALL BLM PWR 107 claims.

As the Preliminary Order of Determination (POD) acknowledges, any valid PWR 107 is not just simply a reservation of an amount of water. Valid PWRs are land reservations reserving either the 40 acre land subdivision in which the PWR spring lies, in cases of surveyed land, or one-quarter of a mile of land around every PWR spring, in cases of unsurveyed land. The approach by the State Engineer in making determinations on PWRs through simple flow rate analysis has major implications on the multiple-uses of public land and in effect locks up thousands of acres of public land from many multiple uses including non-metalliferous mining, oil and gas exploration and development, rights of way, and range improvements, among other uses.

The State Engineer did not complete the necessary field work or evidence review to justify most if not all of the PWRs found to be valid. It appears that there were no field investigations whatsoever by the State Engineer's office on many of PWR claimed springs nor a thorough investigation of the other water rights that we have identified that exist on many of the same sources. Further, there appears to have been no review or analyses of General Land Office (GLO) records, BLM Master Title Plats and other Plat maps, existing rights and infrastructure recorded through deeds, etc. to justifiably conclude that either the 40 acre land subdivision in which the PWR spring lies, in cases of surveyed land, or one-quarter of a mile of land around every PWR spring, in cases of unsurveyed land, were actually "vacant" or "unappropriated" as required in the 1926 Executive Order. We have identified that two of the PWR springs found to be valid by the State Engineer are on private land and many others already fully appropriated with water rights prior to 1926.

2. While we acknowledge, understand, and agree that sending back claims for corrections is appropriate and NRS 533.125(3) and (4) allow this, we do not believe it is appropriate for “coaching” from the State Engineer’s office to BLM about how to amend a PWR claim in order for it to meet the PWR “standard.” In the State Engineer files associated with the PWR claims, there was a June 15, 2016 email with attachment from the State Engineer’s office to the BLM that identified “a few thing you may want to address” and “maybe some ideas on how to fix them.” We do not argue that it was inappropriate to send back claims for typographical errors, corrections in legal descriptions, and corrections on supporting maps. However, some of the unsolicited “ideas” provided to BLM that we argue were not simple “corrections” and were inappropriate include:

1. **Claims that do not have enough diversion claimed and not enough flow measured in the field. These Claims were filed without a domestic component. You may want to file amended Claims to add this domestic component to bring the claimed diversion rate up to at least 0.0028cfs.**
2. **Claims that do not have enough diversion claimed but have enough flow measured in the field. These Claims were filed without a domestic component. You will want to file amended Claims to add this domestic component to bring the claimed diversion rate up to at least 0.0028cfs.**

This email provided an avenue for BLM to amend claims in a way that allowed the State Engineer to find many to be valid. Vested claimants on sources that also had BLM PWRs could just have easily been allowed to “add a domestic component” or increase the diversion rate to increase their claims.

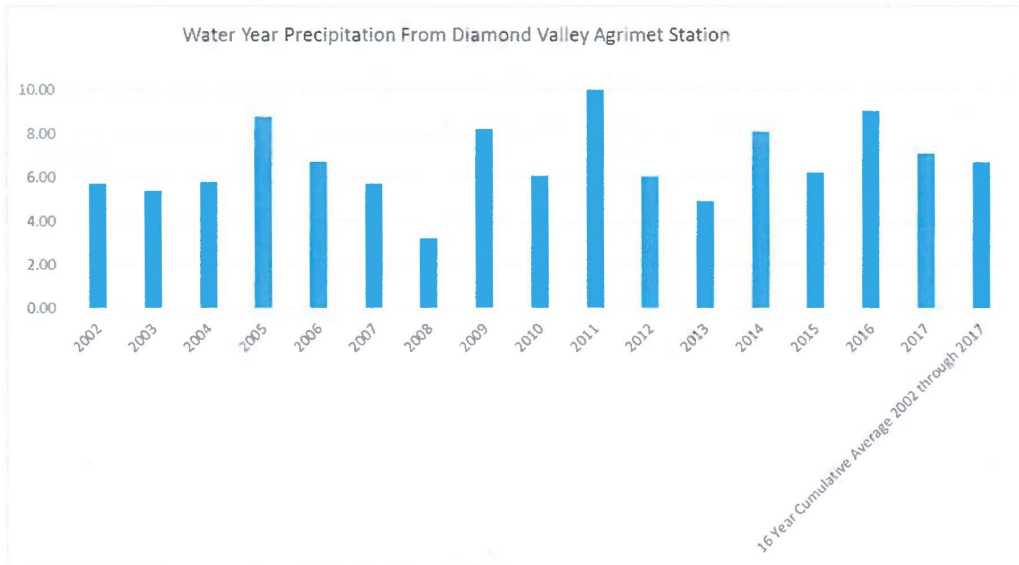
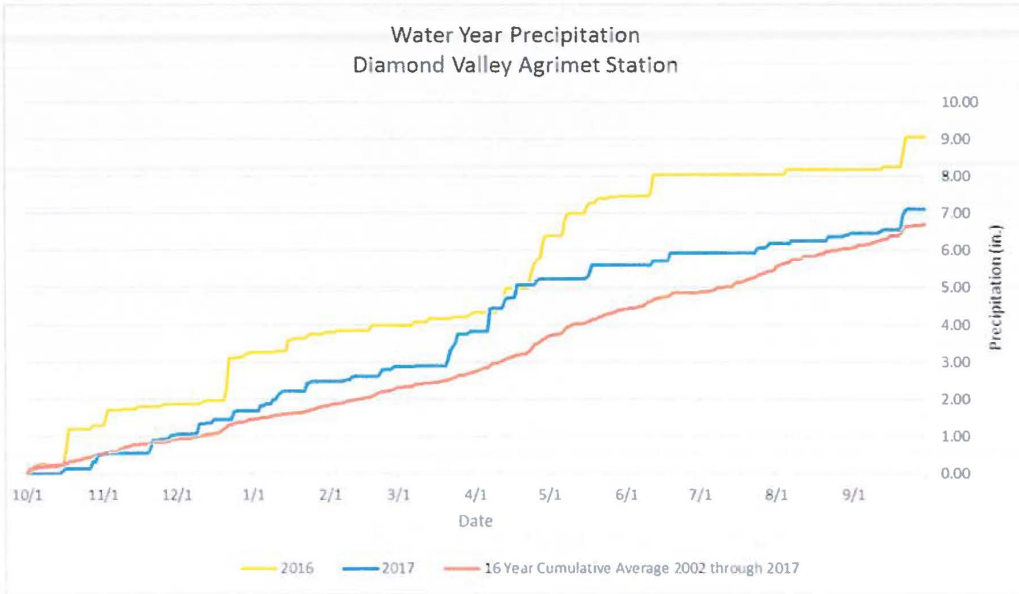
3. In the files of the State Engineer for the BLM PWR claims, it appears the BLM filed the required supporting maps after the deadline provided by the State Engineer in Order 1266. Order 1266 required “claimants to the waters of said Diamond Valley must file their Proofs of Appropriation...***on or before the 31<sup>st</sup> day of May, 2016...***” (emphasis added). NRS 533.115(3) states “The proof of appropriation submitted by the claimant ***must be accompanied by a map prepared,*** except as otherwise provided in subsection 4, in accordance with and depicting any information required pursuant to the requirements of subsections 3 and 4 of NRS 533.100” (emphasis added). The BLM letter dated June 1, 2016 and stamped “Received” by the State Engineer’s office on June 1, 2016 at 4:30 pm appears to be the transmittal letter or supporting maps stating “BLM is filing maps to accompany Reserved and Vested water rights on the subject order pursuant to a notice to file claims issued by the State Engineer on October 16, 2015.” Any maps supporting BLMs PWR claims received after May 31, 2016 are not in accordance with Order 1266 and must be rejected.
4. While we do not object to the findings on the PWRs that were found to not be valid, the same analysis mentioned above needs to be completed by the State Engineer to bolster the finding that these springs are not PWRs due to other factors in addition to rejecting the claim based on a low flow rate.

