

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

IN THE MATTER OF APPLICATION 63526)
FILED TO APPROPRIATE THE PUBLIC)
WATERS FROM HIKO SPRING WITHIN)
THE COLORADO RIVER VALLEY)
HYDROGRAPHIC BASIN (213), CLARK)
COUNTY, NEVADA AND IN THE MATTER)
OF THE ABANDONMENT OF PERMIT)
11405, CERTIFICATE 3156.)

RULING

6032

GENERAL

I.

Application 63526 was filed on October 22, 1997, by the United States of America, Department of the Interior, Bureau of Land Management (BLM), to appropriate 0.027 cubic feet per second (cfs) of water from Hiko Spring for wildlife purposes within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, T.32S., R.65E., 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 12.¹

II.

Application 63526 was timely protested by Thomas E. and Barbara W. Smigel, on grounds summarized as follows:¹

- The Protestant's have a stockwatering right on Hiko Spring, Permit 11405, Certificate 3156.
- The Protestant's have a pending application for a new appropriation for irrigation on the spring, Application 61007.
- The Protestant's Desert Land Entry (DLE) N-59723, for the area around the spring, was denied by the BLM and is under appeal.
- Application 63526 is in direct conflict with existing rights.
- The BLM denied the Protestant's DLE on the basis of insufficient water and now files Application 63526 for water the existence of which it previously denied.
- No appropriation of water for wildlife use is necessary at this natural spring because NRS § 533.367 requires that access to the spring must be provided to wildlife.
- The use of water for "riparian/habitat maintenance" of 99% of the water included in the application is nebulous and undefined use, not measurable and cannot be shown to be a beneficial use. There is no diversion works planned in the application (63526 question 8). In order to verify the beneficial use of water there must be a measurement by a water rights surveyor showing the amount of water beneficially used (NRS 533.400). In this case, there is no diversion and no way to measure the

¹ File No. 63526, official records in the Office of the State Engineer.

use as required. In the application, the answers to questions 5 and 8 are in direct conflict.

III.

Permit 11405, Certificate 3156 authorizes the appropriation of 0.002 cfs of water from Hiko Spring for the stockwatering of 150 head of cattle on public land managed by the BLM.

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 there is sufficient evidence in the records of the Office of the State Engineer and that a hearing is not necessary to consider the merits of the protest.

II.

A search of records within the Office of the State Engineer finds that the only active water right on Hiko Spring is Permit 11405, Certificate 3156, which is owned by Thomas E. and Barbara W. Smigel. Application 61007, referred to by the Protestants, was filed on March 10, 1995, by Thomas E. and Barbara W. Smigel to appropriate 0.25 cfs of water from Hiko Spring for irrigation purposes on 20.0 acres of land, access to which was hoped to be obtained pursuant to the Protestants' DLE application, BLM Application NVN-59723. The land applied for under the DLE application was determined unsuitable for entry on May 21, 1997, and the Protestants' appeal of the denial of entry was dismissed on March 31, 1998. The State Engineer denied Application 61007 on August 31, 2009, on the grounds of insufficient water and that it would threaten to prove detrimental to the public interest to grant a water right for use on land to which the applicant had no access.² The State Engineer finds that Permit 11405, Certificate 3156 is the only current authorized appropriation of water on Hiko Spring.

III.

Permit 11405, Certificate 3156 authorizes the appropriation of 0.002 cfs of water from Hiko Spring for the stockwatering of 150 head of cattle on public land managed by the BLM. The Office of the State Engineer contacted the Las Vegas Office of the BLM to determine the current authorized range user. The BLM disclosed that the Ireteba Peaks grazing allotment, of which Hiko Spring is a part, was closed in 1999, because it was considered to be a critical Desert

² State Engineer's Ruling No. 6004, dated August 31, 2009, official records in the Office of the State Engineer.

