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

IN THE MATTER OF APPLICATION NUMBER 84433
FILED BY Nevada State Grazing Board District N-4
ON November 10, , 20 14

PROTEST

FILED
NOV 14 2014
STATE ENGINEER'S OFFICE

Comes now Nevada State Grazing Board District N-4
Printed or typed name of protestant

whose post office address is P.O.Box 461, Panaca, NV 89042
Street No. or PO Box, City, State and ZIP Code

whose occupation is entity of State of Nevada, under N.R.S. 568 and protests the granting

of Application Number 84433, filed on October 14, 20 14

by USDI Bureau of Land Management for the

waters of Trilobata Spring situated in Dry Lake Valley Basin 181, Lincoln
an underground source or name of stream, lake, spring or other source

County, State of Nevada, for the following reasons and on the following grounds, to wit:

As explained on the attached pages, the applicant is attempting to obtain a permit to appropriate the water of Nevada for "wild horses" by calling their horses "wildlife". In parenthesis the applicant has included "wild horses" as a type of wildlife contrary to state and federal law. By "wild horses" they apparently mean Wild Free-Roaming Horses and Burros" (WH&B). Identifying "wild horses" as a form of wildlife is a false and possibly fraudulent statement and this application must be denied.

Wildlife as defined by Nevada law already has water reserved for beneficial use by wildlife. A permit sought by this application for legitimate wildlife is not necessary and adds to the regulatory costs of water rights.

THEREFORE the Protestant requests that the application be DENIED
Denied, issued subject to prior rights, etc., as the case may be

and that an order be entered for such relief as the State Engineer deems just and proper.

Signed Connie Simkins
Agent or protestant

Connie Simkins, for N-4 State Grazing Board
Printed or typed name, if agent

Address P.O. Box 461
Street No. or PO Box

Panaca, Nevada, 89042-0461
City, State and ZIP Code

775-962-1333 cell, 775-728-4682 home
Phone Number

ninescattle@yahoo.com
E-mail

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State of Nevada
County of Lincoln

Subscribed and sworn to before me on November 10, 2014
by Connie Simkins

W. Catherine Tennille
Signature of Notary Public Required

W. CATHERINE TENNILLE
Notary Public • State of Nevada
Appointment Recorded in Lincoln County
No: 03-81972-11 Expires May 20, 2015
Notary Stamp or Seal Required

+ $30 FILING FEE MUST ACCOMPANY PROTEST. PROTEST MUST BE FILED IN DUPLICATE.

ALL COPIES MUST CONTAIN ORIGINAL SIGNATURE.

ATTACHMENT #1

In Application 84433, the Applicant (United States as United States Department of Interior, Bureau of Land Management) seeks a permit to appropriate water for use by "wildlife"; however, in parenthesis the applicant has included federally protected "wild horses and burros" as a type of wildlife contrary to state and federal law. As "wildlife" the applicant seeks to appropriate water every day of the year for populations of wild horses and burros.

Common usage of the terms "wild horses and burros" by both federal and state officials would indicate that what the Applicant calls "wild horses and burros" are "Wild Free-Roaming Horses and Burros" (WH&B) as defined by the Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195).

Applicant fails to indicate if these animal numbers would be a thriving natural ecological balance AS REQUIRED by and in accordance with the Wild Free-Roaming Horses and Burros Act of 1971. USDI BLM has federal mandates to require them to enhance and protect public lands in Nevada. Failure to maintain and improve a thriving natural ecological balance would be contrary to federal policy and certainly detrimental to the natural resources here in Nevada, that federally managed land cited as place of use under this particular application.

