

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

IN THE MATTER OF APPLICATION 68306)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE NORTH FORK)
AREA HYDROGRAPHIC BASIN (44),)
ELKO COUNTY, NEVADA.)

RULING

#5755

GENERAL

I.

Application 68306 was filed on December 13, 2001, by Glaser Land and Livestock Co., to appropriate 0.01 cubic feet per second of water from an underground source for stockwatering purposes within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, T.37N., 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 10.¹

II.

Application 68306 was timely protested by the U.S.D.I., Bureau of Land Management (BLM) on the following grounds:¹

1. This well is located on public land in a multiple use management area, and wildlife is one of the uses.
2. The applicant has not been authorized by BLM to use or maintain the well.
3. All water rights acquired for stockwater on public land after August 21, 1995 must be in accordance with 43 CFR 4120.3-9.
4. BLM cost shared in the development of this project and must protect the investment of public funds by acquiring part or all of the water rights.

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

¹ File No. 68306, official records in the Office of the State Engineer.

State of Nevada. The State Engineer finds that in the case of protested Application 68306, 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.

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 the 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.

An examination of the records contained within File No. 68306 shows that the BLM has indicated that Application 68306 is located on the North Fork Group Allotment and confirmed the Applicant is one of the current authorized range users/permittees for this allotment.²

The State Engineer finds that the Applicant is entitled by the proper federal agency to place livestock upon the public range described under Application 68306.

III.

The protest indicates that the well is located on public land in a multiple use management area, and wildlife is one of the uses. Absent of any physical restrictions,

² See, Correspondence from the U.S. Bureau of Land Management Elko Field Office to the Office of the State Engineer, January 15, 2004, official record in the Office of the State Engineer.

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 wildlife. If water is needed at this particular point of diversion for wildlife, at times when water is not being diverted for livestock, an application may be filed for such purposes.

Application 68306 requests an appropriation of water for stockwatering purposes from an existing well within the Applicant's grazing allotment. The BLM has confirmed that the Applicant is one of the authorized permittees for the grazing of up to 2,064 cattle from April 1 to October 31 of each year.¹

The State Engineer finds that the BLM, by issuing the Applicant a grazing permit, implicitly considers stockwatering as one of the multiple uses within this area. The State Engineer further finds that the application before him requests an appropriation of underground water for stockwatering purposes only, and that any need for an appropriation of additional water from this well site for wildlife purposes can be requested through the submittal of a water right application for such purpose.

IV.

The protest also indicates that the Applicant has not been authorized by BLM to use or maintain the well. Information on the application form indicates that the proposed point of diversion is an existing well equipped with pump, motor, pipelines and troughs. It should be noted that 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. It does not appear that the Applicant will need to do any development to the public lands, but if any development is necessary, the issuance of a water right permit will not absolve the Applicant of any additional permitting requirements from other regulatory agencies.

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.³ 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 point of diversion.⁴

The State Engineer finds that Federal permitting and access requirements would not be annulled by the issuance of a water right permit and access, use and maintenance of the well is an issue between the Applicant and the BLM. The State Engineer further finds that there are no existing rights at the proposed point of diversion.

V.

The protest states that all water rights acquired for stockwater on public land after August 21, 1995, must be in accordance with 43 CFR 4120.3-9. A review of the cited regulation shows that water for livestock watering on public lands shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the state of Nevada.⁵ Within this regulation, the BLM clearly recognizes and accepts the limits and authority of state water law regarding non-reserved water rights for livestock purposes.

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 to control the use of the State's water in accordance with the provisions set forth in the Statutes of the state of Nevada.⁶ There is no provision in Nevada water law requiring stockwater rights on public land be held in the name of the United States.

The State Engineer finds that this protest claim is without merit and the Applicant is entitled under Nevada water law to file the application in its own name. The State Engineer further finds that the BLM cannot frustrate state substantive or procedural laws regarding the appropriation of water for livestock upon public lands.

VI.

The final protest issue is in regards to the funding of the development of the water project consisting of the well, pump, pipelines and troughs. The protest states that the

³ NRS § 534.050 (3).

⁴ Nevada Division of Water Resources' Water Rights Database, Special Hydrographic Abstract, January 17, 2007.

⁵ 43 CFR § 4120.3-9.

⁶ NRS chapters 532 to 538, inclusive, also chapters 540, 543 and 544.

BLM cost shared in the development of this project and must protect the investment of public funds by acquiring part or all of the water rights.

All water sources within the boundaries of the State belong to the public and are subject to the laws of the state of Nevada relating to the appropriation and use of water and not otherwise.⁷ Application 68306 was protested in part on the grounds that it is BLM policy to acquire a partial interest in a water right in those cases where the federal government has made a financial contribution to the water development. No similar requirement exists within the Nevada Revised Statutes or the policies established by the Office of the State Engineer; therefore, the State Engineer finds that this protest issue is without merit.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁹

- 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.

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 Application 68306 would not threaten to prove detrimental to the public interest.

⁷ NRS § 533.025

⁸ NRS chapters 533 and 534.

⁹ NRS § 533.370 (5).

IV.

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

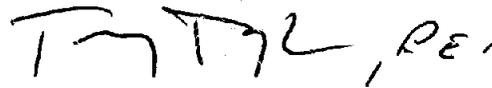
V.

The State Engineer concludes that the protest claims of the BLM are without merit and may be overruled.

RULING

The protest to Application 68306 is hereby overruled and said application is approved subject to existing rights and payment of the statutory permit fee.

Respectfully submitted,



Tracy Taylor, P.E.
State Engineer

TT/TW/jm

Dated this 27th day of
July, 2007.