

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

IN THE MATTER OF APPLICATIONS)
60584, 60585, 60586, AND 60587 FILED)
TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE SMOKE CREEK)
DESERT HYDROGRAPHIC BASIN)
(021), WASHOE COUNTY, NEVADA.)

RULING

#5385

GENERAL

I.

Application 60584 was filed on October 19, 1994, by Espil Sheep Company, Inc., to appropriate 0.0436 cubic feet per second (cfs) of water from Lower Smoke Creek Well, an underground source, for stockwatering purposes (1,000 cows and 2,000 sheep) within Section 16, T.30N., R.19E., 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 16.¹

II.

Application 60585 was filed on October 19, 1994, by Espil Sheep Company, Inc., to appropriate 0.0436 cfs of water from Upper Bonham Well, an underground source, for stockwatering purposes (1,000 cows and 2,000 sheep) within Section 4, T.29N., R.19E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 4.²

III.

Application 60586 was filed on October 19, 1994, by Espil Sheep Company, Inc., to appropriate 0.0436 cfs of water from Buffalo Well, an underground source, for stockwatering purposes (1,000 cows and 2,000 sheep) within Section 18, T.32N., R.20E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 18.³

¹ File No. 60584, official records in the Office of the State Engineer.

² File No. 60585, official records in the Office of the State Engineer.

³ File No. 60586, official records in the Office of the State Engineer.

IV.

Application 60587 was filed on October 19, 1994, by Espil Sheep Company, Inc., to appropriate 0.0436 cfs of water from Salt Works Well, an underground source, for stockwatering purposes (1,000 cows and 2,000 sheep) within Section 27, T.31N., R.19E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ NE¼ of said Section 27.⁴

V.

Applications 60584, 60585, 60586 and 60587 were timely protested by the U.S.D.I., Bureau of Land Management (BLM) on the grounds that:^{1, 2, 3, 4}

1. The Bureau of Land Management is the owner of this well and the Espil Sheep Co., Inc., is using this water by permission only.
2. The application requests a year round use but authorized use of this well is only for 3.5 months.
3. The public interest is not protected; other uses of the water are at risk. Management of the public lands requires these waters for other uses, i.e., wild horses and wildlife.
4. Other permittees use the water and is not this permittee's water to claim.

FINDINGS OF FACT

I.

Nevada Revised Statute § 533.365 (3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to address the merits of a protest to an application to appropriate the public waters of the State of Nevada. The State Engineer finds that a hearing is not necessary to consider the merits of the protests filed by the BLM.

II.

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 the applicant for the permit is legally entitled to place livestock on the lands for which the permit is sought and:

⁴ File No. 60587, official records in the Office of the State Engineer.

- (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 (a), 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.⁵

On January 14, 2002, the State Engineer's office sent a letter to the BLM requesting information regarding the applicant's status as a grazing permittee within the place of use described under Applications 60584, 60585, 60586 and 60587. The BLM responded by letter dated February 7, 2002, and indicated that all the wells are located on the Twin Peaks Allotment #00701 and the current authorized range user/permittee is John Espil Sheep Company, Inc. The letter also indicates that with respect to Applications 60585, 60586, and 60587, Lavar Ranches is also a current authorized range user/permittee.

The State Engineer finds that the applicant is entitled by the proper federal agency to place livestock upon the public range described under Applications 60584, 60585, 60586 and 60587.

III.

The first protest issue raised by the BLM states "The Bureau of Land Management is the owner of this well and that the Espil Sheep Co., Inc., is using this water by permission only."

⁵ NRS § 533.503.

Water right permits issued by the State Engineer do not extend the permittee the right of ingress and egress on public, private, or corporate lands, and do not waive any permitting requirements by other State, Federal, and local agencies.

The protest implies that the applicant has been using water from this well in the past by permission of the BLM. Before any diversion of water may be made from a well, the appropriator must make application to and obtain from the State Engineer, a permit to appropriate the water.⁶ An examination of the records of the Office of the State Engineer, show that there is no additional water right permits, proofs or claims filed at the proposed points of diversion and the BLM has never obtained a permit to appropriate water from any of the wells.⁷ Nevada state law controls both the process and the substance of a proposed appropriation and use of water in the State of Nevada. It is the responsibility of the State Engineer, not the BLM, to control the use of the State's water in accordance with the provisions set forth in the Statutes of the State of Nevada.⁸

The State Engineer finds that Federal permitting and access requirements would not be annulled by the issuance of water right permits to the applicant. The State Engineer further finds that the BLM has never had a water right permit allowing the diversion of water from these wells; and therefore, has never had the authority to use or authorize permission to use water from these wells.

IV.

The second protest issue raised by the BLM states "The application request year round use, authorized use of this well is only for 3.5 months." According to the BLM letter of February 7, 2002, the *Authorized use time frames (dates)* are from April 1 to January 31. The letter also indicates that the actual cattle and sheep use within the allotment varies within that time frame for each of the well locations. For example, at the Lower Smoke Creek Well location, actual use for cattle is April 1 to April 15 and November 1 to January 31 and actual use for sheep is April 1 to June 1 and October 1 to October 25.⁹ The Office of the State Engineer recognizes that changes to grazing time

⁶ NRS § 534.050 (3).