5. Our review has found the lands where PWR springs are located found valid (and those found not valid) have never been withdrawn because the BLM land status maps, BLM Resource Management Plan (and amendments), Master Title Plat Maps, indicate that these lands were eligible for homestead or Desert Land Entry. Most of the private land in Diamond Valley was acquired through homestead entry of Desert Land Entry (DLE). As the State Engineer is aware, there was somewhat of a land rush in Diamond Valley and much of the land in Diamond Valley became private land in the 1950s through 1960s. Through personal communication with landowners in Diamond Valley that developed and received land patents through DLE in the 1960s and 1970s, the maps available to these potential DLE claimants from Department of Interior for Diamond Valley during the 1950s through the 1970s did not depict any land in all of Diamond Valley being reserved from DLE.
6. In this POD, the State Engineer adopted and incorporated the analysis from his Ruling 5729 (p. 284). Yet, the State Engineer did not apply the complete analyses necessary to the PWR claims in this Adjudication to address the findings in Ruling 5729. For instance, in many circumstances, the following findings from Ruling 5729 (pp. 18-19) were not analyzed in the POD.
  - a. "PWR 107 claims cannot divert or displace a water right vested under Nevada law prior to April 17, 1926."
  - b. "PWR 107 claims can only be made on springs that have a discrete natural flow of water emerging...at a reasonable distinct location. It does not apply to a seep or wet spot..."
  - c. "PWR 107 claims do not act upon a source of water that only becomes important through artificial development or man-made structures."
  - d. 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"
  - e. "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."

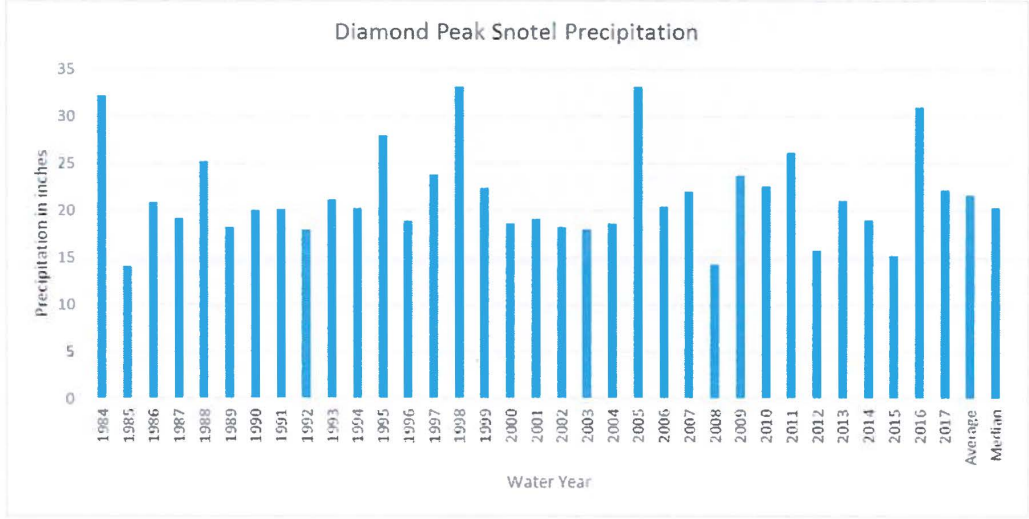
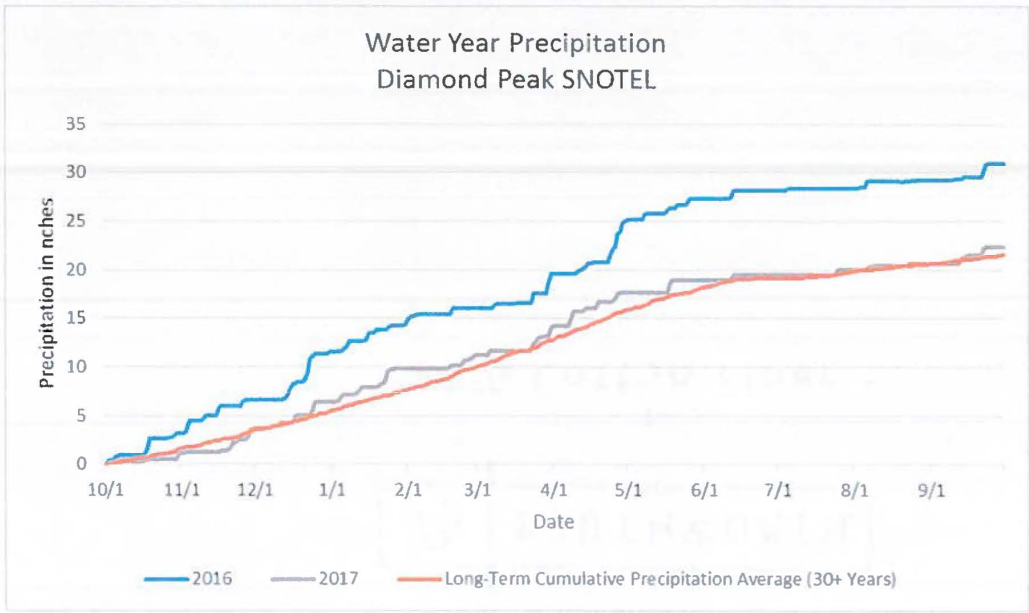
If the State Engineer completed analyses consistent with these findings, it would have been found that many of the PWRs found to be valid are, in fact, not valid.

