

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

IN THE MATTER OF APPLICATIONS 36778,)
43028, 44746, 44776, 44780, 44882, 47259, 47260,)
47261, 58133, 58135, 58163, 59674, 59712, 59767,)
59768, 59995, 60085, AND 60141 FILED TO)
APPROPRIATE AND/OR CHANGE THE PUBLIC)
WATERS OF VARIOUS UNDERGROUND AND)
SURFACE SOURCES WITHIN THE FOLLOWING)
HYDROGRAPHIC BASINS AND COUNTIES;)
TULE DESERT (221), KOBEH VALLEY (139),)
DIAMOND VALLEY (153), BOULDER FLAT)
(061), WHITE RIVER VALLEY (207), SPRING)
VALLEY (184), SNAKE VALLEY (195), BUTTE)
VALLEY SOUTHERN PART (178B), TIPPETT)
VALLEY (185); LINCOLN COUNTY, EUREKA)
COUNTY AND WHITE PINE COUNTY,)
NEVADA.

RULING

#5327

GENERAL

I.

Application 36778 was filed on February 14, 1979, by the U.S. Department of the Interior – Bureau of Land Management to appropriate 0.01 cfs of water from Rock Hole Spring for livestock and wildlife purposes within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T.7S., R.69E., M.D.B.&M., and the NW $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, T.8S., R.70E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 25, T.7S., R.69E., M.D.B.&M.¹

II.

Application 36778 was timely protested by State of Nevada Department of Agriculture on the following grounds:¹

The State Director of the Bureau of Land Management has stated that they intend filing approximately 7 to 9,000 applications to appropriate waters on the public lands of the State of Nevada which clearly indicates their intent to appropriate virtually all of the remaining waters of the State of Nevada. To grant these applications would be clearly contrary to the

¹ File No. 36778, official records in the Office of the State Engineer.

interests of the State of Nevada and its citizens. Since land in an arid state is almost unusable without water, the granting of these applications would prohibit the future development of the lands of the State of Nevada and jeopardize the future welfare of its citizens.

The applicant does not have a permit to graze livestock in the area and in fact does not own any livestock and since it is the policy of the state to deny applications for livestock water to applicants who do not have a livestock grazing permit, the application should be denied. Since the applicant does not own any livestock, then it logically follows that the applicant could not make beneficial use of water for livestock, and the application should be denied.

Livestock grazing in this area was common prior to the enactment of state law requiring the filing of applications with the State Engineer to obtain livestock watering rights. The present owners and operators of livestock have vested rights to water livestock obtained from their predecessors on this land, even though the exact numbers of livestock and amounts of water may be lost to record or not of record.

Clearly, the Bureau of Land Management does not intend to consume these waters themselves, but rather to control or prohibit the future use of these waters by others. Of course, the control of the use of waters by others is the responsibility of the State Engineer, in accordance with definite provisions set forth in Statutes of the State of Nevada. The granting of these applications would in effect delegate the future control of these waters to the Bureau of Land Management and would be contrary to the public policy of the State of Nevada.

The Federal Land Management Policy Act provides that use of the resources on the public lands shall be charged for at market value. This is contrary to Nevada law which does not charge for the use of state waters by its citizens. The granting of these applications can, and we believe will, lead to the charging by the federal government for use of these waters which would be free if granted direct from the state to the citizen, and therefore these applications should be denied.

The people of the State of Nevada were unlawfully denied the right to develop the agricultural lands of the state by the Secretary of Interior who placed a moratorium on filings under the Act from June 4, 1964 until January 1, 1979. Present and future filings under the Desert Land Entry Act are dependent on available water sources both underground and surface. The granting of these applications to appropriate waters by the Bureau of Land Management would unreasonably interfere with the development of land by entrymen under the Desert Land Act.

