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

IN THE MATTER OF APPLICATION 64645 FILED TO APPROPRIATE THE PUBLIC WATERS FROM AN UNDERGROUND SOURCE WITHIN THE NEWARK VALLEY HYDROGRAPHIC BASIN (10-154), WHITE PINE COUNTY, NEVADA.	)))))	**RULING** **#4943**

GENERAL

I.

Application 64645 was filed on November 30, 1998, by the United States of America, Bureau of Land Management ("BLM") to appropriate 0.074 cubic feet per second (cfs), not to exceed 2.0 acre-feet annually, of underground water from the Newark Valley Groundwater Basin, White Pine County, Nevada, for wild horses and wildlife watering purposes within the SE¼ SW¼ of Section 11, T.23N., R.56E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ SW¼ of said Section 11.[1]

II.

Application 64645 was timely protested by Eureka County on the following grounds:

1. This application by the BLM seeks to appropriate ground water diverted from a location in the County of White Pine for use for wildlife and wild horses. It is not within the authority or purposes of the BLM to appropriate water for wildlife and wild horses.
2. The Nevada Department of Wildlife has exclusive jurisdiction for the preservation of wildlife in Nevada.
3. The requested appropriation when combined with existing appropriations and uses in the subject basin and/or areas will, upon information and belief, lower the static water level, degrade the quality of water from existing wells and cause negative hydraulic gradient

[1] File No. 64645, official records in the office of the State Engineer.

influences and other negative impacts.

4. The granting or approving of the subject application in the absence of comprehensive water resource development planning, including but not limited to, environmental impacts, socioeconomic impacts, and long-term impacts on the water resource, threatens to prove detrimental to the public interest.
5. The granting or approval of the above-referenced application would conflict with or tend to impair existing rights in the subject basin and/or areas.
6. The application cannot be granted because the applicant has filed [sic] to provide information to enable the State Engineer to safeguard the public interest properly.
7. The above-referenced application should be denied because the applicant has failed to provide relevant information regarding this application as required by NRS 533.335 and NRS 533.340. The failure to provide such relevant information denies protestant due process as said information may provide further meaningful grounds of protest, and protestant may be barred from submitting the same because the protest period may end before the applicant provides such required information. The failure of applicant to provide such information denies protestant the meaningful opportunity to submit a protest to this application as allowed by Chapter 533 of the Nevada Revised Statutes.
8. The above-referenced application should be denied because economic activity in the area of the proposed point of diversion is water-dependent (e.g., grazing, recreation, etc.); and a reduction in the quantity and/or quality of water in the area would adversely impact said activity and the way of life of the area's

residents. In addition, granting of this application would set a dangerous precedent that could affect Eureka County, in that eighty-five percent (85%) of its area is comprised of BLM administered land.

9. It is impossible to anticipate all potential adverse effects of this water application without further information and study. Accordingly, the protestant reserves the right to amend the subject protest to include such issues as they may develop as a result of further information and study.

10. The undersigned additionally incorporates by reference as though fully set forth herein and adopts as its own, each and every other protest to the subject application filed pursuant to NRS 533.365.

Protestant respectfully reserves the right to submit additional evidence relevant to its points of protest and any additional matters that may affect its citizens as such evidence and information become available.

Therefore, the protestant requested that the application be denied.

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. The State Engineer finds that a hearing is not necessary to consider the merits of the protest filed by Eureka County.

II.

Under the provisions of NRS § 533.365 any interested person may file a protest with the State Engineer against the granting of an application to appropriate the public waters of this state. The protest filed against granting an application shall set forth

with reasonable certainty the grounds of such protest.[2] Protestant Eureka County indicated that they would amend their protest as issues develop and adopts as its own, each and every other protest to the subject application filed pursuant to NRS § 533.365. The State Engineer finds that the issues to be considered are determined from the contents of the subject application and that enumerated in the protest filed against granting of said application. The State Engineer further finds that Eureka County is the only protestant against the subject application.[3]

III.

Under the provisions of NRS § 533.375 the State Engineer, by letter of July 2, 1999, requested the applicant to provide additional information to address some of the issues of the protest. The BLM timely filed a response in the office of the State Engineer in answer to the request for additional information. Eureka County timely replied to the additional information provided by the BLM and filed it in the office of the State Engineer. The State Engineer finds the response to the request for additional information supplied sufficient information for the State Engineer to address the protest issues.