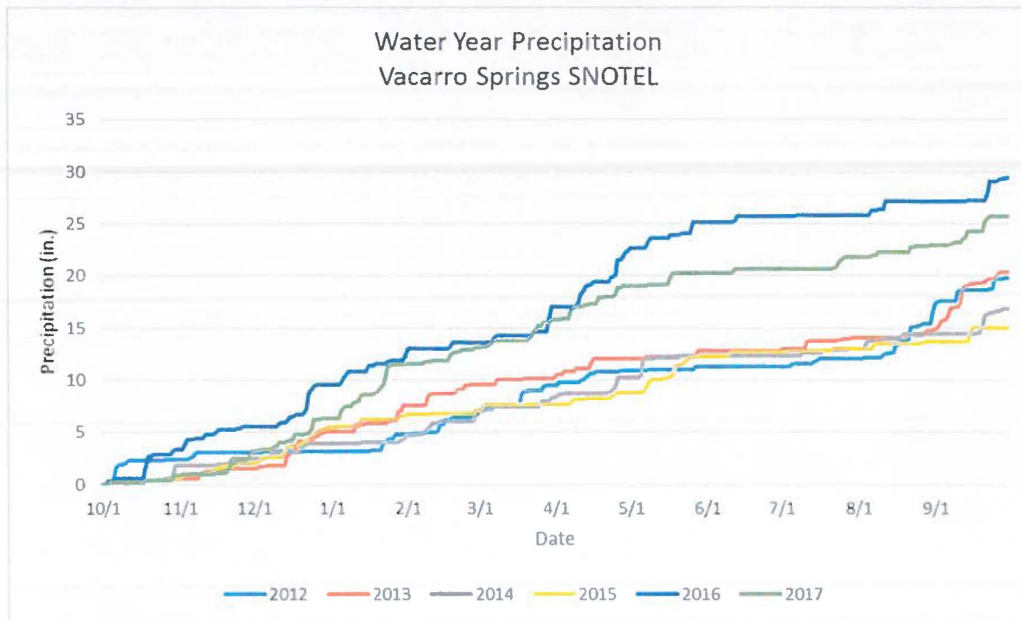
7. It appears the State Engineer took BLM's flow measurements at face-value to determine if enough flow was available to provide for a PWR. BLM's flow measurements were measured in April and May 2016. Runoff flows were high as this was one of the wettest springs (and years) we have had especially during the timeframe BLM was doing field measurements and BLM was likely measuring runoff as a component of the total flow, in many cases. Precipitation data from local sources, including the two nearby NRCS SNOTEL sites, Vacarro Springs (ID 1137) and Diamond Peak (ID 443), and the Diamond Valley USBR AgriMet Station, amongst others, irrefutably show that precipitation for water year 2016 leading up

and during the timeframe of BLM's measurements was well above average. See the figures below:









8. The PWR 107 checklist (attached) used by BLM as the tool to determine whether or not a water source could be a PWR 107 was first developed and directed for use in two 1983 BLM Nevada State Office instructional memoranda, IM 83-454 and IM 83-331. Based on this BLM memoranda, BLM should not even apply for any spring for PWR 107 that does not meet the criteria in the checklist. The State Engineer should use BLM's own rules and guidance to assist in the analysis of valid PWRs. We assert that none of the PWR 107 claims meet the standard in the BLM checklist and BLM, based on its own policy, was precluded from even filing these PWRs. The BLM checklist uses the following criteria to assess the PWR 107 eligibility of springs and waterholes. BLM asks whether:

- 1) Private control of the spring or waterhole would monopolize the public resources;
- 2) The source supplies a sufficient quantity of water for public watering purposes;
- 3) The spring or waterhole came into existence prior to October 21, 1976;
- 4) A private water right does not exist on this source;
- 5) The land on which the source is located was not acquired after April 17, 1926;
- 6) The source is not artificially developed (i.e., well or reservoir); and
- 7) The source is important. One or more of the following circumstances must be applied for the source to be important.
  - a. The spring or waterhole is used or needed by the public for watering purposes;
  - b. The spring or waterhole is located so that it is of utility and benefit to the general public;
  - c. The availability of the spring or waterhole for public watering purposes affects the use of surrounding lands, water uses and users, habitat, and/or inhabitants of the surrounding lands;

- d. The distance to the next nearest PWR or available source of water is such that there is no readily available, suitable alternative source of water; and
- e. Competing private interests could obtain water rights under State law for this water source if it were not reserved.

BLM's own policy requires that each-and-every item 1-6 above and at least one circumstance in Item 7 from their checklist apply for BLM to even file a PWR claim. We assert that none of the PWRs found valid by the State Engineer meet BLM's own policy.

9. The purpose of PWR 107 was to assure 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 and for the general public purposes of human and domestic animal (stock) consumption. It was put in place prior to the Taylor Grazing Act (TGA) to ensure water would be available for stockwatering and human consumption and to ensure against monopolization of water for purposes other than stockwater and human consumption. The historical PWR 107 documentation makes it clear that the concern about privatizing and monopolizing the public resource was related to these springs being privatized through homestead entry and actually becoming private land. Nevada Water Law is clear that all water belongs to the public where NRS 533.025 states that "The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." Water rights owners have just that, a water right. But the ownership of the water itself belongs to the public. As such, private interests cannot monopolize the public resource. Further, the TGA required grazing permittees to have associated "base property" that is a required basis for having a grazing permit. The base property is land and water that provide the needs for livestock raising in tandem with the public land grazing allotment. This required attachment of private water rights for stockwatering ensures that these waters on public land are used for the primary purpose which PWR 107 was intended to meet – livestock watering on the public domain. Since 1934 when the TGA was passed there have been multiple other Acts of Congress that have further refined land management including the National Environmental Policy Act of 1969 (NEPA) and the Federal Land Policy and Management Act of 1976 (FLPMA). In today's circumstance, there is no longer a threat of monopolization counter to livestock and human watering when 1) Homestead entry is no longer authorized, 2) the range is settled under grazing permits through the TGA, 3) FLPMA ensures lands be managed for sustainability and multiple-use, 4) NEPA sets an extremely high bar for permitting of the necessary facilities and infrastructure that would allow a person to sever springs from public land, and 5) there are dozens of other documented water sources and water rights in the allotments that provide the express needs for stockwatering and human use.
10. A field investigation was undertaken by Eureka County Natural Resources Department on October 16, 18, 19, and 20, 2018 to measure spring flows for each PWR claim to determine

if the flows claimed by the BLM are continuously available. The County's reconnaissance provided spring flow measurements taken in the Fall of the year that are more representative of base flow than measurements without runoff taken in the Spring and yield a better assessment of the available resource to determine sustained flows for PWRs. Given field conditions and the short amount of time available between the date of the Preliminary Order (August 30, 2018) and the deadline for filing objections to the Preliminary Order (November 7, 2018) only 23 of the 27 springs were visited. However, as will become apparent, the measurements made in the Spring of 2016 over-state the amount of water available from the source year round.