Nevada Law classifies all equine species (horses and burros) as livestock or as WH&B and clearly does not classify any equine species as wildlife. As indicated below, Nevada law includes regulation of domestic animals that are either feral or estray by the Nevada Department of Agriculture but cannot apply the regulatory controls for feral animals to WH&B:

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NRS 569.0085 "Livestock" defined. "Livestock" means:

1. *All cattle or animals of the bovine species;*
2. *All horses, mules, burros and asses or animals of the equine species;*
3. *All swine or animals of the porcine species;*
4. *All goats or animals of the caprine species;*
5. *All sheep or animals of the ovine species;*
6. *All poultry or domesticated fowl or birds; and*
7. *All alternative livestock.*

(Added to NRS by 2003, 2152)

NRS 569.008 "Feral livestock" defined. "Feral livestock" means any formerly domesticated livestock or progeny of domesticated livestock which have become wild and are running at large upon public or private lands in the State of Nevada, and which have no physical signs of domestication. The term does not include horses or burros that are subject to the jurisdiction of the Federal Government pursuant to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331 to

1340, inclusive, and any regulations adopted pursuant thereto, or any other federal statute or regulation. (Added to NRS by 2003, 2152)

NRS 569.010 states in part: Estrays and feral livestock deemed property of Department; management, control, placement and disposition of estrays and feral livestock; disposition of money; liability.

On May 14, 2011 the Nevada Board of Wildlife Commissioners took action approving Commission Policy Number 67 dated May 14, 2011, and expressed concern that federal agencies have failed to adhere to the requirement for thriving ecological balance as required by the Act of 1971. Wildlife Commission Policy No. 67 is included with this protest as Attachment #2; please consider Policy No. 67 to be fully incorporated into this text by reference. Nevada Wildlife Commission and Nevada Department of Wildlife do not consider Wild Free-Roaming Horses and Burros to be wildlife.

All wildlife in Nevada is identified as wildlife through a process of classification that in the case of mammals includes: game, fur bearing, protected, and unprotected see NAC 503.015. WH&B have received no "Classification as Wildlife" in accordance with NRS 501.110 as shown below because the WH&B are not wildlife under Nevada law.

Classification of wildlife is completed within the Nevada Administrative Code. Wild Free-Roaming Horses and Burros are mammals but are not classified as "wild mammals" under the criteria of NAC 503.005 to 503.104. The entire list of classified wild mammals is included in Attachment #3:

NAC 503.015 Wild mammals. (NRS 501.105, 501.110, 501.181) Wild mammals include all species classified as game, fur-bearing, protected and unprotected mammals.
(Supplied in codification; A by Bd. of Wildlife Comm'rs by R133-04, 10-28-2004)

NRS 501.097 "Wildlife" defined. "Wildlife" means any wild mammal, wild bird, fish, reptile, amphibian, mollusk or crustacean found naturally in a wild state, whether indigenous to Nevada or not and whether raised in captivity or not.
(Added to NRS by 1969, 1350; A 1987, 560; 1991, 259; 2007, 1798)

NRS 501.100 Legislative declaration regarding wildlife.
1. Wildlife in this State not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada.

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2. The preservation, protection, management and restoration of wildlife within the State contribute immeasurably to the aesthetic, recreational and economic aspects of these natural resources.

[Part 8:101:1947; A 1949, 292; 1943 NCL § 3035.08]—(NRS A 1969, 1347)

NRS 501.110 Classification of wildlife.

1. For the purposes of this title, wildlife must be classified as follows:

(a) Wild mammals, which must be further classified as either game mammals, fur-bearing mammals, protected mammals or unprotected mammals.

(b) Wild birds, which must be further classified as either game birds, protected birds or unprotected birds. Game birds must be further classified as upland game birds or migratory game birds.

(c) Fish, which must be further classified as either game fish, protected fish or unprotected fish.

(d) Reptiles, which must be further classified as either protected reptiles or unprotected reptiles.

(e) Amphibians, which must be further classified as either game amphibians, protected amphibians or unprotected amphibians.

(f) Mollusks, which must be further classified as either protected mollusks or unprotected mollusks.

(g) Crustaceans, which must be further classified as either protected crustaceans or unprotected crustaceans.

2. Protected wildlife may be further classified as either sensitive, threatened or endangered.

3. Each species of wildlife must be placed in a classification by regulation of the Commission and, when it is in the public interest to do so, species may be moved from one classification to another.