The wildlife who drink or exist on or in these waters are resident species under the control and responsibility of the State of Nevada. The granting of these applications would allow the Bureau of Land Management to control the watering or use of this water by wildlife and unreasonably interfere with the state's authority and responsibility for wildlife management. The state's wildlife has used these waters on these

lands since Statehood and the state has a vested right to have water for its wildlife.

The granting of these applications by the Bureau of Land Management to appropriate the waters of the State of Nevada would allow the federal government to interfere with the sovereignty and dominion of the State of Nevada over the use and control of the natural resources within its borders.

In view of the vast magnitude of these filings and the permanent severe adverse effects that the granting of these applications would have on the future development of the state and the welfare of its citizens, we are hopeful that we will be allowed to appear before the State Engineer to present evidence and further oral arguments in opposition to the granting of these applications.

III.

Application 43028 was filed on December 31, 1980, by the Bureau of Land Management, Battle Mountain District to appropriate 0.1 cfs of water from an underground source for stockwatering purposes within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 27, T.20N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 27.²

IV.

Application 43028 was timely protested by Donald R. Smith on the following grounds:²

- I. The granting to BLM may cause lowering of the water table in this area. Our only source of stockwater in this area is from this source. Our only source of dependable irrigation water is from this source. Also culinary water @ 1 Ranch.
- II. The BLM – under the Taylor Grazing Act – can not run livestock on this range, so has absolutely no need for 'stockwater'. There are no wild horses or burros on this area – This verified by BLM.

V.

Application 44746 was filed on October 29, 1981, by the United States Government, Dept. of the Interior, Bureau of Land Management to appropriate 0.01 cfs of water from Antelope Wayside Well for livestock purposes within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of

² File No. 43028, official records in the Office of the State Engineer.

Section 30, T.19N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ SW¼ of said Section 30.³

VI.

Application 44746 was timely protested by Donald R. Smith on the following grounds:³

I. The granting to BLM. may cause lowering of the water table in this area. Our only source of stockwater in this area is from this source. Our only source of dependable irrigation water is from this source. II. – The BLM., under the Taylor Grazing Act, can not run livestock on this range, so has absolutely no need for stockwater. The wildlife in this area is not migratory and therefore is the responsibility of the State of NV.; not the B.L.M. All wildlife have adequate water in this area, and have not, and will not be denied access to this water. There are no wild horses in this area / B.L.M.

VII.

Application 44776 was filed on October 29, 1981, by the United States Government, Dept. of the Interior, Bureau of Land Management to appropriate 0.01 cfs of water from Leroy's Well for livestock/wildlife purposes within the E½ NE¼ of Section 24, T.20N., R.49E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of said Section 24.⁴

VIII.

Application 44776 was timely protested by Donald R. Smith on the following grounds:⁴

1. The granting to BLM may cause lowering of the water table in this area – our only source of stockwater in this area is from this source. Our only source of dependable irrigation water is from this source.
2. The BLM, under the Taylor Grazing Act, can not run livestock on this range, so has absolutely no need for stockwater. The wildlife in this area is not migratory and therefore is the responsibility of the State of Nev. Not the BLM. There is – always has been – always will be (except by Act of God – not the BLM.) adequate water in this area for wildlife.

³ File No. 44746, official records in the Office of the State Engineer.

⁴ File No. 44776, official records in the Office of the State Engineer.

IX.

Application 44780 was filed on October 29, 1981, by the United States Government, Dept. of the Interior, Bureau of Land Management to appropriate 0.01 cfs of water from Bend Well for livestock/wildlife purposes within the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 18, T.23N., R.54E., 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 18.⁵

X.

Application 44780 was timely protested by T.M. Thompson on the following grounds:⁵

These waters at one time flowed from an old seismograph test hole cased by this ranch in the late 1950's. This flow ceased prior the alleged installation of improvements by the BLM. This is nothing more than an attempt on the part of the BLM to usurp the soul [sic] right I own to graze my cattle in this area. There is a natural spring a short distance to the North. The BLM has refused to cooperate in getting the flow of these old testhole stopped which are affecting an already damaged water table. This organization should be permanently enjoined from ever acquiring a right to the states waters.