The location of each claim, based on coordinates provided by the BLM, was compared with those from the Coordinates provided by the BLM along with their claims. In many instances there was good correlation between the BLM coordinates and the field locations of the springs, but not for each and every spring.

The spring sources claimed by the BLM are located in the mountain block and are associated with local, as opposed to regional, watersheds and their flows are known by the residents of Eureka County to vary seasonally. Many are ephemeral, ceasing to flow by the end of summer or early fall. As such, there is often insufficient flow to fulfill claims of vested water rights on the same source, much less a Public Water Reserve which by its very nature is junior to vested claims and must be available year-round. Some of the spring sources claimed by the BLM also comprise sources of stream flow that has been appropriated.

#### **Data Collection Methodology**

The coordinates (in UTM, meters; NAD 1983) of each of the PWR claims of interest provided in the Preliminary Order were imported to a handheld Trimble GeoXH Global Navigation Satellite System (GNSS) data receiver. Private land ownership was also imported into the Trimble to assess whether any claims to Public Water Reserves might have been mistakenly filed on springs located on private land. Locations were also imported to a Garmin InReach Explorer+ handheld GPS receiver as a backup to the Trimble receiver. USGS topographic maps were also imported to the InReach Explorer+ to aid with overland navigation to the claim locations. It also recorded a trace of travel to/from the location of the BLM coordinates. The field location of each PWR claim was compared to the BLM's coordinates and descriptions of the sources prepared by it (Ibid.). Any discrepancies between observed conditions at the site and those provided in the Preliminary determination were noted.

Flow rates were determined by measuring the time to collect a measured volume of the spring discharge. Each visit was photographed to document the conditions on the ground at the time the measurements were made.

## Reporting

The location of each PWR claim based on coordinates provided by the BLM is depicted below on an aerial image obtained from <https://us0.inreach.garmin.com/Map> sourced from Digital Globe, USDA (2018). These images depict the BLM's reported location of the source (a larger blue circle), location of additional points of interest near each source (green circle) and a trace of the travel around each site (depicted as a blue line with small blue circles). Digital photographs of each site are provided. Lastly, and most importantly, the flow rates for each spring measured during the October 2018 reconnaissance are documented and compared with measurements made by the BLM in April and May 2016.

## Summary

A table comparing the flow rates measured in October 2018 with the previous BLM measurements is provided as Table 1. From the Table, it is apparent that:

- Of the 23 sites where the BLM claimed a Public Water Reserve and were field checked by Eureka County, two (2) are located on private property.
- Of the sites field checked by Eureka County in October 2018, the spring was either "dry" or wet, but there was no measureable flow at 6 sites.
- The measured flow at all but two sites was less than that reported by the BLM when they visited the sites in April and May 2016. The reasons behind these differences include:
  - Some springs are seasonal in nature, sourced by small, local recharge areas, and the source becomes depleted over the course of the year.
  - Some of the measurements may have had a component of surface runoff in addition to discharge from the spring.
  - The table prepared by the BLM may contain typographical errors.

**Table 1. Summary of Spring Measurements by Eureka County and BLM.**

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PWR	BLM Coordinates		Reconnaissance		Date	time	volume			time			BLM Q		
	11N_UTM_X	UTM_Y	UTM_X	UTM_Y			qt	gal	ml	gal	sec	min			gpm
RD4233	591280	4368042			10/16/2018	10:36									no spring at BLM coordinates
			591283	4368036			1.5		0.375	30	0.5	0.75			Bennet Spring west of BLM coordinates
			591281	4368048				0.5	0.5	30	0.5	1			at trough
												1.75	11		total
RD4236	597299	4377569	597157	4377551	10/16/2018	15:00	1.8		0.45	30	0.5	0.9			hill-side seep 465 ft west of BLM coordinates
			596398	4374971			1		0.25	30	0.5	0.5			hillside seep 633 ft west of BLM coordinates
												1.4	1.8		total
RD4237	597419	4374282	597419	4374282	10/16/2018	12:45			0			0	1.75		Observation made at the BLM coordinates
RD4238	597401	4374426	597401	4374426	10/16/2018	12:55			0			0	1.25		Observation made at the BLM coordinates
RD4239	596715	4374864	596658	4374900	10/16/2018	12:15			250	0.066	15	0.25	0.066		
			596398	4374971				0.5	0.5	30	0.5	1			total
												1.07	6		
RD4241	596959	4379014	596953	4379016	10/16/2018	13:40			0			0	2.5		spring is approximately 20 feet west of BLM coordinates. water standing in divots, but no flow
RD4244	597663	4372923	597661	4372926	10/16/2018	13:21	1		0.25	60	1	0.25	1.25		
RD4249	596584	4387573	595867	4387570	10/19/2018	12:25	3.5		0.875	15	0.25	3.5			flow in channel downstream of source
			595505	4387418					5	15	0.25	20			Pipe outflow to pond
												23.5	3		total
RD4250	599050	4385347	599041	4385354	10/19/2018	11:12	1.1		1.1	60	1	1.1	2		Measured at inflow to tank. Actual spring location is unknown.
RD4251	599971	4384153	599972	4384157	10/18/2018	16:15	3		0.75	12	1	0.75	12		Measured just downstream of the trough to capture flow to trough and flow that bypasses trough.
RD4252	599806	4383392	599849	4383339	10/19/2018	17:30	6		1.5	8	0.13	11.25	47.3		Actual spring location differs from BLM coordinates. located on private property
			599789	4383385											Measured in the stream channel approx. 279 ft NW of actual location.
RD4253	598516	4381929	598516	4381929	10/18/2018	14:50		0.49	0.505	30	0.5	1.01	2.35		BLM coordinates ok.
			598490	4381917											Measured downstream at a location where measurement could be made.
RD4254	598795	4381835	598795	4381835	10/18/2018	15:10		0.505	0.505	30	0.5	1.01			BLM coordinates ok. Difficult to measure at source.
			598727	4381911				1	1	20	0.33	3			measured downstream of source
			598647	4381968								4.01	2.5		measured farther downstream to capture additional discharge
												0	2.5		total
RD4255	598097	4379955	598104	4379934	10/18/2018	13:15			damp			0	2.5		damp but no flow
RD4256	598002	4378578	597939	4378568	10/14/2018	16:30		0.5	0.5	60	1	0.5	9.4		BLM coordinates are approximately 210 feet east of the actual spring source.
			597911	4378562											Measurement made at outflow from pond, approx. 83 ft. WSW of spring
RD4257	599647	4395593													
RD4258	599649	4392998	599646	4393004	10/19/2018	14:55	3.5		0.875	2	0.03	109			source appears to be approx. 27 feet NNW of BLM Coordinates
			599626	4392992											Measured in the channel approximately 78 ft WSW of source.
RD4259	597453	4390408	597453	4390408	10/19/2018	13:50			0			0	3		BLM coordinates seem to be OK
RD4260	599229	4407979	599229	4407979	10/20/2018	9:35			0			0	>2		BLM coordinates seem to be OK
RD4261	598418	4406758	598418	4406758	10/20/2018	10:05			0			0	>2		BLM coordinates seem to be OK
RD4262	599550	4401202													
RD4263	600239	4404780	600246	4404816	10/20/2018	12:05			270	0.07128	8	0.133333	0.53	4.7	No spring at the BLM coordinates. Spring located approx. 126 ft NNW of BLM coordinates.
			600235	4404827											Flow measured in channel approx. 51 ft NNW & below the spring.
RD4264	600584	4404957	600584	4404957	10/20/2018	13:40			dry			0	2.5		Since no spring was observed at the BLM coordinates, can't determine accuracy.
RD4270	599300	4410899	599300	4410899	10/20/2018	14:56			dry			0	>2		Since no spring was observed at the BLM coordinates, can't determine accuracy.
RD4271	597502	4426660													
RD4277	599025	4429149													
			599048	4429201	10/20/2018	16:50			puddle			0.001	42		BLM coordinates mark a dry ephemeral stream channel, not a spring.
															Spring is located 180 ft NNE of BLM coordinates.
RD4280	591132	4452827													

