

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

IN THE MATTER OF APPLICATION 44986 )  
FILED TO APPROPRIATE THE PUBLIC )  
WATERS OF AN UNDERGROUND SOURCE )  
WITHIN THE DIXIE CREEK – TENMILE )  
CREEK AREA HYDROGRAPHIC BASIN (48), )  
ELKO COUNTY, NEVADA. )

**RULING**  
**#5949**

**GENERAL**

**I.**

Application 44986 was filed on October 29, 1981, by the Bureau of Land Management (BLM) to appropriate 0.0049 cubic feet per second of water from Indian Well for livestock and wildlife purposes within the NE¼ SE¼ of Section 30, T.31N., R.55E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ SE¼ of said Section 30.<sup>1</sup>

**II.**

Application 44986 was timely protested by John H. Reed on the following grounds:<sup>1</sup>

1. Beneficial use is the basis measure and limit of the right to use water. (NRS 533.035) Beneficial use refers to the amount of water actually applied by the appropriator to use. Appropriation must be coupled with the act of applying the water to a beneficial use recognized by Nevada. The United States does not own livestock or wildlife and so it is impossible for the United States to actually apply the water to beneficial use. In the case of livestock, only the person who owns or controls the livestock can apply the water to beneficial stockwater use and in the case of wildlife, only the State of Nevada can apply the water to wildlife use, whether on private lands or public lands.
2. The United States has no necessity for the use of the water applied for. The person who owns or controls the livestock has the necessity to water the livestock; and the State of Nevada has the necessity to water the wildlife. The U.S. therefore, is not permitted to use the waters under Nevada law. (NRS 533.045)

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<sup>1</sup> File No. 44986, official records in the Office of the State Engineer.

3. The Protestant is informed and believes that it has vested rights to use the water for stockwater purposes to the extent that to grant the application would impair the vested rights of the Protestant.
4. No application shall be for water to be used for more than one purpose. (NRS 533.330) The U.S. applications include both livestock and wildlife use.
5. NRS 533.340 requires that the application contain, if for stockwatering purposes, the approximate number and character of animals to be watered. If the application does not contain that information, it is defective. This statute does not list wildlife as a use specifically requiring application and appropriation.
6. The applications are detrimental to the public welfare. If granted they will undermine the sovereign control of the State of Nevada over wildlife by giving the United States Government control of the water sources for wildlife. Appropriating stockwater use to the U.S., which owns no livestock, will prevent Nevada residents and bona fide appropriators from appropriating stockwaters that may be available or become available through water development to water additional livestock in the future which may be grazed if forage increases. By granting the United States its appropriation, the State of Nevada is thereby delegating to the U.S. the right to determine how many livestock will use the Nevada public waters on each water source involved. In the event that the public lands upon which the water source is located, would be returned or transferred to the State of Nevada, this would create serious ownership and management problems for the State of Nevada. The State of Nevada would own the lands but the U.S. government would have water right appropriations on the water sources on the lands and no use for such water. The application threatens to prove detrimental to the public interest. The proposed use or change that would result from granting the application conflicts with existing rights of the Protestant and would grant the U.S. the authority to reduce the Protestant's stockwater use on the water source and replace it with use by some other livestock owner or operator, or with other beneficial use contrary to the long established water law of the State of Nevada and without the State of Nevada exercising its jurisdiction over the water. NRS 533.370 requires the rejection of the application by the State Engineer.
7. The Protestant has a subsisting right to water range livestock at the place and source applied for and in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at the place and source. Therefore, pursuant to NRS 533.495, the application must be denied.
8. Wildlife use is a natural use which does not require appropriation by any entity for the benefit of the wildlife.
9. The water of all sources in Nevada belong to the public. (NRS 533.025) Granting of the application will surrender this public ownership and the sovereign rights of the State of Nevada in and to

