

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

IN THE MATTER OF APPLICATION 67191 )  
FILED TO APPROPRIATE THE PUBLIC )  
WATERS OF A SURFACE SOURCE WITHIN )  
THE GRASS VALLEY HYDROGRAPHIC )  
BASIN (138), LANDER COUNTY, NEVADA. )

**RULING**

**#5671**

**GENERAL**

**I.**

Application 67191 was filed on February 5, 2001, by the U.S. Bureau of Land Management (BLM), to appropriate 2.0 cubic feet per second (cfs) of water from an unnamed stream in Underwood Canyon (Underwood Canyon stream) for recreation and wildlife use from January 1 through December 31. The proposed point of diversion is within the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 17, T.22N., R.48E., M.D.B.&M., at the point where the stream leaves private land and enters land administered by the BLM. The place of use is described as in-stream flow, starting at the upper reach, within the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 17, W $\frac{1}{2}$  SW $\frac{1}{4}$  of Section 8, NE $\frac{1}{4}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , W $\frac{1}{2}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$ , of Section 7, SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Lot 7 of Section 6 all in T.22N., R.48E., M.D.B.&M and S $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 1, W $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 12 all in T.22N., R.47E., M.D.B.&M.<sup>1</sup>

**II.**

Application 67191 was timely protested by Lander County on the following grounds:<sup>1</sup>

The proposed use of water may conflict with existing rights to surface and groundwater and may prove detrimental to the public interest by restricting agriculture and livestock uses of water. Appropriation to BLM may also impair NDOW wildlife and fisheries management in the area. These effects may induce adverse economic and fiscal impacts to Lander County and may impair resident quality of life. BLM has not indicated how many wildlife will be watered and how many people will benefit from the recreational use.

**FINDINGS OF FACT**

**I.**

Nevada Revised Statute (NRS) § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public administrative hearing is necessary to

<sup>1</sup> File No. 67191, official records in the Office of the State Engineer.

address the merits of a protest to an application to appropriate the public waters of the State of Nevada. The State Engineer finds that in the case of protested Application 67191 there is sufficient information contained within the records of the Office of the State Engineer to gain a full understanding of the issues and a hearing on this matter is not required.

## II.

An examination of the records of the Office of the State Engineer shows that a prior water right exists on the Underwood Canyon stream under Permit 4613, Certificate 1656. This permit was certificated on June 17, 1930, for 0.323 cfs and 117.00 acre-feet annually for the purpose of irrigation and domestic use from April 1 through October 1. The point of diversion under Permit 4613 is within the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 7, T.22N., R.48E., M.D.B.&M. The certificated place of use is described as 32.27 acres of land, found within the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 12, all in T.22N., R.47E., M.D.B.&M.<sup>2</sup> The current owner of record of Permit 4613 with the Office of the State Engineer is Don Bowman; however, recent communications suggest this record is incomplete and the current deeded owner may be Dalton Wilson. Mr. Wilson also owns the private land that contains the headwater of Underwood Canyon stream. Maps prepared by the Office of the State Engineer for the point of diversion (POD) and place of use (POU) for Application 67191 and Permit 4613, Certificate 1656, reveal that the POD for Permit 4613, Certificate 1656 is located approximately at the mid-point of the POU for Application 67191.<sup>1</sup> A further examination of the records of the Office of the State Engineer show that no determination has been made for the estimated annual flow for the Underwood Canyon stream. Informal observations of annual flow for the stream by Division of Water Resources staff, BLM staff, and the local rancher(s) suggest that snowmelt is the principal source of water for the Underwood Canyon stream and that stream flow declines to a trickle or is dry by summers end. The State Engineer finds Permit 4613 is an existing water right downstream from the proposed point of diversion under Application 67191.

## III.

On May 06, 2005, the Office of the State Engineer held a field investigation in Underwood Canyon with notice sent on April 06, 2005, to the Applicant, the Protestant and the owner of record for Permit 4613, Certificate 1656. The field investigation attendants were: Hamilton Reed and Dan Taylor - Nevada Division of Water Resources, Gerald Smith and John Sherve (Applicant) – BLM Battle Mountain Field Office, Rodger Sutton (Protestant on behalf of

---

<sup>2</sup> File No. 4613, official records in the Office of the State Engineer.