Notes  
 a. source = 2016 Battle Mountain, Diamond Valley, Basin 158, PUBLIC WATER RESERVES

PWR	11N_UTMX	UTM_Y	Date	time	volume	gal	ml	gal	time	min	gpm	BLM Q
					qt				sec			gpm (a)
R04233	591280	4368042	10/16/2018	10:36	1.5			0.375	30	0.5	0.75	
						0.5		0.5	30	0.5	1	
											1.75	11
R04236	597299	4377569	10/16/2018	15:00	1.8			0.45	30	0.5	0.9	
					1			0.25	30	0.5	0.5	
											1.4	18
R04237	597419	4374282	10/16/2018					0			0	1.75
R04238	597401	4374426	10/16/2018	12:55				0			0	1.25
R04239	596715	4374864	10/16/2018				250	0.066043	15	0.25	0.26	
						0.5		0.5	30	0.5	1	
											1.26	6
R04243	496959	4373014	10/16/2018	13:40				0			0	2.5
R04244	597663	4372923	10/16/2018	13:21	1			0.25	60	1	0.25	1.25
R04249	595884	4387573	10/19/2018	12:25	3.5			0.875	15	0.25	3.5	
								5	15	0.25	20	
											23.5	3
R04250	599050	4385347	10/19/2018	11:12		1.1		1.1	60	1	1.1	2
R04251	599971	4384153	10/18/2018	16:15	3			0.75	12	1	0.75	12
R04252	599806	4383392	10/18/2018	17:30	6			1.5	8	0.13	11.25	47.3
R04253	598516	4381929	10/18/2018	14:50		0.49		0.505	30	0.5	1.01	2.35
R04254	598795	4381835	10/18/2018	15:10		0.505		0.505	30	0.5	1.01	
						1		1	20	0.33	3	
											4.01	2.5
R04255	598097	4379955	10/18/2018	13:15				damp			0	2.5
R04256	598002	4378578	10/16/2018	16:30		0.5		0.5	60	1	0.5	9.4
R04257	599647	4395593										
R04258	599649	4392998	10/19/2018	14:55	3.5			0.875		2	0.03	109
R04259	597453	4390408	10/19/2018	13:50				0			0	3
R04260	599229	4407979	10/20/2018	9:35				0			0	>2
R04261	598418	4406758	10/20/2018	10:05				0			0	>2
R04262	599550	4401202										
R04263	600239	4404780	10/20/2018	12:05			270	0.07128	8	0.133333	0.53	4.7
R04264	600584	4404957	10/20/2018	13:40				dry			0	2.5
R04270	599300	4410899	10/20/2018	14:56				dry			0	>2
R04271	597502	4426660										
R04277	599025	4429149	10/20/2018	16:50				puddle			0.001	42
R04520	591132	4452827										

Notes

a. source: 2016 Battloe Mountain, Diamond Valley, Basin 153, PUBLIC WATER RESERVES

This effort is further documented below in the analysis of each individual PWR spring at issue.

11. Each of the PWRs found to be valid by the State Engineer are individually analyzed below.

**R-04233**

***Eureka County Field Reconnaissance***

BLM description: "Spring Complex, at least 3 springs expressions, all flow into a stock pond. There is a trough but it is nonfunctional."

- The source is not artificially developed (i.e., well or reservoir) – the source has been extensively developed through excavation at the source, spring collection gallery, piping, ditch digging, and stock troughs.

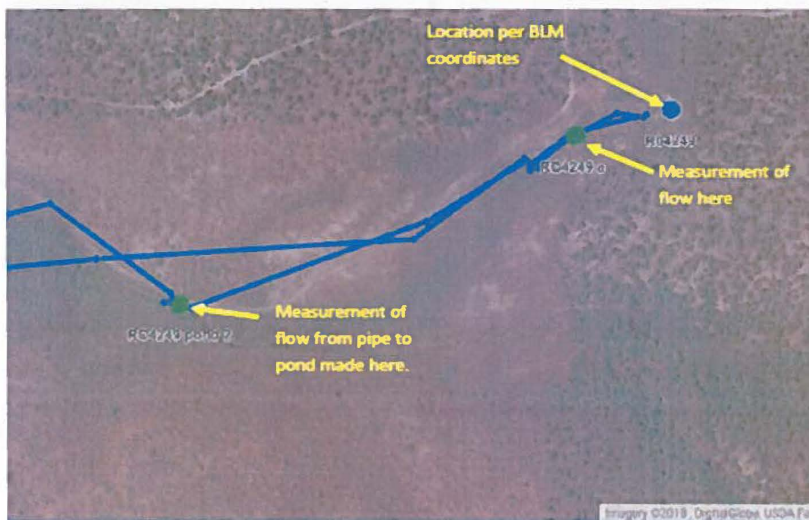
**R-04249**

***Eureka County Field Reconnaissance***

**R04249**

**Coreales Spring**

BLM description: "Spring head is fenced for about 50 meters, riparian vegetation is developed within fence."