[Part 1:101:1947; 1943 NCL § 3035.01]—(NRS A 1959, 361; 1969, 1347; 1971, 1381; 1977, 76; 1987, 560; 1991, 259)

Once animals are identified as wildlife because they have been properly classified then Nevada water rights laws apply for the beneficial use of wildlife and for protection of wildlife as a natural resource of Nevada. Here are two instances where properly classified wildlife are protected by Nevada Revised Statutes which also relate to the thriving natural ecological balance of WH&B:

NRS 533.023 "Wildlife purposes" defined. "Wildlife purposes" includes the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitats. (Added to NRS by 1989, 1733; A 2009, 596)

NRS 533.367 Requirement to ensure access of wildlife to water it customarily uses; waiver. Before a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, the person must ensure that wildlife which customarily uses the water will have access to it. The

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State Engineer may waive this requirement for a domestic use of water. (Added to NRS by 1981, 1840)

The Wild Free-Roaming Horses and Burros Act of 1971 is found in Federal Statutes as 16 USC CHAPTER 30 - WILD HORSES AND BURROS: PROTECTION, MANAGEMENT, AND CONTROL. As noted below the Act defines public lands as any lands regulated by either the Bureau of Land Management or the U.S. Forest Service. The act did not define "wild horses" but it can be reasonably assumed that wild horses are a synonym for what are now identified by federal law as Wild Free-Roaming Horses and Burros.

16 USC § 1332 – Definitions
As used in this chapter—
(a) *"Secretary" means the Secretary of the Interior when used in connection with public lands administered by him through the Bureau of Land Management and the Secretary of Agriculture in connection with public lands administered by him through the Forest Service;*
(b) *"wild free-roaming horses and burros" means all unbranded and unclaimed horses and burros on public lands of the United States;*
(c) *"range" means the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands;*
(d) *"herd" means one or more stallions and his mares; and*
(e) *"public lands" means any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service.*
(f) *"excess animals" means wild free-roaming horses or burros*
(1) *which have been removed from an area by the Secretary pursuant to applicable law or,*
(2) *which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.*
Source
(Pub. L. 92–195, § 2,Dec. 15, 1971, 85 Stat. 649; Pub. L. 95–514, § 14(b),Oct. 25, 1978, 92 Stat. 1810.)

BLM policies for WH&B management are discussed in the WILD HORSES AND BURROS MANAGEMENT HANDBOOK H-4700-1 07/07/2010. WH&B are not identified as wildlife within this handbook; however following is the Handbook discussion of providing water for their animals. Agency policy identifies the need for water, specifies that a "public land water inventory" is required, and also states a policy for removal of the WH&B if water is not available:

CHAPTER 3—HABITAT MANAGEMENT GENERAL
*Section 3.2 **WATER***
An adequate year-round quantity and quality of water must be present in the HMA to sustain WH&B numbers within AML. If baseline information concerning access to

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and availability of water does not exist, then a public land water inventory should be conducted.
If privately-owned water is essential to sustaining WH&B populations within HMAs, cooperative agreements with the owners or acquisition of water rights should be considered. If agreement cannot be achieved with private water owners, or if public land water cannot be developed and maintained, one of the following should occur:
• AML should be adjusted based on the available public land water within the HMA boundary.
• The authorized officer should amend or revise the LUP to remove the area's designation as an HMA.

The N-4 State Grazing Board (N-4) was formed under state law following the enactment of the Taylor Grazing Act of 1934 (P.L. 73-482). Under this organizational pattern, the BLM has re-organized field offices and district management boundaries over the past 50 years. Hence N-4 now serves livestock operations in Lincoln, and White Pine counties. The N-4 State Grazing Board requests that this water right application be denied on the basis that Wild Free-Roaming Horses and Burros are not wildlife under Nevada law. Further, by identifying WH&B as wildlife then issuing a permit to appropriate water the results will include injury to public lands, multiple uses of this public land, and interfere with the orderly use of the lands by all citizens, and could set a continuation precedent that would interfere with the stability of the livestock industry within Nevada.