XI.

Application 44882 was filed on October 29, 1981, by the United States Bureau of Land Management to appropriate 0.005 cfs of water from Cap's A Well for livestock and wildlife purposes within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T.35N., R.48E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 34.⁶

XII.

Application 47259 was filed on September 20, 1983, by Albert Gubler / U.S. Government - BLM to appropriate 0.004 cfs of water from Albert Well for stockwater and wildlife purposes within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, T.11N., R.62E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 15.⁷

⁵ File No. 44780, official records in the Office of the State Engineer.

⁶ File No. 44882, official records in the Office of the State Engineer.

⁷ File No. 47259, official records in the Office of the State Engineer.

XIII.

Application 47260 was filed on September 20, 1983, by Albert Gubler / U.S. Government - BLM to appropriate 0.004 cfs of water from Ab Well for stockwater and wildlife purposes within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 2, T.11N., R.62E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 2.⁸

XIV.

Application 47261 was filed on September 20, 1983, by Albert Gubler / U.S. Government - BLM to appropriate 0.002 cfs of water from Fera Well for stockwater and wildlife purposes within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, T.11N., R.61E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 35.⁹

XV.

Application 58133 was filed on September 28, 1992, by the USDI - BLM, Ely District to appropriate 0.027 cfs of water from Shoshone Well #4 for livestock and wildlife purposes within the Lot 5, Section 2, T.12N., R.67E., M.D.B.&M. The proposed point of diversion is described as being located within Lot 5 of said Section 2.¹⁰

XVI.

Application 58135 was filed on September 28, 1992, by the USDI - BLM, Ely District to appropriate 0.055 cfs of water from McCoy Creek for livestock and wildlife purposes within Sections 23, 24, 25, 26, 35, and 36, T.18N., R.66E., M.D.B.&M.; Section 31, T.18N., R.67E., M.D.B.&M; Sections 1, 2, 11, 12, 13, and 14, T.17N., R.66E., M.D.B.&M.; Sections 6 and 7, T.17N., R.67E., M.D.B.&M.. The proposed point of diversion is described as being located within SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 35, T.18N., R.66E., M.D.B.&M.¹¹

⁸ File No. 47260, official records in the Office of the State Engineer.

⁹ File No. 47261, official records in the Office of the State Engineer.

¹⁰ File No. 58133, official records in the Office of the State Engineer.

¹¹ File No. 58135, official records in the Office of the State Engineer.

XVII.

Application 58135 was timely protested by Reed B. Robison on the following grounds:¹¹

There are no unappropriated waters on this source and the granting of this application will conflict and interfere with existing prior rights.

XVIII.

Application 58163 was filed on October 2, 1992, by the USDI - BLM, Ely District to appropriate 0.21 cfs of water from Willow Pond for livestock and wildlife purposes within the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 35, T.15N., R.68E., M.D.B.&M. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 35.¹²

XIX.

Application 59674 was filed on January 6, 1994, by the USDI - Bureau of Land Management, Ely District to appropriate 0.02 cfs of water from Twin Spring # 1 for stockwatering purposes within the NE $\frac{1}{4}$ of Section 10 and NW $\frac{1}{4}$ of Section 11, T.22N., R.65E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 10.¹³

XX.

Application 59674 was timely protested by Intermountain Ranches, Ltd., on the following grounds:¹³

On Behalf Of Intermountain Ranches, Ltd For Uses Of Waters For Stockwater Purposes Based On Vested Rights On Predecessors Interest To Twin Spring #1.

XXI.

Application 59712 was filed on January 19, 1994, by the USDI - Bureau of Land Management, Ely District to appropriate 0.02 cfs of water from Twin Spring # 2 for stockwatering purposes within the NE $\frac{1}{4}$ of Section 10 and NW $\frac{1}{4}$ of Section 11, T.22N.,

¹² File No. 58163, official records in the Office of the State Engineer.