Aerial image of R04249 site.

Eureka County Field Reconnaissance Date/Time: 10/19/18 12:25 hrs

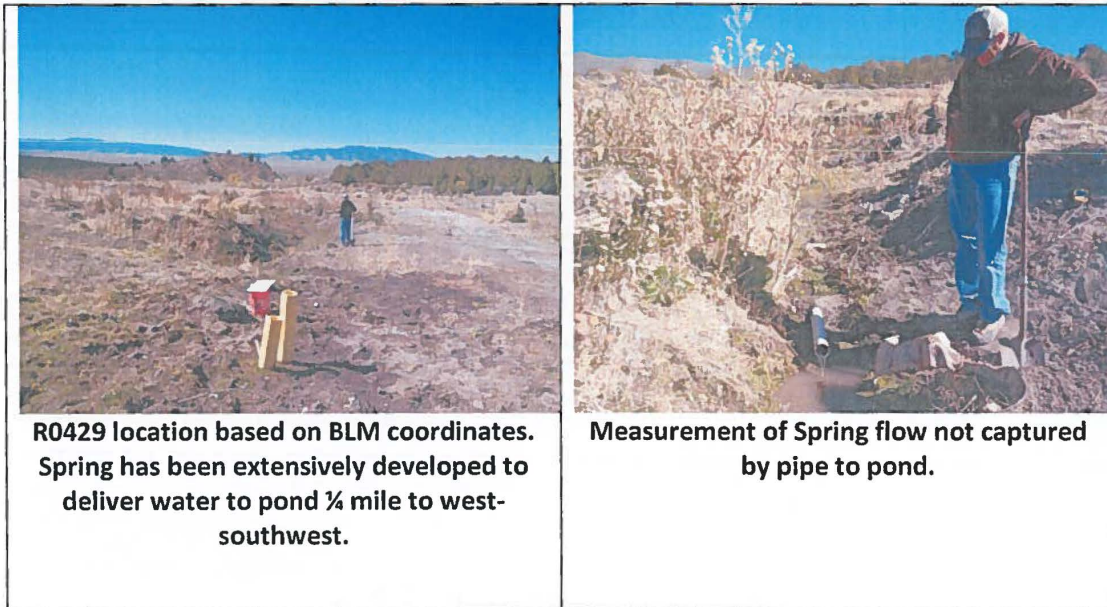
**Site description**

The spring as located by BLM is a few feet beyond the boundary between public land and private property. Extensive spring development has taken place at the source, including remnant of a reservoir at the source, extending into the private property. Water is piped approximately one-quarter mile west-southwest to a pond. A small portion of the spring discharge flows overland west of the source.

**Spring flow**



The discharge from the spring was measured at two locations – in the channel approximately 250 feet west of the location depicted by the BLM and at the outfall of the pipe at the pond approximately ¼ mile to the west-southwest. Flow was measured at 3.5 gpm in the channel near the source and 20 gpm at the outfall to the pond, for a total of 23.5 gpm. In contrast, the BLM reported a flow of 3 gpm on May 16, 2016. Clearly, the spring development has captured flow in excess of the spring’s natural discharge.



***Prior Right Fully Appropriates the Spring and Flow Rate Is Not Enough for Prior Right Let Alone PWR***

There are discrepancies in the Preliminary Order of Determination on this spring. On page 291, the State Engineer used BLM’s flow measurements of this spring, Coreales, on May 16, 2016 at 3.0 gpm and found that “if the water is available on a year-round basis” would be “0.0067 cfs, 4.83 afa, and 4,320 gpd” or enough to be a PWR. On this same page, the State Engineer stated that “There are no other water right claims on this source.” But, this is the same source as Certificate 43 (Application 1937) with a priority date of January 25, 1911, more than fifteen years prior to PWR 107. This water right is for domestic, stockwatering, and irrigation at a diversion rate of 0.43 cfs. The irrigation portion of this right is for 126.48 acre-feet per season (afs) and the domestic and stockwatering portion of this right are in addition to this 126.48 afs. This water right is for the waters of Preston Creek in which the spring under R-04249 is part of.

This finding by the State Engineer that PWR R-04244 is valid is arbitrary and incorrect based on multiple facts: 1) higher-than-average precipitation and run-off that inflated the flow under

BLM's measurement and consideration of flow measurements taken by others; and 2) a prior right, Certificate 43, appropriates all of the flow.

It appears that there were no field investigations completed by the State Engineer's office as there were no State Engineer staff field notes with flow measurements in the State Engineer files for R-04249.

BLM measured the spring flow on May 16, 2016 at only 3.00 gpm. BLM failed to identify for the State Engineer that the spring area is only a few feet beyond the boundary of private property on which the water immediately flows. Extensive spring development has taken place at the source by the current and prior water rights holder. See the map associated with Application 1937 that identifies a reservoir immediately adjacent to the spring where all the water of the spring was previously impounded before being piped. Remnants of this reservoir still remain today.

BLM did not identify that most of the water is actually captured and piped approximately one-quarter mile west-southwest to a pond/reservoir on private property. A small portion of the spring discharge expresses at the source. It appears that BLM only measured this small portion that is not captured in the pipe. On October 16, 2018, Eureka County Department of Natural Resources and Contract Hydrogeologist correctly measured the flow at two locations – in the channel approximately 250 feet west of the GPS location in the BLM spreadsheet and at the outfall of the pipe at the pond approximately ¼ mile to the west-southwest. Flow was measured at 3.5 gpm in the channel at the source and 20 gpm at the outfall to the pond, for a total of 23.5 gpm. This equates to 0.052 cfs, well below the certificated amount of 0.43 cfs. So even with a flow much higher than what BLM measured, there is not enough flow to satisfy the preexisting certificated right. Also, based on the conditions of the spring development outlined above, there is no way that BLM could have obtained a flow measurement at the GPS location provided in their spreadsheet. The only location available to actually measure any of the flow at the spring that is not captured in the pipe is at the location 250 feet west of the BLM GPS point where Eureka County measured.