As indicated by the following excerpts of Nevada Statutes, N-4 Grazing Board is responsible to act on each of the above concerns and more that are not listed:

NRS 568.010 states in part: "Taylor Grazing Act" defined. As used in NRS 568.010 to 568.210, inclusive, "Taylor Grazing Act" means the Act of Congress entitled "An act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement and development, to stabilize the livestock industry dependent upon the public range, and for other purposes,

NRS 568.040 State grazing boards: Creation. To direct and guide the disposition of the range improvement fund of each grazing district concerned, in the manner most beneficial to the stock raising payers of the grazing fees from which the funds are derived and to the counties concerned, there is hereby created a state grazing board for each Bureau of Land Management grazing district established and existing in Nevada under the provisions of the Taylor Grazing Act.

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CONCLUSION

Under Nevada law horses and burros have never been classified as wildlife, only as livestock, estray livestock, or feral livestock; however, since 1971 some have become animals with special status under federal law. Nevada and federal law identifies the animals that are within the jurisdiction of the Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195) as "Wild Free-Roaming Horses and Burros" (WH&B) which means they are not livestock and also are not wildlife. With this application, the BLM is attempting to pre-make the decision for the State Water Engineer, and thereby re-make the US Congressional decisioin that created Public Law 92-195; that would, in effect, change Nevada Law by classifying Wild Free-Roaming Horses and Burros as "wildlife". This application for water rights for the beneficial use by WH&B is calling for a water right for a beneficial use that is not recognized by Nevada law and must be rejected.

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ATTACHMENT #2

STATE OF NEVADA
BOARD OF WILDLIFE COMMISSIONERS
Commission Policy Number 67 Title: Federal Horses and Burros
Effective Date: May 14, 2011

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STATE OF NEVADA
BOARD OF WILDLIFE
COMMISSIONERS

Commission Policy Number 67 **Title:** Federal Horses and Burros

References: NRS 561.025, 561.218, 569.008, 504.030, 533.367, 533.695, 533.460, NRS 321, Presidential Executive Order: 12630, Public Law 92-195 (1971).
Effective Date: May 14, 2011

BACKGROUND

The Board of Wildlife Commissioners shall establish policies necessary for the preservation, protection, management and restoration of wildlife and its habitat and shall utilize its land management authority to carry out a program for conserving, protecting and propagating wildlife and their habitats. To that end the Nevada Board of Wildlife Commissioners established the "Feral Horse Committee" and asked that committee to provide background and action recommendations relative to the Wild Free-Roaming Horses and Burros found within Nevada.

The Wild Free-Roaming Horses and Burros Act of 1971 (Public Law 92-195) gave federal protection to feral horses that went unclaimed on the federally administered lands. The Act of 1971 protects multiple use, wildlife, wildlife habitat, jurisdiction and authority of State Law, and consultation or coordination with State agencies such as the Nevada Department of Wildlife and the Nevada Board of Wildlife Commissioners (PL92-195 Section 1333(a)). Federal assumption of ownership of the WFRHB places them in a category that is neither wildlife nor livestock. The Act of 1971 instructs each federal agency to resolve any conflicts between wildlife and these feral horses and burros that have been redefined with special status under federal law.

Congress declared that Wild Free-Roaming Horses and Burros (WFRHB) would be kept at the level of "*thriving natural ecological balance*" within the areas in which they would exist. "*Thriving natural ecological balance*" is specified numerous times throughout The Act of 1971. Federal agencies are required to "*...protect the natural ecological balance of all wildlife species which inhabit such lands, particularly endangered wildlife species.*" Failure to limit

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WFRHB numbers to thriving natural ecological balance will trigger specific actions to reduce herd numbers in accordance with the law (PL92-195 Section 1332(f)(2)).

PURPOSE

The purpose of this policy is to provide direction and guidance for the Nevada Department of Wildlife regarding Wild Free-Roaming Horses and Burros, the recognition of any

impediments to natural ecological balance, and the fulfillment of coordination to resolve inconsistencies between federal actions and this official policy.

POLICY

The Board of Wildlife Commissioners does hereby establish the following policy to provide for the preservation, protection, management and restoration of wildlife and its habitat:

A. When the Board of Wildlife Commissioners or the Nevada Department of Wildlife determine a conflict exists between any wildlife of Nevada and WFRHB, written notification should be sent describing such conflict to the responsible federal agency and officials. Such determination of a conflict may be the result of direct observations by Wildlife Commissioners, NDOW personnel, reports by other state or local officials, or reports by members of the public.