IV.

Protestant Eureka County alleged that it is not within the authority or purposes of BLM to appropriate water for wildlife and wild horses. The review of the BLM's response by Eureka County acknowledges that Nevada case law[4] and State Engineer's Ruling No. 4671 clarify entitlement for BLM to apply for an appropriation of water for wildlife and wild horse watering purposes. The BLM's

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[2] NRS § 533.365(1).
[3] A timely protest was filed by Silver State Ranches but it was subsequently withdrawn by their agent on April 11, 2000, and is on file under Application 64645 in the office of the State Engineer.
[4] State, Board of Agriculture v. Morros, 104 Nev. 709 (1988).

response outlined the authority and purposes for the need to appropriate water for the watering of wild horses and wildlife under federal laws[5] and is proceeding in conformance with Nevada water law. The State of Nevada has long advocated that federal agencies must recognize and comply with state water law.[6] Nevada water law provides that any person who wishes to appropriate the public waters shall file an application to do so,[7] and "person" is defined in the statutes to include the United States as an entity entitled to file a water right application.[8] NRS § 533.023 provides that the use of water for wildlife purposes includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats. The State Engineer finds that the United States, Department of Interior, Bureau of Land Management is a person under the provisions of Nevada water law entitled to file an application to appropriate the public waters of the state for beneficial use of water for wild horse and wildlife watering purposes. The State Engineer further finds no basis or foundation that would dictate a finding that the BLM may not appropriate water for the purposes of watering wild horses and wildlife, and finds that Nevada water law recognizes these purposes as a beneficial use.

V.

Protestant Eureka County alleges that the exclusive jurisdiction for the preservation of wildlife in Nevada is under the Nevada Department of Wildlife.[9] The State Engineer finds that while the Division of Wildlife of the Department of Conservation

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[5] See, BLM letter of July 7, 1999, in File No. 64645, official records in the office of the State Engineer.
[6] State Engineer's Ruling No. 3242, p. 21, dated October 4, 1985, official records in the office of the State Engineer.
[7] NRS § 533.325.
[8] NRS § § 533.010, 534.014.
[9] There is no longer a Department of Wildlife, it is now the Division of Wildlife within the Department of Conservation and Natural Resources.

and Natural Resources has statutory duties related to wildlife, this does not preclude the United States from requesting an appropriation of water to serve that beneficial purpose on federal lands.

VI.

Protestant Eureka County alleges the applicant failed to provide relevant information in the application in compliance with the provisions of NRS § § 533.335 and 533.340. A copy of the original application filed was returned to BLM for corrections on December 28, 1998. An amended application was filed by BLM on January 7, 1999. Nevada Revised Statute § 533.335 lists the information to be provided in an application to appropriate water. The State Engineer finds that the amended application provided the relevant information in accordance with NRS § § 533.335 and 533.340. The State Engineer further finds that Protestant Eureka County was afforded ample time to determine the grounds for protest based on the amended application for which they did not specify what was missing and was therefore, not denied due process on this issue.

VII.

Protestant Eureka County alleges the requested appropriation when added to the existing appropriations will lower the static water levels, degrade the quality of water from existing wells, cause negative hydraulic gradient influences, and other negative impacts which would conflict with or tend to impair existing rights in the subject basin and/or areas. The subject application has requested an annual duty of water not to exceed two acre-feet annually at a diversion rate of 0.074 cfs. The total annual duty of water applied for is less than the amount allowed for the development and use of underground water from a well for domestic purposes for which no permit is required.[10] The State Engineer finds that Nevada water law does not prevent him from granting

permits for applications later in time that may cause a reasonable lowering of the static water level in a prior appropriator's well in a particular area.[11] The State Engineer further finds that the de-minimus quantity applied for in the instant application would not be of such a quantity that there would be an unreasonable lowering of the static water level.

VIII.

Protestant Eureka County alleges that the State Engineer should not grant a permit in the absence of a comprehensive water resource development plan which reviews the potential impacts including, but not limited to environmental, socioeconomic, degradation of water quality, and long-term impacts on the water resource. The State Engineer is cognizant of the existing water level conditions in Newark Valley through groundwater level measurements and crop inventories.[12] The State Engineer has discretion to determine whether a study is necessary under NRS § § 533.368 and 533.375. The State Engineer finds that there is no need for a hydrological, environmental, or other study necessary to protect the public interest under the instant application. The State Engineer further finds that the quantity requested in the application is de-minimus and approval for such a quantity would not threaten to prove detrimental to the public interest or have a detrimental effect on the quantity and quality of the underground water resources in Newark Valley.