Tortoise Habitat. By certified letter dated September 22, 2009, the Office of the State Engineer requested Thomas E. and Barbara W. Smigel to provide evidence that the water under Permit 11405, Certificate 3156 was being put to beneficial use from 1999 through 2009. This letter provided the Smigels with a deadline to respond within 30 days of the date of the letter and they were warned that failure to adequately or timely provide the requested information would result in a declaration of abandonment of Permit 11405, Certificate 3156. A properly endorsed certified mail receipt was received in the Office of the State Engineer on October 1, 2009; however, there has been no response to the request for information to date.

The State Engineer finds that the authorized beneficial use of water under Permit 11405, Certificate 3156 for stockwatering purposes was not possible after the grazing allotment was closed in 1999. The State Engineer finds the Smigels failed to respond to the State Engineer's request for information regarding alleged abandonment of Permit 11405, Certificate 3156.

IV.

The Protestants claim that Application 63526, which seeks to appropriate 0.0003 cfs to provide water for up to 38 Bighorn Sheep and 0.0267 cfs of water for riparian/habitat maintenance, directly conflicts with existing rights. The only existing water right on Hiko Spring is Permit 11405, Certificate 3156, which the Protestants failed to provide any evidence of current beneficial use. The State Engineer finds that if Permit 11405, Certificate 3156 is declared abandoned then the Protestants' claim of conflict with their existing water right is moot.

V.

The Protestants assert that the BLM denied their DLE application on the grounds of there being insufficient water for the irrigation of 20 acres of land and that the BLM is being disingenuous by filing on water that it previously denied existed. In May 2009, the Office of the State Engineer conducted a field investigation at Hiko Spring and determined that the flow from Hiko Spring was approximately 0.001 cfs. This diversion rate expands to a yearly volume of water of approximately 0.72 acre-feet annually. The State Engineer finds that this flow of water is minimal and would be definitively insufficient to irrigate 20.0 acres of land. Conversely, Application 63526 seeks to appropriate 0.027 cfs, of which 0.0267 cfs is for what is essentially un-diverted in-stream flow. The remaining 0.0003 cfs is for Bighorn Sheep watering and is well within the range of what Hiko Spring can produce. The State Engineer finds that the requested appropriation of 0.027 cfs under Application 63526 is reasonable and does not conflict with the BLM denial of the Protestants' DLE application, as the flow of Hiko Spring is vastly insufficient for the irrigation of 20 acres of land.

CONCLUSIONS

I.

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

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:⁴

- 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 there is substantial evidence to support a declaration of abandonment of Permit 11405, Certificate 3156.

IV.

The State Engineer concludes the Protestants' DLE application and related water right application have been denied; therefore, those grounds of its protest are moot.

V.

The State Engineer concludes there is water available for appropriation and the use of water under Application 63526 will not conflict with existing rights.

VI.

Nevada Revised Statute § 533.367 provides that before a person may obtain a right to the use of water from a spring or water that has seeped to the surface of the ground, he must ensure that wildlife that customarily uses the water will have access to it. Therefore, even if the Smigels were able to place the water under their stockwater permit to beneficial use, which they cannot, they would be required to ensure that the wildlife have access to the spring. Nevada Revised Statute § 533.023 provides the use of water for wildlife purposes includes the watering of wildlife and the establishment and maintenance of wildlife habitat. The Nevada Supreme Court has held that watering of wildlife is encompassed in the definition of recreation as a beneficial

³ NRS Chapter 533.

⁴ NRS § 533.370(5).

use of water. *State, Bd. Of Agriculture v. Morros*, 104 Nev. 709 (1988). The State Engineer concludes that NRS § 533.367 does not preclude the appropriation of water from this spring for wildlife purposes and the approval of Application 63526 does not threaten to prove detrimental to the public interest.

RULING

The protest is hereby overruled and Application 63526 is hereby approved subject to payment of the statutory permit fees. Permit 11405, Certificate 3156 is hereby declared abandoned.

Respectfully submitted,

K.L. Smith P.E.

TRACY TAYLOR, P.E.
State Engineer

for

Dated this 19th day of
March, 2010.