B. Strict compliance with the Act of 1971 is the minimal acceptable level of management of Wild Free-Roaming Horses and Burros (WFRHB) in Nevada. In particular "*thriving natural ecological balance*" is to be maintained at all times.

Thriving ecological balance of Nevada wildlife is violated when WFRHB directly compete for any attribute of wildlife habitat. Such violations include but are not limited to: competition for food or forage, competition for space that disturbs the movement or distribution of wildlife, competition for water, interference with wildlife access to water, use of water reserved for wildlife under Nevada Law by WFRHB that do not have lawful beneficial use designation for that water, etc.

Thriving natural ecological balance is defined in part by the Secretary of Interior in Section
4.1.5 (page 17) of the BLM Wild Horses and Burros Management Handbook dated July 7, 2010.

Wild Horses and Burros "*...shall be managed in balance with other uses and the productive capacity of their habitat (i.e., WH&B will be managed to achieve*

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and maintain a thriving natural ecological balance (TNEB) and multiple use relationships on the public lands). ...To achieve a TNEB on the public lands, WH&B should be managed in a manner that assures significant progress is made toward achieving the Land Health Standards for upland vegetation and riparian plant communities, watershed function, and habitat quality for animal populations, as well as other site-specific or landscape-level objectives, including those necessary to protect and manage Threatened, Endangered, and Sensitive Species (TES)"

C. When it is found that WFRHB are not within "thriving natural ecological balance" NDOW should request in writing to the responsible Federal Agency they immediately remove the offending animals in accordance with the Act of 1971.

D. When WFRHB are found outside of designated Herd Management Areas (HMA) NDOW should request in writing to the responsible Federal Agency that those horses or burros be removed immediately in accordance with the Act of 1971.

E. When it is found that WFRHB within an HMA are above the set Appropriate Management Levels (AML) NDOW should request in writing to the responsible Federal Agency that all excess animals be removed in accordance with the Act of 1971.

F. When it is found that the wild horses and burros are in direct competition for limited resources with wildlife this should be a trigger mechanism for the NDOW to request in writing to the responsible Federal Agency that the horses or burros be immediately removed in accordance with the Act of 1971 and that the AML be revised so as to achieve and maintain thriving natural ecological condition.

G. When a member of the public, local or county officials, or officials of other state agency notifies NDOW that they have identified a violation, this notification should be a trigger for NDOW to investigate and take appropriate action in accordance with this policy.

H. This policy shall be submitted to the federal agencies operating who may have responsibilities for managing WFRHB and will serve to enable those agencies to fully comply with federal law requiring federal actions be coordinated with state policy and any conflicts be resolved.

This policy shall remain in effect until amended, repealed, or superseded by the

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Board of Wildlife Commissioners.

BY ORDER OF THE BOARD OF WILDLIFE COMMISSIONERS IN REGULAR SESSION, May 14, 2011

Chairman, Board of Wildlife
Commissioners Scott Raine

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ATTACHMENT #3

NAC 503.015 Wild mammals. (NRS 501.105, 501.110, 501.181) Wild mammals include all species classified as game, fur-bearing, protected and unprotected mammals.

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NAC 503.015 Wild mammals. (NRS 501.105, 501.110, 501.181) Wild mammals include all species classified as game, fur-bearing, protected and unprotected mammals.

(Supplied in codification; A by Bd. of Wildlife Comm'rs by R133-04, 10-28-2004)

NAC 503.020 Game mammals.