¹³ File No. 59674, official records in the Office of the State Engineer.

R.65E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 10.¹⁴

XXII.

Application 59712 was timely protested by Intermountain Ranches, Ltd., on the following grounds:¹⁴

On Behalf Of Intermountain Ranches, Ltd For Uses Of Waters For Stockwater Purposes Based On Vested Rights On Predecessors Interest To Twin Spring #2.

XXIII.

Application 59767 was filed on February 15, 1994, by the USDI – Bureau of Land Management to appropriate 0.021 cfs of water from Shoshone Well #1 for livestock and wildlife purposes within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 2, T.12N., R.67E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 2.¹⁵

XXIV.

Application 59768 was filed on February 15, 1994, by the USDI – Bureau of Land Management to appropriate 0.016 cfs of water from Shoshone Well #3 for livestock and wildlife purposes within Lots 5, 6, 7, and 8 of Section 2, T.12N., R.67E., M.D.B.&M. The proposed point of diversion is described as being located within Lot 8 of said Section 2.¹⁶

XXV.

Application 59768 was timely protested by Kirkeby Ranch, on the following grounds:¹⁶

The granting of this application will conflict and interfere with the value of existing rights; the BLM cannot show a public need for this water other than that which is currently used by the wildlife which made available and maintained by the private sector and protected by the State Department of Wildlife [sic]; there is no excess water available from this source; in as much as there are adequate waters within the area to satisfy the current wildlife, livestock and domestic uses, the drilling of an additional well

¹⁴ File No. 59712, official records in the Office of the State Engineer.

¹⁵ File No. 59767, official records in the Office of the State Engineer.

¹⁶ File No. 59768, official records in the Office of the State Engineer.

would be contrary to the State's wellhead and groundwater protection programs.

XXVI.

Application 59768 was timely protested by Robert L. and Fern A. Harbecke on the following grounds:¹⁶

The wildlife currently has immediate access and an inherent use of all free flowing water throughout the State of Nevada and the Nevada Department of Wildlife, with the Division of Water Resources, has been protecting these uses. The granting of this application will do nothing but add an additional bureaucracy. There are no available excess waters above the current uses.

XXVII.

Application 59995 was filed on April 14, 1994, by the United States of America, USDI, Bureau of Land Management to appropriate 0.0228 cfs, not to exceed 11 acre-feet annually, of water from Bonanza Well for livestock purposes within the Section 32, T.20N., R.61E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of said Section 32.¹⁷

XXVIII.

Application 60085 was filed on May 24, 1994, by the U.S.D.I. BLM, Ely District to change the point of diversion and place of use of the underground waters previously applied for under Application 58133. The proposed manner of use is for livestock and wildlife purposes within Lots 5, 6, 7, and 8 of Section 2, T.12N., R.67E., M.D.B.&M. The proposed point of diversion is described as being located within Lot 6 of said Section 2.¹⁸

XXIX.

Application 60141 was filed on June 21, 1994, by Reed B. Robison and the United States of America - USDI - BLM, later assigned to Nevada Land and Resource Company, L.L.C. and the United States of America-USDI-BLM, to appropriate 0.045 cfs of water from Antelope Well for livestock, wildlife, and wild horse purposes within the

¹⁷ File No. 59995, official records in the Office of the State Engineer.

¹⁸ File No. 60085, official records in the Office of the State Engineer.

SE¼ NE¼ of Section 27, T.25N., R.68E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ NE¼ of said Section 27.¹⁹

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, based on the protest issues above, that a hearing is not necessary.

II.

The issue of BLM stockwater applications has been addressed numerous times in the past with the most recent events being amendments to the Nevada Revised Statutes chapter 533 in 1995 and 2003, State Engineer's Ruling No. 4519, and a Nevada Supreme Court decision in 2001.