IX.

The proposed point of diversion under Application 64645 is the same well as that described in Permit 64409. Permit 64409 is in the name of Silver State Ranches for stock watering purposes.[13]

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[10] NRS § 534.180.
[11] NRS § 534.110(5).
[12] Crop inventory and static water levels in Newark Valley 1996, official records in the office of the State Engineer.
[13] File No. 64409, official records in the office of he State Engineer.

Silver State Ranches acquired the use of the well from Placer Dome U.S. Inc., who was the previous owner of the well that used it for mining and milling purposes under Permit 49272, which was withdrawn by the permittee on August 27, 1998.[14] The BLM and Silver State Ranches entered into a cooperative agreement March 14, 2000, and filed this agreement in the office of the State Engineer.[1] The administration and ability to use public lands for grazing or any other purposes are a matter of federal law. The subject application filed by the BLM is also the federal entity that administers and controls the land under the proposed place of use of Application 64645, which is identical to the place of use under Permit 64409. The existing non-federal stock water right under Permit 64409 is a compatible use with the purposes under Application 64645. The State Engineer finds that the proposed point of diversion under Application 64645 is an existing well utilized by Silver State Ranches under Permit 64409. The State Engineer further finds that the requested manner of use of wildlife and wild horse watering under the subject application is a use compatible with the existing stock water right under Permit 64409 and thereby would not conflict or impair the value of existing water rights.

X.

Protestant Eureka County alleges that the subject application if approved would aversely impact the economic activity that is water dependent (e.g. grazing, recreation, etc.) in the area of the proposed point of diversion. The State Engineer found above that the quantity of water applied for under the subject application is de-minimus. The State Engineer finds that the approval of the subject application for a de-minimus quantity of water for the watering of wild horse and wildlife would not

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[14] File No. 49272, official records in the office of the State Engineer.

adversely impact the economic activity in the vicinity of the proposed point of diversion and place of use.

XI.

Protestant Eureka County alleges that approval of this application would set a dangerous precedent that could affect Eureka County, in that eighty-five percent (85%) of its area is comprised of BLM administered land. The State of Nevada is a prior appropriation state where a water right that is first in time is first in right. This priority system for allocating water rights in Nevada allows for junior appropriators to have water from a source once the needs of senior appropriators are met.

In the instant case the applicant and Silver State Ranches, who happens to be the current range user and owner of the existing water right in the well proposed to be utilized under the subject application, have entered into a cooperative agreement that provides for the use of the well by the parties to that agreement.[1] The State Engineer finds that both junior and senior rights can be exercised accordingly. The State Engineer further finds that the approval of an application where there is an agreement between the junior and senior appropriators does not set precedent since each application filed to appropriate water is reviewed and based on its own merits.

CONCLUSIONS

I.

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

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:[16]

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[15] NRS chapters 533 and 534.

[16] NRS § 533.370(3).

A. there is no unappropriated water at the proposed source;

B. the proposed use conflicts with existing rights; or

C. the proposed use threatens to prove detrimental to the public interest.

III.

Application 64645 requests 2.0 acre-feet annually of underground water from a point of diversion that is far removed from existing well sites that appropriate water from the Newark Valley Groundwater Basin. The State Engineer concludes that the approval of Application 64645 for 2.0 acre-feet annually of underground water will not conflict, interfere with, nor impair the value of existing water rights.

IV.

Application 64645 requests an appropriation of underground water for the purposes of watering wild horses and wildlife. The State Engineer concludes that Nevada water law recognizes these purposes as a beneficial use and that approval of the subject application for said purposes would not threaten to prove detrimental to the public interest.

V.

The State Engineer concludes there is no basis or foundation under applicable law to support the position of the protestant.

RULING

The protest to Application 64645 is hereby overruled and Application 64645 is approved subject to:

1. payment of the statutory permit fees;
2. all other existing rights.

Respectfully submitted,

R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/cl

Dated this 11th day of

July, 2000.