- the water, to the United States Government contrary to the best interests and the general welfare of the State of Nevada.
10. Granting the application would give the United States the authority and the opportunity to take from the Protestant, without compensation, property of the Protestant in the form of water development, water development improvements and costs and stockwater use that have been applied to the water source by the Protestant.
  11. Granting the application would place the U.S. Government in the position of being able to charge fees and licenses for the use of Nevada's water through the licensing of livestock grazing.
  12. Granting the application could give the U.S. Government the legal basis upon which to dictate to the State of Nevada the numbers and types of wildlife that could use the water source and their seasons of use. Thereby interfering with the jurisdiction of the Nevada Department of Fish and Game.
  13. Consent of the State of Nevada to the acquisition by the United States of America for such water rights has not been given as required by Nevada Revised Statutes 328.030 through 328.150.
  14. The historical use of the water source for stock purposes has made such water appurtenant to the Protestant's ranch through a vested right or appropriation. After Protestant's use is satisfied there may be no unappropriated water.
  15. The source of the water applied for is on private lands owned or controlled by Protestant and the U.S. applicant has no legal access to the water source or right to use Protestant's lands to make use of the water.
  16. The Protestant caused or contributed to the drilling and development of the well and in using the water for stockwatering purposes. There may not be enough water to satisfy Protestant's present and future needs and those applied for. Permitting others to use the water through BLM licensing would require the taking or using of Protestant's property without compensation.
  - \*17. There are no so-called wild horses or burros legally in the area and no water should be appropriated for their use.
  - \*17. The numbers of so-called "wild horses" to be watered under this application are in excess of those permitted by law and the use should be reduced.
  - \*18. Provisions unique to each ranch are:

Water rights are personal property rights and have a market value. By holding a water right, the Federal Government, in effect, owns rights not constitutionally intended by the framers of our Constitution. The Federal Government unfairly competes with the private citizen for these rights by using our own tax monies to acquire 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 State of Nevada. The State Engineer finds that sufficient evidence exists within the records of the Office of the State Engineer and a hearing is not necessary to consider the merits of the protest.

### II.

BLM ownership of water rights for stockwater use constitutes a large portion of the protest issues.

1. 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.

The State Engineer finds the BLM does not own, lease, or otherwise possess a legal or proprietary 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.

### III.

The protests imply that it is not necessary or appropriate for the BLM to hold water rights in the state of Nevada. Nevada Revised Statute § 533.325 provides that only a “person” can file an application to appropriate water. In general usage, a “person” is defined to be a human being, firm, labor organization, partnership, association, corporation, legal representative, trustee, etc.<sup>2</sup> Nevada Revised Statute § 533.010 defines “person” as used in chapter 533 to include the United States and the State of Nevada. Nevada Revised Statute § 534.014 defines person to include any municipal corporation, power district, political subdivision of this or any state, or an agency of the United States Government. The State Engineer finds that the BLM is a person as defined in Nevada water law and is therefore entitled to file an application to appropriate the public waters of Nevada within the confines of Nevada water law.

### IV.

The protest claims in part that the BLM has no legal mandate or necessity to obtain or use water to manage or serve wildlife and cannot put such water to beneficial use. These issues have been previously addressed, in part, under State Engineer’s Ruling Nos. 4671 and 4943 and Nevada case law.<sup>3</sup>

In State Engineer’s Ruling No. 4671, the State Engineer found that while the Nevada Division of Wildlife<sup>4</sup> 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 there was no basis or foundation that would dictate a finding that the BLM may not appropriate water for the purposes of watering 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.

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<sup>2</sup> Black’s Law Dictionary, 1028 (5<sup>th</sup> ed. 1979).

<sup>3</sup> *State Board of Agriculture v. Morros*, 104 Nev. 709 (1988).

<sup>4</sup> Note, the Nevada Division of Wildlife is now the Nevada Department of Wildlife.

Therefore, the Court concluded that providing water to wildlife is a beneficial use of water.<sup>5</sup>

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.