NAC 503.020 Game mammals. (NRS 501.105, 501.110, 501.181)

The following wild mammals are further classified as game mammals:

Common Name		Scientific Name
1. Antelope	Pronghorn	Antilocapra americana
2. Bear	Black	Ursus americanus
3. Deer	Mule	Odocoileus hemionus
4. Goat	Mountain	Oreamnos americanus
5. Lion	Mountain (Cougar)	Felis concolor
6. Moose		Alces alces
7. Peccary		Pecari angulatus
8. Rabbit,	Cottontail (Audubon)	Sylvilagus audubonii
	Cottontail (Nuttall)	Sylvilagus nuttallii
	Pygmy	Sylvilagus idahoensis
	Snowshoe	Lepus americanus
	White-tailed Jack	Lepus townsendii
9. Sheep	Bighorn	Ovis canadensis canadensis
		Ovis canadensis nelsoni
		Ovis canadensis californiana
10. Elk	Rocky Mountain	Cervus elaphus nelsoni
11. Wolf	Gray	Canis lupus

[Bd. of Fish & Game Comm'rs, part No. 1, eff. 7-1-69; A 10-1-76]—(NAC A by Bd. of Wildlife Comm'rs, 2-28-94; R133-04, 10-28-2004; R059-08, 8-26-2008)

NAC 503.025 Fur-bearing mammals.

NAC 503.025 Fur-bearing mammals. (NRS 501.105, 501.110, 501.181)

Fur-bearing mammals include:

Common Name	Scientific Name
1. Beaver	Castor canadensis
2. Bobcat	Lynx rufus
3. Fox,Gray	Urocyon cinereoargenteus
Kit (Swift)	Vulpes velox
Red	Vulpes vulpes
4. Marten,American	Martes americana
5. Mink	Mustela vison

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6. Muskrat	Ondatra zibethica
7. Otter, River	Lontra canadensis

NAC 503.030 Protected, threatened and sensitive mammals.
NAC 503.030 Protected, threatened and sensitive mammals. (NRS 501.105, 501.110, 501.181)
1. Protected mammals include:

Common Name	Scientific Name
(a) Pika	Ochotona princeps
(b) Squirrel	
Chickaree (Douglas)	Tamiasciurus douglasi
Northern Flying	Glaucomys sabrinus
Western Gray	Sciurus griseus
(c) Bat	
Fringed	Myotis thysanoides
Pallid	Antrozous pallidus
Allen's Lappet-eared	Idionycteris phyllotis
Brazilian Free-tailed	Tadarida brasiliensis
(d) Mouse	
Dark Kangaroo	Microdipodops megacephalus
Pale Kangaroo	Microdipodops pallidus
(e) Wolverine	Gulo gulo

2. The following species of protected mammal is further classified as threatened:

Common Name	Scientific Name
Bat Spotted	Euderma maculatum

3. The following species of protected mammals are further classified as sensitive:

Common Name	Scientific Name
(a) Bat	
California Leaf-nosed	Macrotus californicus
Western Red	Lasiurus blossevillii
Townsend's Big-eared	Corynorhinus townsendii
Western Mastiff	Eumops perotis
(b) Beaver	
Sierra Mountain	Aplodontia rufa californica
(c) Chipmunk	
Hidden Forest Uinta	Tamias umbrinus nevadensis
Palmer's	Tamias palmeri
(d) Vole	
Ash Meadows Montane	Microtus montanus nevadensis

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Pahranagat Valley	
Montane	Microtus montanus fucosus

[Bd. of Fish & Game Comm'rs, part No. 1, eff. 7-1-69; A 10-1-76; 10-15-77]—(NAC A by Bd. of Wildlife Comm'rs, 7-6-92; R133-04, 10-28-2004; R155-08, 9-18-2008)

NAC 503.035 Unprotected mammals.
NAC 503.035 Unprotected mammals. (NRS 501.105, 501.110, 501.181)
Unprotected mammals:

1. Are all species of mammals which are not classified as game, fur-bearing, protected, sensitive, threatened or endangered animals.
2. Include:

Common Name	Scientific Name
(a) Coyote	Canis latrans
(b) Rabbit	
Black-tailed Jack	Lepus californicus
(c) Skunk	
Spotted	Spilogale gracilis
Striped	Mephitis mephitis
(d) Weasel	
Long-tailed	Mustela frenata
Short-tailed	Mustela erminea

[Bd. of Fish & Game Comm'rs, part No. 1, eff. 7-1-69; A 10-1-76]—(NAC A by Bd. of Wildlife Comm'rs, 7-6-92; R133-04, 10-28-2004)

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