In 1995, the Nevada Legislature amended the provisions of the water law regarding the appropriation of water for stockwatering by adding Nevada Revised Statute § 533.503, which mandated that the State Engineer shall not issue a permit to appropriate water for the purposes of watering livestock on public lands unless the applicant for the permit is legally entitled to place the livestock on the public lands for which the permit is sought. The Nevada Attorney General's Opinion 97-05, dated February 11, 1997, concluded that the phrase "legally entitled to place livestock on the public lands for which the permit is sought" excluded the BLM from applying for a stockwatering permit. The Opinion also concluded that the State Engineer could not issue a stockwater permit for applications filed jointly by the BLM and the livestock operator and that the statute applied to pending applications. State Engineer R. Michael Turnipseed denied nine BLM stockwater applications in Douglas County, Nevada on April 7, 1997, based on the Nevada Attorney General's interpretation of NRS § 533.503.²⁰ The denial was appealed by the BLM to the Ninth Judicial District Court. The Ninth Judicial District Court denied review of the case and, as a result, the BLM appealed to the Nevada Supreme Court. The

¹⁹ File No. 60141, official records in the Office of the State Engineer.

²⁰ State Engineer's Ruling No. 4519, official records in the Office of the State Engineer.

Nevada Supreme Court issued a decision²¹ and remanded the case to the Ninth Judicial District Court. The Ninth Judicial District Court interpreted the Supreme Court decision to, in effect, require reversal of the order denying review and to issue water right permits to the BLM. On July 3, 2002, Judge Michael P. Gibbons of the Ninth Judicial District Court issued an order reversing State Engineer's Ruling No. 4519 and directing the State Engineer to issue the subject permits.²² The State Engineer issued the permits, as directed by the court, on November 15, 2002.

III.

In 2003, the Nevada Legislature amended NRS § 533.503 to provide, in part, 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 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.

The amended law clearly states that the State Engineer shall not issue a permit to appropriate water for livestock unless the applicant 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. The statute applies to all applicants for stockwater permits, including the United States. The BLM does not qualify for a permit because it is not currently authorized by Congress to raise livestock in the name of the United States. The State Engineer finds the BLM does not own, lease or otherwise possess a legal or proprietary

²¹ United States v. State Engineer, 117 Nev. 585, 27 P. 3d 51 (2001).

²² Case No. 97-CV-0119, Ninth Judicial District, July 3, 2002.

interest in the livestock on or to be placed on the lands for which the permit is sought and is therefore not qualified to obtain a stockwater permit under Nevada Water Law.

IV.

Applications 47259, 47260, 47261 and 60141 were filed jointly between a private individual and the BLM. The State Engineer finds that when an application is filed jointly, all parties on the joint application must meet the provisions of NRS § 533.503. Since the State Engineer has already found the BLM is not qualified to obtain a stockwater permit, the State Engineer finds that joint Applications 47259, 47260, 47261 and 60141 cannot be approved.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²³

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:²⁴

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change 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 Nevada law prohibits the State Engineer from issuing a permit to appropriate water for livestock unless, the applicant 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, and since the BLM does not meet this requirement, the subject applications must be denied in accordance with NRS § 533.503.

²³ NRS chapters 533 and 534.

²⁴ NRS § 533.370 (3).

RULING

Applications 36778, 43028, 44746, 44776, 44780, 44882, 47259, 47260, 47261, 58133, 58135, 58163, 59674, 59712, 59767, 59768, 59995, 60085, and 60141 are hereby denied under the provisions of NRS § 533.503. No ruling is made on the merits of the protests. This ruling does not prejudice the Bureau of Land Management from filing water right applications for uses other than stock water.

Respectfully submitted,



Hugh Ricci, P.E.
State Engineer

HR/TW/jm

Dated this 26th day of

February, 2004.