***Land Is Not "Vacant" Or "Unappropriated" As Required In 1926 Executive Order***

The spring is identified by the BLM PWR claim and the POD description as being in SE ¼ NW ¼ of Section 3, T20N, R54E. This is correct, for the most part, but some of the spring discharge area also exists in the adjacent 40 acres subdivision just to the north, Lot 3 of Section 3, T20N, R54E. The spring development area tied to the prior certificated water right is in both 40 acre subdivisions. SE ¼ NW ¼ of Section 3, T20N, R54E (and also Lot 3 of the same section) are not "vacant" or "unappropriated" and were not in 1926. As noted in the maps associated with the water right Certificate 43 that are records of the State Engineer, in 1911, and when this right was certificated, there were identified private reservoirs, ditches, and development on these 40 acre subdivision. Further, a review of the General Land Office (GLO) records for this 40 acre subdivision reveal GLO survey and survey notes from 1905 that identify the spring, a ditch from

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the spring to the main stem of Preston Creek, reservoir, a "House" on the adjacent 40 acre subdivision, and a fence around the entire homestead, and roads and trails. This area was not reserved from Homestead Entry because the infrastructure to eventually complete the homestead patent was included extensively on the entire Section 3 including the 40 acres in question. These infrastructure and rights-of-way prove that the 40 acres in question and each of the adjacent 40 acres can in no way be "vacant" or "unappropriated." These are rights of way established on this 40 acres under Revised Statute (RS) 2477 for travel and RS 2339 and RS 2340 easements for water storage and rights-of-way for water conveyance (ditches, dams, pipelines, etc.) including the ditches mentioned above. This is in addition to no BLM land status maps, BLM Resource Management Plan (and amendments), and Master Title Plat Map indicating that these lands were reserved from homestead or Desert Land Entry.

Further, the patent for the private land on which this water is appurtenant, Patent No. 394049, in 1914 granted "all the rights...and appurtenances, of whatsoever nature, thereunto belonging...subject to any vested and accrued water rights for...agriculture, or other purposes, and rights to ditches and reservoirs used in connection with such water rights...." The water and 40 acres in question could not have been reserved at the source since 12 years prior to the the Executive Order, a patent was issued by the United States to land in which the water flowed and is appurtenant under a right with associated ditches and reservoirs, etc., in the 40 acres in question.

***All State Engineer Findings under Ruling 5729 and Other Previous Orders Not Met***

The finding that "PWR 107 claims cannot divert or displace a water right vested under Nevada law prior to April 17, 1926" is not met because the flow of this spring is insufficient to even satisfy the associated certificated right.

The finding that "PWR 107 claims do not act upon a source of water that only becomes important through artificial development or man-made structures" is not met because there has been substantial artificial development and man-made structures put in at this source to cross the threshold to being "important." This includes excavation at the source, extensive spring collection gallery, piping, ditch digging, and reservoir building.

The finding that "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" was not met because first, the State Engineer or the BLM did not complete an analysis of the quality of the source; and second, the spring has been fenced off from the public and grazing allotment since at least 1905 as depicted in the GLO survey. The area is still fenced off from the public lands grazing allotment today and remains inaccessible to livestock. Based on the evidence, this spring has been continually fenced off for over 100 years from livestock ranging on public lands.

***BLM PWR Checklist Criteria Not Met***

BLM's own policy was not met and should have precluded BLM from filing on this spring. The following PWR criteria based on BLM's own policy were not met:

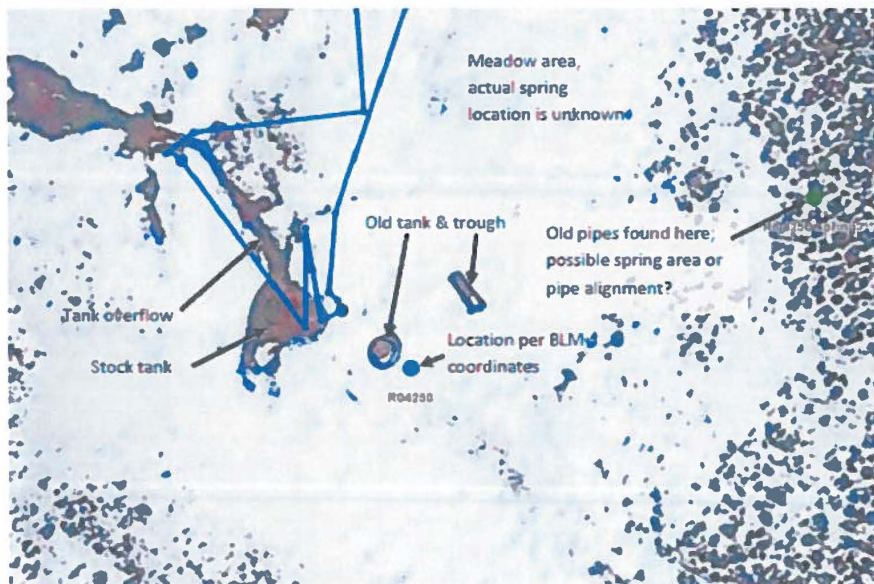
- Private control of the spring or waterhole would monopolize the public resources – there are dozens of stockwater rights available on the grazing allotment.
- The source supplies a sufficient quantity of water for public watering purposes – as documented above, the spring flows are insufficient to provide enough water for public watering purposes let alone the prior vested right on this source.
- A private water right does not exist on this source – a private, prior right exists on this source.
- The source is not artificially developed (i.e., well or reservoir) – the source has been extensively developed through excavation at the source, extensive spring collection gallery, piping, ditch digging, and reservoir building

#### **R-04250**

#### ***Eureka County Field Reconnaissance***

#### **R04250**

BLM description. "3 meadows lead to a piped trough which then leads to an overflow stream."



Aerial image of R04250 site.

