

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

IN THE MATTER OF APPLICATIONS)
61317, 61318, 61383, 61384, 61385, 61386,)
61387, 61388, 61389, 61390 AND 61391)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF SURFACE WATER SOURCES)
WITHIN THE BRUNEAU RIVER AREA)
HYDROGRAPHIC BASIN (38), ELKO)
COUNTY, NEVADA.)

RULING

#5866

GENERAL

I.

Application 61317 was filed on June 15, 1995, by the United States of America, Department of the Interior, Bureau of Land Management, (BLM) Elko District Office, to appropriate 0.084 cubic feet per second (cfs) of surface water from Little RB Reservoir #1 for stockwatering and wildlife purposes within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, T.43N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 22. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.¹

II.

Application 61318 was filed on June 15, 1995, by the BLM, Elko District Office, to appropriate 0.084 cfs of surface water from Little RB Reservoir #2 for stockwatering and wildlife purposes within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, T.43N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 22. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.²

¹ File No. 61317, official records in the Office of the State Engineer.

² File No. 61318, official records in the Office of the State Engineer.

III.

Application 61383 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.027 cfs of surface water from Rattlesnake Reservoir #1 for stockwatering and wildlife purposes within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T.42N., R.57E., 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 14. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.³

IV.

Application 61384 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.027 cfs of surface water from Rattlesnake Reservoir #2 for stockwatering and wildlife purposes within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 11, T.42N., R.57E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 11. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.⁴

V.

Application 61385 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.001 cfs of surface water from Rattlesnake Reservoir #3 for stockwatering and wildlife purposes within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, T.42N., R.57E., 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 3. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.⁵

VI.

Application 61386 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.028 cfs of surface water from Evans Flat Stockpond for stockwatering and wildlife purposes within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T.43N., R.57E., 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 28. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.⁶

³ File No. 61383, official records in the Office of the State Engineer.

⁴ File No. 61384, official records in the Office of the State Engineer.

⁵ File No. 61385, official records in the Office of the State Engineer.

⁶ File No. 61386, official records in the Office of the State Engineer.

VII.

Application 61387 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.051 cfs of surface water from Stone Flat Reservoir #2 for stockwatering and wildlife purposes within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 25, T.42N., R.57E., 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 25. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.⁷

VIII.

Application 61388 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.051 cfs of surface water from Stone Flat Reservoir #3 for stockwatering and wildlife purposes within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 30, T.42N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 30. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.⁸

IX.

Application 61389 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.051 cfs of surface water from Stone Flat Reservoir #1 for stockwatering and wildlife purposes within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, T.42N., R.57E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 25. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.⁹

X.

Application 61390 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.028 cfs of surface water from Reservoir, Field Stock Pond, and Ditch for stockwatering and wildlife purposes within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 24, all within T.43N., R.57E., 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 24. On

⁷ File No. 61387, official records in the Office of the State Engineer.

⁸ File No. 61388, official records in the Office of the State Engineer.

⁹ File No. 61389, official records in the Office of the State Engineer.

June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.¹⁰

XI.

Application 61391 was filed on July 10, 1995, by the BLM, Elko District Office, to appropriate 0.027 cfs of surface water from Lookout Mountain Spring Dam for stockwatering and wildlife purposes within the NE¼ NE¼ of Section 22, T.42N., R.57E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of said Section 22. On June 7, 2005, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wildlife purposes only.¹¹

XII.

Applications 61317, 61318, 61383, 61384, 61385, 61386, 61387, 61388, 61389, 61390 and 61391 were timely protested by the Board of County Commissioners, Elko County, on the following grounds:^{1,2,3,4,5,6,7,8,9,10,11}

The Board of County Commissioners protest the abovenoted application on the basis of Senate Bill No. 96 passed by the 1995 Nevada Legislature whereby Section 1 notes that Chapter 533, Nevada Revised Statutes was amended as follows: The state engineer shall not issue a permit to appropriate water for the purpose 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.

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 protest.

¹⁰ File No. 61390, official records in the Office of the State Engineer.

¹¹ File No. 61391, official records in the Office of the State Engineer.

II.