⁷ Nevada Division of Water Resources Water Rights Database, Special Hydrographic Abstract, December 31, 2003.

⁸ NRS chapters 532 to 538, inclusive, also chapters 540, 543 and 544.

⁹ See, BLM letter of February 7, 2002, in File No. 60587, official records in the Office of the State Engineer.

frames sometimes occur. 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.

Under Nevada Water Law, beneficial use shall be the basis, the measure and the limit of the right to the use of water.¹⁰ In this regard, the permit holder must prove beneficial use of the water to perfect the water right by obtaining a water right certificate for the permit. The permit holder must provide the information required under NRS § 533.400, before a water right certificate can be issued. Specifically, the permit holder must provide the number of months, naming them, in which the water has been beneficially used.¹¹ For a permit issued with a period of use from Jan. 1 to Dec. 31, if the beneficial use of water under the permit occurs over a specified time frame during the calendar year, any certificate issued under such permit may be restricted to the period of use during the calendar year in which the beneficial use occurs.

Applications 60584, 60585, 60586 and 60587 request a period of use from Jan. 1 to Dec. 31.^{1,2,3,4} The State Engineer finds that the period of use requested under the applications is proper and there are no provisions under Nevada Water Law to support the protest claim of the BLM.

V.

Part of the third protest issue raised by the BLM states "The public interest is not protected, other uses of the water are at risk."

A determination was made, after an examination of the records of the Office of the State Engineer, that there are no additional water right permits, proofs or claims filed at the proposed points of diversion.¹² The State Engineer finds that no other uses of water are permitted at the proposed points of diversion; therefore, there is no conflict with existing rights and no other uses of the water are at risk.

¹⁰ NRS § 533.035.

¹¹ NRS § 533.400 (1)(L).

¹² Water Rights Township Plats, Township 18 North, Range 24 East, M.D.B.&M., official records in the Office of the State Engineer.

VI.

Part of the third protest issue raised by the BLM states "Management of the public lands require these waters for other uses, ie., wildhorses and wildlife."

Absent of any physical restrictions, wildlife will water at various water sources within their range independent of ownership or the stated beneficial use of a water right. If water is available, the wildlife may or may not choose to water at a particular source and the use may be consistent or sporadic depending on numerous environmental factors. In the case of an underground source of water being pumped to the surface for use by livestock, the water is simultaneously available for wild horses and wildlife. If water is needed at these particular points of diversion for wild horses and wildlife, at times when water is not being diverted for livestock, an application may be filed for such purposes.

The State Engineer finds that the applications before him request an appropriation of underground water for stockwatering purposes only, and that any need for an appropriation of additional water from these well sites for wild horses and wildlife purposes can be requested through the submittal of a water right application for such purpose.

VII.

The fourth and last protest issue raised by the BLM states "Other permittees use the water and is not this permittee's water to claim."

Every water right permit that is issued by the State Engineer contains conditions that are contained within the permit terms. One such permit term often applied to stockwatering permits states "This permit is issued with the express understanding and on the condition that existing grazing use of the public range by authorized users or permittees will not be impaired or adversely affected by approval and issuance of this permit." In addition, any authorized range user that qualifies under NRS § 533.503, may request a permit to appropriate water for the purpose of watering livestock in accordance with Nevada water law.

The State Engineer finds that sufficient protection exists with the water right permitting process to protect any additional range users on the subject allotment where the wells are located. The State Engineer finds that additional water right permits may

exist at the same point of diversion when multiple range users are authorized by the BLM to share the allotment.

VIII.

Applications 60584, 60585, 60586 and 60587 request appropriations of water from existing wells within the Smoke Creek Desert Hydrographic Basin. The estimated perennial yield of the Smoke Creek Desert Hydrographic Basin is 16,000 acre-feet annually, which assumes salvage of all discharge.¹³ A review of records in the Office of the State Engineer show the estimated committed groundwater resources to be approximately 10,000 acre-feet annually.¹⁴ The State Engineer finds that permits and certificates have been issued under existing rights for less than the estimated perennial yield from the groundwater system within the Smoke Creek Desert Hydrographic Basin; therefore, there is unappropriated water at the proposed sources in sufficient quantity to satisfy the requested appropriations.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁵

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:¹⁶

- 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.

¹³ Jon O. Nowlin, *Ground-Water Quality in Nevada – a Proposed Monitoring System*, USGS Open-File Report 78-768, United States Department of the Interior Geological Survey, p. 191, (1986).

¹⁴ Nevada Division of Water Resources Water Rights Database, Hydrographic Basin Summary for Smoke Creek Desert, September 26, 2003.

¹⁵ NRS chapters 533 and 534.

¹⁶ NRS § 533.370 (4).

III.

The State Engineer concludes that stockwatering is a beneficial use and the applicant is the current range user of the federal grazing allotment; therefore, the approval of Applications 60584, 60585, 60586 and 60587 would not threaten to prove detrimental to the public interest.

IV.

The State Engineer concludes there is unappropriated water at the source and the proposed use will not conflict with existing rights.

V.

The State Engineer concludes that the protest claims of the BLM are without merit.

RULING

The protest to Applications 60584, 60585, 60586 and 60587 are hereby overruled and said applications are approved subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,



Hugh Ricci, P.E.
State Engineer

HR/TW/jm

Dated this 18th day of

June, 2004.