Eureka County Field Reconnaissance Date/Time: 10/19/18 11:12 hrs

#### **Site description**

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Field Investigative Report and Analysis of the BLM's Public Water Reserves in the Preliminary Order of Determination in Support of Eureka County's Objections

**Attachment to  
Field Investigative Report and Analysis of the BLM's  
Public Water Reserves in the Preliminary Order of  
Determination in Support of Eureka County's Objections**

Public Water Reserve (PWR 107) Checklist

Source Name: \_\_\_\_\_

Source Location: \_\_\_\_\_

Project #: \_\_\_\_\_

Allotment: \_\_\_\_\_

1. Private control of this spring or waterhole would monopolize the public resources. \_\_\_\_\_

2. The source supplies a sufficient quantity of water for public watering purposes.  
(The specific quantity may vary seasonally because of variations in  
consumptive use requirements.) \_\_\_\_\_

3. The spring or waterhole came into existence prior to October 21, 1976. \_\_\_\_\_

4. A private water right does not exist on this source. \_\_\_\_\_

5. The land on which the source is located was not acquired after  
April 17, 1926. \_\_\_\_\_

6. The source is naturally occurring and not an artificially developed source  
(i.e., well or reservoir). \_\_\_\_\_

7. The source is important. One or more of the following circumstances must be  
applied for the source to be important. \_\_\_\_\_

a. The spring or waterhole is used or needed by the public for watering purposes.  
Describe briefly.  
\_\_\_\_\_  
\_\_\_\_\_

b. The spring or waterhole is located so that it is of utility and benefit to the general  
public. Describe briefly.  
\_\_\_\_\_  
\_\_\_\_\_

c. The availability of the spring or waterhole for public watering purposes affects  
the use of surrounding lands, water uses and users, habitat, and/or inhabitants of  
the surrounding lands.  
\_\_\_\_\_  
\_\_\_\_\_

d. The distance to the next nearest PWR or available source of water is such that  
there is no readily available, suitable alternative source of water.  
\_\_\_\_\_  
\_\_\_\_\_

e. Competing private interests could obtain water rights under State law for this water source if it were not reserved. Describe briefly. \_\_\_\_\_

As a result of this PWR Analysis I have determined that Items 1-6 and at least one circumstance in Item 7 apply. Consequently this source fulfills the criteria outline for a public water reserve.

(Attach additional support narrative as necessary)

\_\_\_\_\_  
Signature of Evaluator

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

Concurrence:

\_\_\_\_\_  
Area Manager

\_\_\_\_\_  
Date

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

IN THE MATTER OF THE DETERMINATION  
OF THE RELATIVE RIGHTS IN AND TO  
ALL WATERS OF DIAMOND VALLEY,  
HYDROGRAPHIC BASIN NO. 10-153,  
ELKO AND EUREKA COUNTIES, NEVADA.

STATE ENGINEERS OFFICE  
2010 NOV - 7 PM 4: 05  
RECEIVED

**AFFIDAVIT OF JAKE TIBBITTS**

STATE OF NEVADA            )  
  : ss.  
CARSON CITY                 )

JAKE TIBBITTS, under penalty of perjury, does solemnly swear and affirm that the following assertions are true:

1. I am the Natural Resources Manager for the Eureka County Department of Natural Resources. I have been the Natural Resources Manager for the Eureka County Department of Natural Resources since July, 2008.
2. I make this affidavit as agent for objector EUREKA COUNTY and in support of EUREKA COUNTY's request that I prepare Objections to the Bureau of Land Management's Public Water Reserves in the Preliminary Order of Determination In The Matter of The Determination of The Relative Rights In And To All Waters of Diamond Valley, Hydrographic Basin No. 10-153, Elko And Eureka Counties, Nevada, issued by the State Engineer on August 30, 2018.
3. In my capacity as agent for objector EUREKA COUNTY, I am qualified and authorized to file and verify Eureka County's Objections to the Bureau of Land Management's Public Water Reserves in the Preliminary Order of Determination filed concurrently with this Affidavit.
4. I have carefully examined all the statements, exhibits and matters contained in Eureka County's Objections to the Bureau of Land Management's Public Water Reserves in the Preliminary Order of Determination; all such statements made and exhibits and matters set forth therein are true and correct to the best of my knowledge, information and belief. Eureka County's Objections to the Bureau of Land Management's Public Water Reserves in the Preliminary Order of

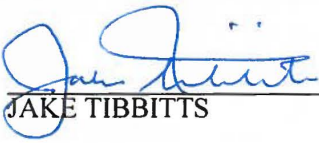
ALLISON MACKENZIE, LTD.  
402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com



1 Determination are made in good faith, with the intention of presenting evidence in support thereof in  
2 every particular.

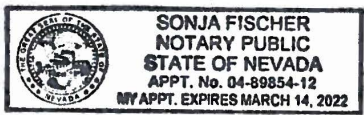
3 5. I have further reviewed all the statements, exhibits and matters contained in  
4 Eureka County's Objections to the Bureau of Land Management's Public Water Reserves in the  
5 Preliminary Order of Determination with representatives of EUREKA COUNTY.

6 DATED this 7 day of November, 2018.

7  
8   
9 JAKE TIBBITTS

10  
11 STATE OF NEVADA )  
12 CARSON CITY ) : ss.

13 On November 7, 2018, personally appeared before me, a Notary Public, JAKE  
14 TIBBITTS, personally known (or proved) to me to be the person whose name is subscribed to the  
15 foregoing document, and who acknowledged to me that he executed the foregoing document.



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19   
20 NOTARY PUBLIC

21 4829-5623-3338, v. 1

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ALLISON MacKENZIE, LTD.  
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Telephone: (775) 687-0202 Fax: (775) 882-7918  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of **ALLISON MacKENZIE, LTD.**, Attorneys at Law,  
and on this date, I caused to be delivered the foregoing document(s) as follows:

The Honorable Jeff Sessions  
Attorney General  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

USDI Bureau of Land Management  
1340 Financial Blvd.  
Reno, NV 89502

USDI Bureau of Land Management  
3900 E. Idaho Street  
Elko, NV 89801

USDI Bureau of Land Management  
50 Bastian Road  
Battle Mountain, NV 89820

Beck Family Trust  
289 La Costa Avenue  
Dayton, NV 89403

James E. & Vera L. Baumann  
P.O. Box 308  
Eureka, NV 89316

Daniel S. Venturacci  
8500 Schurz Highway  
Fallon, NV 89406

Bailey Family Trust, et al.  
P.O. Box 29  
Eureka, NV 89316

David Little  
Little Paris Sheep Company  
HC30, Box 346  
Spring Creek, NV 89815

Bingham Revocable Living Trust,  
dated April 8, 1999  
340 Juniper Hill Road  
Reno, NV 89519

Norman C. & Kindy L. Fitzwater  
P.O. Box 15  
Eureka, NV 89316

D Bar Land & Livestock LLC  
David C. & Leora A. Betschart  
HC 62 Box 62141  
Eureka, NV 89316

Chad D. & Rosie J. Bliss  
P.O. Box 585  
Eureka, NV 89316

Merkley Ranches Inc.  
HC 30, Box 400-17  
Spring Creek, NV 89815

DATED this 7<sup>th</sup> day of November, 2018.

  
\_\_\_\_\_  
NANCY FONTENOT

4829-5623-3338, v. 1

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402 North Division Street, P.O. Box 646, Carson City, NV 89702  
Telephone: (775) 687-0202 Fax: (775) 882-7918  
E-Mail Address: law@allisonmackenzie.com