#### V.

The State Engineer's office has long held that federal agencies must comply with state water law.<sup>6</sup> The State Engineer finds that the BLM, by filing Application 44986 to appropriate the public waters of the State of Nevada, has accepted the authority of the State Engineer for filing applications to appropriate water.

#### VI.

Application 44986 was filed for livestock and wildlife as the proposed manner of use. A water right application may only be filed for one purpose;<sup>7</sup> however, it was not uncommon in the past for an applicant to indicate on Item #3 of the application both stockwater and wildlife as the one purpose for the application. The Division of Water Resources accepted these applications, in the late 70s and early 80s, possibly due to the lack of distinction within Nevada water law between larger wildlife, livestock and wild horses during that time period. However, recent stockwater legislation has drawn a clearer distinction between wildlife, wild horses and stockwater. The requirements placed upon an applicant for a stockwater appropriation are more rigorous than the application requirements for wildlife.<sup>8</sup> In addition NRS § 533.503, State Engineer's Ruling Nos. 4671 and 4943 and *State Board of Agriculture v. Morros*, previously mentioned in this ruling, have forced a greater distinction between wildlife, wild horses and stockwater.

Under Item #4(c) of Application 44986, the applicant listed 10 mule deer and 20 antelope. As found in Section II of this ruling, the BLM is not entitled under current Nevada water law to apply for a new appropriation of water for stockwater purposes. The State Engineer finds that Application 44986 cannot be approved for stockwatering; however, Application 44986 can be considered for wildlife.

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<sup>5</sup> *State Board of Agriculture v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988).

<sup>6</sup> State Engineer's Ruling No. 3242, p. 21, dated October 4, 1985, official records in the Office of the State Engineer.

<sup>7</sup> NRS § 533.330.

<sup>8</sup> NRS § 533.503.

## VII.

Application 44986 can be considered for a total appropriation of water sufficient to water 10 deer and 20 antelope. The standard duty for deer and antelope is 4 gallons per day per head. The State Engineer finds that the quantity of water requested in this application is minimal and approval of such a small quantity would not impair existing ground-water rights in the Dixie Creek – Tenmile Creek Area Hydrographic Basin.

## VIII.

In regards to Application 44986, the Protestant indicates that they have a vested right or appropriation on the source through historical use of the water and no unappropriated water exists at this well. However, 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 source for Application 44986.<sup>9</sup>

The State Engineer finds neither the Protestant nor any other party has a valid water right at the proposed point of diversion of Application 44986.

## IX.

The protest states that the sources of water applied for are on private land and therefore, the BLM has no legal access to the source. A review of land status maps on file in the Office of the State Engineer shows that the source of water is on public lands managed by the BLM. The State Engineer finds that the proposed point of diversion under Application 44986 is on public land managed by the BLM; therefore, the BLM does have access to the water source.

## CONCLUSIONS

### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>10</sup>

### II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:<sup>11</sup>

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<sup>9</sup> Water Rights Database, Hydrographic Abstract, official records in the Office of the State Engineer.

<sup>10</sup> NRS chapters 533 and 534.

<sup>11</sup> NRS § 533.370(5).

- 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.**

Application 44986 was filed by the BLM for livestock and wildlife. After a careful evaluation of the information contained within the application it has been found that Application 44986 can be considered for approval on a limited basis for wildlife use.

The State Engineer concludes Application 44986 can be considered for approval for wildlife purposes.

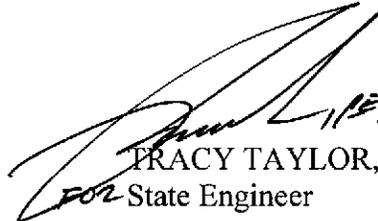
**IV.**

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

**RULING**

The protest is overruled and Application 44986 is hereby approved for wildlife purposes only, subject to existing rights and payment of the statutory permit fee.

Respectfully submitted,

  
TRACY TAYLOR, P.E.  
FOR State Engineer

TT/TW/jm

Dated this 12th day of  
February, 2009.