The protest centers on issues involving BLM ownership of water right permits for stockwater use. In this case, Applications 61317, 61318, 61383, 61384, 61385, 61386, 61387, 61388, 61389, 61390 and 61391 were originally filed for stockwatering and wildlife purposes. Once an application is filed and has gone through the publication process, the only method available for changing the point of diversion, place of use or manner of use is through the change application process. However, the Office of the State Engineer has allowed the deletion of information on an existing application, after publication, on a case-by-case basis. On June 7, 2005, the BLM sent a letter to the Office of the State Engineer requesting that stockwatering be withdrawn from consideration and that the application proceed for wildlife watering only. The State Engineer's office has accepted this request and stockwatering has been deleted from the applications. The remaining use requested under the applications is for the watering of wildlife.¹²

The applications have been protested on the grounds that the BLM is prohibited from obtaining an appropriation of water for stockwatering purposes. Since stockwatering has been withdrawn from the applications and only wildlife remains the protest issue has been rendered moot.

The State Engineer finds the protest issue has been resolved with the withdrawal of stockwatering from the applications and the applications may be considered for wildlife purposes only.

III.

The issue of the BLM obtaining water right permits for wildlife purposes has been previously addressed, in part, under State Engineer's Ruling Nos. 4671 and 4943 and Nevada case law.¹³

In State Engineer's Ruling No. 4671, the State Engineer found that while the Nevada Division of Wildlife¹⁴ has statutory duties related to wildlife, this does not preclude the United States from requesting an appropriation of water to serve that beneficial purpose. In State Engineer's Ruling No. 4943, the State Engineer found that

¹² File Nos. 61317, 61318, 61383, 61384, 61385, 61386, 61387, 61388, 61389, 61390 and 61391, official records in the Office of the State Engineer.

¹³ *State Board of Agriculture v. Morros*, 104 Nev. 709 (1988).

¹⁴ Note, the Nevada Division of Wildlife is now the Nevada Department of Wildlife.

there was 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.

In the *State Board of Agriculture v. Morros*, on cross-appeal from an order of the district court reversing the State Engineer's grant of applications by the United States, the Court held that wildlife watering is encompassed in the NRS § 533.030 definition of recreation as a beneficial use of water. NRS § 501.100 recognizes the recreational value of wildlife and NRS § 501.181 and NRS § 533.367 recognize the need to provide wildlife with water. NRS § 533.030 indicates that the legislature intended the provision to include wildlife watering under rubric of recreation as a beneficial use of water. Therefore, the Court concluded that providing water to wildlife is a beneficial use of water.¹⁵

The State Engineer finds that Nevada water law recognizes wildlife watering as a beneficial use of water. The State Engineer finds that the BLM may file an application to appropriate the public waters of the State of Nevada for wildlife watering purposes in compliance with state water law.

IV.

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 for the proposed water sources.¹⁶ Applications 61317, 61318, 61383, 61384, 61385, 61386, 61387, 61388, 61389, 61390 and 61391 request a total appropriation of water sufficient to water 876 deer and 90 antelope, combined. The standard duty for a deer and antelope is 4 gallons per day per head. This equates to a total requested appropriation of approximately 4.328 acre-feet annually.

The State Engineer finds that the quantity of water requested in these applications is minimal and approval of such a small quantity would not conflict with or impair existing water rights.

¹⁵ *State Board of Agriculture v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988).

¹⁶ Water Rights Database, Hydrographic Abstract, official records in the Office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁷

II.

The State Engineer concludes that the grounds of the protests are no longer applicable and the protests may be overruled.

III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:¹⁸

- 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 or change threatens to prove detrimental to the public interest.

IV.

The State Engineer concludes that there is unappropriated water at the source sufficient to satisfy the minimal requirements of the requested appropriations and said appropriations will not conflict, interfere with, nor impair the value of existing rights.

V.

Applications 61317, 61318, 61383, 61384, 61385, 61386, 61387, 61388, 61389, 61390 and 61391 request an appropriation of surface runoff for the purposes of watering wildlife by the BLM. Nevada water law recognizes this purpose as a beneficial use and recognizes the BLM as an entity entitled to file an application to appropriate water for this beneficial use within the confines of state law. The State Engineer concludes that approval of the subject applications would not threaten to prove detrimental to the public interest.

¹⁷ NRS chapters 533.

¹⁸ NRS § 533.370(5).

RULING

The protests are overruled and Applications 61317, 61318, 61383, 61384, 61385, 61386, 61387, 61388, 61389, 61390 and 61391 are hereby approved subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 27th day of

June, 2008