



United States Department of the Interior



BUREAU OF LAND MANAGEMENT

Nevada State Office

1340 Financial Boulevard

Reno, Nevada 89502-7147

<http://www.blm.gov/nv>

NOV 05 2018

RECEIVED
2018 NOV -6 PM12:58
STATE ENGINEER'S OFFICE

Mr. Jason King
Department of Conservation and Natural Resources
Division of Water Resources
901 S. Stewart Street, Suite 2002
Carson City, NV 89701

Dear Mr. King:

By notice dated August 31, 2018, your office released the Preliminary Order of Determination for the Diamond Valley Adjudication. Objections to the preliminary order of determination are due to the Nevada State Engineer's Office on or by November 7, 2018.

In reviewing the preliminary order of determination, the Bureau of Land Management (BLM) had some concerns, specifically with the rejection of 39 PWR 107 claims. Please accept the enclosed objections to the preliminary order of determination.

If you have any questions, please contact Sarah Peterson, NV State Lead for Soil, Water, Air and Riparian Resources, at 775-861-6516.

Sincerely,

Brian C. Amme
Acting State Director

Enclosure

Cc:

Sarah Peterson, Nevada State Office

Melanie Peterson, Elko District Office

John Sherve, Battle Mountain District Office

**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.*

**Objections by the United States of America, U.S. Department of the Interior, Bureau of
Land Management, to the Preliminary Order of Determination (Preliminary Order) made
by the State Engineer.**

Pursuant to NRS 533.145, the United States of America, U.S. Department of the Interior, Bureau of Land Management (BLM), under claim of interest, hereby objects to the Preliminary Order of Determination to the above named waters, filed by Jason King, P.E., State Engineer, on August 31, 2018. Specifically, the United States objects to the following portions of the Preliminary Order of Determination:

Objections to “VI. Findings of the State Engineer on Non-Reserved Right Claims”

The BLM objects to the findings of the State Engineer for the following claims: V-01423, V-09756, V-09758, V-09759, V-09760, V-09761, V-09762, V-09763, V-09764, V-09765, V-09767, V-09768, V-09769, V-09770, V-09776, V-09778, V-09779, V-10870, V-10871, V-10873, V-10874, V-10875, V-10877, V-10930, and V-10995. Each of these claims were found to be valid by the State Engineer, however, the claimant(s) are not authorized users of the grazing allotment to which each claim is located. If the claimant is not the authorized user, then there would be no ability for the claimant to provide evidence showing that the water has been put to beneficial use. Even if the claimant was able to provide evidence that those claims were put to beneficial use before the inception of the Taylor Grazing Act, they cannot prove that the use has been continuous nor do they have a way to put these water rights to beneficial use into the future. As such, these claims should be considered abandoned by the claimant(s) and are therefore no longer valid.

Objections to “VII. Findings of the State Engineer Concerning Federal Claims to Reserved Rights”

“Federal Claims

United States Department of the Interior, Bureau of Land Management Claims for Public Water Reserves Pursuant to Executive Order Dated April 17, 1926.”

The Preliminary Order states that claims for Public Water Reserve 107 (PWR-107) were rejected for multiple reasons including the source being fully-appropriated based on existing vested claims, not meeting minimum flow requirement criteria set by the State Engineer, being dry at the time of review in 2016, not having an associated map, not submitting any data and a spring actually being a well.

BLM does not object to the following PWR-107 claims rejected by the State Engineer: BLM does not object to the rejection of R-06944 and R-06947 (lack of evidence). BLM does not object to the rejection of R-04241 and R-06941 (lack of supporting map). BLM does not object to the rejection of R-06945 (spring is actually a well).