Lander County) - Lander County Public Works Director, Rodger H. Williams and Ray Salisbury (Protestant Advisor) – Lander County Public Advisory Commission, Dalton Wilson as owner of Permit 4613, Certificate 1656, and Ken Conley as a friend of Dalton Wilson. After lengthy discussion, the conclusion agreed to by the field investigation attendees was that the Applicant (BLM) would modify Application 67191 to not conflict with Permit 4613, Certificate 1656 and, they would quantify the water amount for the wildlife and recreation requested. The State Engineer finds that all parties attended or were represented at the field investigation and, that the consensus was that the BLM would modify Application 67191 to remove any potential conflict with Permit 4613, Certificate 1656.<sup>1</sup>

#### IV.

On August 5, 2005, the Office of the State Engineer received a letter from the Applicant, dated August 4, 2005, requesting the modification of Application 67191.<sup>1</sup> Subsequent to correspondence and telephone conversations to correct typographic errors in the letter, the Applicant's request can be summarized as:

1. modifying the period of use to October 2 through March 31,
2. modifying the place of use to include only the stream reaches above or upstream of the Point of Diversion for Permit 4613, Certificate 1656,
3. modifying the amount of water applied for to 0.01 cfs.

The State Engineer finds that the Applicant's proposed modifications of Application 67191 are acceptable.

#### V.

On September 1, 2005, the Office of the State Engineer sent a certified letter to the Protestant, and all attendees of the field investigation, which outlined a preliminary plan that incorporated the Applicant's modifications of Application 67191. A signed receipt for the certified mail was received in the Office of the State Engineer on September 9, 2005. The Protestant was requested to respond in writing within sixty (60) days from the date of the letter by withdrawing his protest or indicating that he wished to continue the protest. He was also notified that failure to respond would be grounds for overruling the protest. To date, the Protestant has not contacted the Office of the State Engineer regarding this matter.<sup>1</sup> The State Engineer finds that the Protestant's failure to respond indicates he is no longer interested in pursuing the protest of Application 67191.

## VI.

Application 67191 seeks to create an instream water right, junior to the existing water right Permit 4613, Certificate 1656, for the preservation of existing riparian habitat and wildlife watering on Underwood Creek. This manner of use already exists informally and does not entail any new diversion, nor does it involve the use of more water than has been historically used for the existing riparian habitat and wildlife watering. The State Engineer finds that the proposed manner of use is essentially non-consumptive and would not create any actual diversion from the stream channel above the point of diversion for Permit 4613, Certificate 1656.

## VII.

Nevada Revised Statute § 533.330 only allows the appropriation of water for one main purpose per application. By letter dated September 1, 2005, the State Engineer's office informed the Applicant of this fact, indicated that recreation and wildlife are both major uses and since no amount of water was requested for recreation, Application 67191 would only be considered for wildlife purposes. The Applicant was provided the opportunity to respond to this letter but no comments were received.<sup>1</sup> The State Engineer finds Application 67191 will only be considered for wildlife purposes.

## CONCLUSIONS

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>3</sup>

### II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>4</sup>

- 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.

---

<sup>3</sup> NRS chapters 533.

<sup>4</sup> NRS § 533.370 (5).

**III.**

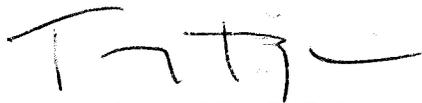
An examination of the records of the Office of the State Engineer, show that a prior water right exists on the Underwood Canyon stream under Permit 4613, Certificate 1656. The State Engineer concludes that Permit 4613, Certificate 1656 is an existing surface water right and by the amendment of Application 67191 there will be no interference with the existing water right. The State Engineer further concludes that the approval of a minimal amount of use, with no actual diversion of water, will not conflict with the existing water right Permit 4613, Certificate 1656 and does not threaten to prove detrimental to the public interest.

**RULING**

The protest to Application 67191 is hereby overruled and said application is approved subject to:

1. the Applicant's August 4, 2005, modification of Application 67191,
2. the issuance for wildlife purposes only,
3. existing rights, and
4. payment of the statutory permit fees.

Respectfully submitted,



TRACY TAYLOR, P.E.  
State Engineer

TT/WHR/jm

Dated this 12th day of  
October, 2006.