The BLM does object to the rejection of 34 PWR-107 claims, including Claim Nos.: R-04232, R-04234, R-04235, R-04240, , R-04242, R-04245, R-04246, R-04247, R-04248, R-04265, R-04266, R-04267, R-04268, R-04269, R-04272, R-04273, R-04274, R-04275, R-04276, R-04278, R-04515, R-04516, R-04517, R-04518, R-04519, R-04521, R-06743, R-06937, R-06938, R-06939, R-06940, R-06942, R-06943, and R-06946. BLM will address each of the bases for rejection of these claims below, demonstrating why the State Engineer is in error and that each of these claims should be found to be valid.

A. “Parameters” established by the State Engineer

In section VII “Findings” of the Preliminary Order, the State Engineer finds “parameters need to be established in order to determine the validity of the claims.”¹ The State Engineer then describes the purposes of PWR-107 and concludes they are “for the general public purposes of human and domestic (stock) consumption.”² In past rulings, the State Engineer has stated various guidelines that he follows in determining, in his opinion, whether a PWR-107 claim is valid. See, e.g. Ruling 5729, pages 18-19. BLM has objected to certain of these guidelines in the past. The State Engineer is again relying on that ruling in support of the “minimum” quantity that must be met to qualify as a PWR-107 spring or waterhole. Preliminary Order at 284. BLM’s specific objections are stated in the following paragraphs. Further, BLM objects to the discussion on pages 277-286 of the Preliminary Order to the extent inconsistent with these objections.

1. Quantity

The State Engineer states in the Preliminary Order that to qualify as a PWR-107, the spring source must be capable of producing at least 2.0 acre-feet annually (1,800 gallons per day). Preliminary Order at 286. The State Engineer provides a qualitative discussion of the basis for this quantity, but does not provide any support for the adopted quantity other than it was adopted by a prior State Engineer and is the “statutory amount” for a domestic well (not a spring or waterhole) in Nevada.³ The State Engineer rejected the following 21 claims for not meeting 2.0 acre-feet annually: R-04240, R-04242, R-04245, R-04247, R-04248, R-04268, R-04273, R-04274, R-04275, R-04276, R-04515, R-04516, R-04517, R-04518, R-04521, R-06937, R-06938, R-06939, R-06940, R-06942, and R-06943. The purposes of the PWR-107 are for human and animal consumption which includes general watering purposes for the public, livestock and other animals as noted above. The quantity to fulfill those purposes is to be determined on a case-by-case basis depending on the area in which the spring occurs and the specific purposes, both past and future, that the spring will serve to meet those purposes. To the extent a minimum quantity applies, it would also be determined on a case-by-case basis based on that amount needed for use by one family and its domestic livestock in the area in which the

¹ It is not clear what “parameters” the State Engineer is referring to other than the “minimum” quantity. To the extent other “parameters” are included, BLM reserves the right to raise further objections.

² The United States maintains that even though water may not have been reserved for wildlife under the Executive Order, the final Order of Determination should recognize incidental wildlife use at the water sources.

³ The State Engineer also notes that a different prior State Engineer did not adopt the 1,800 gpd “standard” for PWR-107. Preliminary Order at 285.

spring occurs. Each of the PWR-107 claims in this adjudication is for flow that is necessary to meet the purposes of the reservation and there is no basis to reject any of these claims on that basis. Thus, there is no basis for this limiting “parameter” (previously referred to as “guidelines” by the State Engineer) and it should be rejected.

2. Spring was dry at time of field review

The State Engineer rejected the following 5 claims because “the information presented indicates the spring is dry and not a viable year round source of water for stockwater or domestic use”: R-04267, R-04269, R-04272, R-04278, and R-06946. The BLM objects to these rejections.

It is not clear whether the rejections were due solely because the spring was dry on the date of measurement, or whether the rejection was also based on the source not being a “year round source of water” whether it was dry on the date of measurement but flowed other times of the year. There is no support for a “parameter” that a spring must flow year round to be a “viable” source of water for stock or domestic uses. The basis for a PWR-107 is whether or not it is considered important. Nevada is the driest state in the nation and typical springs and water holes on public land are small in size and vary in flow, particularly during times of drought. Given the climatic challenges within the State, it makes springs on public lands even more important. The more scarce the water sources and quantity produced at each source, the more important these water sources become. In order to meet the water needs for appropriate livestock management on public lands, multiple sources are needed in an area in order to supply a sufficient quantity. Having PWR-107s available for livestock use protects permittees by ensuring that there is water available for use and allows for better distribution of livestock across the landscape.

In order for the dry spring criteria to be viable, the State Engineer would need to prove that the spring would not flow at any time of the year or will never flow water in the future at any time. This would be difficult knowing that springs throughout the State often cease to flow for periods of time and then begin flowing again. Finding such springs to be valid PWR-107 claims is consistent with other statements in this Preliminary Order finding vested claims valid for the amount of water available from the source for the purpose so stated. See, eg. pp. 11, 12, 94, 96, 216 and 219.

3. Lack of Evidence

BLM objects to the rejection of R-04265 and R-04519. BLM intends to provide the necessary evidence when appropriate.

4. Source is Fully Appropriated

The State Engineer rejected 16 claims due to being fully appropriated by existing vested claims. These claims these include: R-04232, R-04234, R-04235, R-04240, R-04245, R-04246, R-04247, R-04268, R-04275, R-04516, R-06743, R-06937, R-

06938, R-06941, R-06944, and R-06947. Eight of these claims were also rejected for not meeting the NSE set minimum quantity, these include: R-04240; R-04245, R-04247, R-04268, R-04275, R-04516, R-06937, and R-06938. See the discussion on quantity above related to those rejections.

The BLM objects to R-04240, R-04245, R-04246, and R-06743 as being fully appropriated by valid vested claims. As indicated in the preliminary order, the vested claims associated with these PWR-107s are not held by existing authorized permittees. Therefore, the claims have not been put to beneficial use by the claimant, have been abandoned and are no longer valid. In the case of R-04246, there were three vested claims filed on the source, two of which were filed by those that are not authorized permittees. Removing those two vested claims leaves plenty of water available for a PWR-107 to also be filed on the source.

As for the other claims, including R-04232, R-04234, R-04235, R-04247, R-04268, R-04275, R-04516, R-06937, R-06938, BLM objects to these rejections based on the purpose of the reservation and the beneficial use of the water right for the vested claims being for the same purpose of stockwatering. In rulings issued by the State Engineer where the BLM has protested a water right application due to a PWR-107 claim already being asserted on the source, the State Engineer has denied the protest stating that the purpose of the water right application and the PWR-107 claim are similar and therefore one does not conflict with the other. If a PWR-107 is found to be valid, then one water right would be junior to the other and there would be no conflict between a PWR-107 and a vested stockwater claim, the PWR-107 would be a junior right to a vested stockwater right. Given the variability of flow, including seasonal variations, it is possible that in some years and during different times of the year, there may be water available above the vested claim for use. In those years, a junior PWR-107 right would be in priority. Additionally, the Preliminary Order does not provide sufficient evidence to support a finding that the vested claim fully appropriates the source either today or in 1926 and whether the vested claim consumed the entire quantity or if water was still available for use by others under a valid PWR-107 claim.

5. Lack of supporting map

BLM objects to the rejection of R-04265 and R-04266. BLM intends to provide the necessary evidence when appropriate.

B. Conclusion

For all of the above stated reasons, the above objected to PWR-107 claims should be determined to be valid.

The BLM reserves the right to make additional objections as appropriate.

Wherefore, claimant, Bureau of Land Management, requests that the proposed determination of water rights of Diamond Valley, Elko and Eureka Counties, Nevada, be amended to conform to the above objections and that each PWR-107 claim objected to is determined to be valid.

Pursuant to 28 U.S.C. 1746 I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th date of November 2018.



Brian C. Amme
Acting State Director, Nevada