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

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| IN THE MATTER OF APPLICATION 62434, FILED TO CHANGE THE PLACE OF USE, MANNER OF USE AND PERIOD OF USE, APPLICATIONS 62435, 62437 AND 62438 FILED TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, MANNER OF USE AND PERIOD OF USE, APPLICATION 62436 FILED TO CHANGE THE POINT OF DIVERSION, PLACE OF USE, MANNER OF USE AND APPLICATIONS 62439 AND 62440 FILED TO CHANGE THE PLACE OF USE AND MANNER OF USE OF WATER PREVIOUSLY APPROPRIATED WITHIN THE PAHRANAGAT VALLEY HYDROGRAPHIC BASIN (209), LINCOLN COUNTY, NEVADA. | ) | **RULING**<br>**#5945-A** |

## GENERAL

### I.

Application 62434 was filed on September 4, 1996, by the United States Fish and Wildlife Service (USFWS) to change the place of use, manner of use and period of use (for the irrigation manner of use only) of a portion of 6.634 cubic feet per second (cfs), not to exceed 1,514.38 acre-feet annually (afa) of the surface water previously appropriated under Proof No. 01793 under the Pahranagat Lake Decree.[1] The source of water is identified as a reservoir filled with winter flow of Ash and Crystal Springs, and the place of use is identified as being within the boundaries of the Pahranagat National Wildlife Refuge T.7S., R.61E., T.8S., R.61E., T.8S., R.62E., T.9S., R.62E., M.D.B.&M. The existing places of use are lands found within portions of Section 2, T.8S., R.61E., Section 3, T.8S., R.61E., Section 10, T.8S., R.61E., Section 11, T.8S., R.61E., Section 14, T.8S., R.61E., Section 23, T.8S., R.61E., Section 24, T.8S., R.61E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 3, T.8S., R.61E., M.D.B.&M.[2]

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[1] *In the Matter of the Determination of the Relative Rights in and to the Waters of Pahranagat Lake and Its Tributaries in Lincoln County, State of Nevada,* Tenth Judicial District Court of the State of Nevada, in and for the County of Lincoln, Decree October 14, 1929, as amended in *Alamo Irrigation Company, Inc. v. United States of America*, 81 Nev. 390 (1965).

[2] File No. 62434, official records of the Office of the State Engineer.

The application indicates that the use will change from irrigation to wildlife and the period of use for wildlife will change from March 1st through September 1st to January 1st through December 31st and the period of use for storage will remain unchanged being October 1st through March 14th.

**II.**

Application 62435 was filed on September 4, 1996, by the USFWS to change the point of diversion, place of use, manner of use and period of use of a portion of 1.517 cfs of the surface water previously appropriated under Permit 878, Certificate 327. The source of water is identified as Pahranagat Lake and the place of use is identified as being within the boundaries of the Pahranagat National Wildlife Refuge. The existing places of use are lands found within portions of Section 31, T.8S., R.62E., Section 32, T.8S., R.62E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 3, T.8S., R.61E., M.D.B.&M. The existing point of diversion is described as being located within the SW¼ NE¼ of Section 31, T.8S., R.62E., M.D.B.&M.[3] The application indicates that the use will change from irrigation and domestic to wildlife and the period of use will change from March 1st through September 1st to January 1st through December 31st.

**III.**

Application 62436 was filed on September 4, 1996, by the USFWS to change the point of diversion, place of use and manner of use of 1.10 cfs, not to exceed 795 afa of the water of Big Springs (Lonetree Spring) previously appropriated under Permit 8715, Certificate 2470. The place of use is identified as being within the boundaries of the Pahranagat National Wildlife Refuge. The existing places of use are lands found within portions of Section 5, T.9S., R.62E., M.D.B.&M. The proposed points of diversion are described as being two major seeps located within the NW¼ NW¼ of Section 5, T.9S., R.62E., M.D.B.&M. The existing point of diversion is described as being located within the NW¼ NW¼ of Section 5, T.9S., R.62E., M.D.B.&M.[4] The application indicates that the use will change from irrigation and domestic to wildlife and the period of use will remain the same being January 1st through December 31st.

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[3] File No. 62435, official records of the Office of the State Engineer.
[4] File No. 62436, official records of the Office of the State Engineer.

**IV.**

Application 62437 was filed on September 4, 1996, by the USFWS to change the point of diversion, place of use, manner of use and period of use of 729.60 afa of the water of Pahranagat Lake previously appropriated under Permit 11478, Certificate 3426-1. The place of use is identified as being within the boundaries of the Pahranagat National Wildlife Refuge. The existing places of use are lands found within portions of Section 5, T.9S., R.62 E., M.D.B.&M. The proposed point of diversion is described as being located within the SW¼ NE¼ of Section 31, T.8S., R.62E., M.D.B.&M. with a point of re-diversion in the NW¼ SW¼ of Section 32, T.8S., R.62E., M.D.B.&M. The existing point of diversion is described as being located within the SW¼ NE¼ of Section 31, T.8S., R.62E., M.D.B.&M.[5] The application indicates that the use will change from irrigation to wildlife and the period of use will change from March 15th through October 1st to January 1st through December 31st.

**V.**

Application 62438 was filed on September 4, 1996, by the USFWS to change the point of diversion, place of use, manner of use and period of use of a portion of 1,379.20 afa of the water of Pahranagat Lake previously appropriated under Permit 11478, Certificate 3426-2. The place of use is identified as being within the boundaries of the Pahranagat National Wildlife Refuge. The existing places of use are lands found within portions of Section 31, T.8S., R.62E., Section 32, T.8S., R.62E., Section 4, T.9S., R.62E., Section 5, T.9S., R.62E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 3, T.8S., R.61E., M.D.B.&M. The existing point of diversion is described as being located within the SW¼ NE¼ of Section 31, T.8S., R.62E., M.D.B.&M.[6] The application indicates that the use will change from irrigation to wildlife and the period of use will change from March 15th through October 1st to January 1st through December 31st.

**VI.**

Application 62439 was filed on September 4, 1996, by the USFWS to change the place of use and manner of use of 1.3273 cfs, not to exceed 960.94 afa of the underground water previously appropriated under Permit 26653, Certificate 9159. The place of use is identified as being within the

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[5] File No. 62437, official records of the Office of the State Engineer.
[6] File No. 62438, official records of the Office of the State Engineer.

boundaries of the Pahranagat National Wildlife Refuge. The existing places of use are lands found within portions of Section 2, T.8S., R.61E., Section 10, T.8S., R.61E., Section 11, T.8S., R.61E., Section 14, T.8S., R.61E., Section 23, T.8S., R.61E., Section 24, T.8S., R.61E., Section 25, T.8S., R.61E., Section 15, T.8S., R.61E., M.D.B.&M.[7] The application indicates that the use will change from irrigation and domestic to wildlife and the period of use will remain the same being January 1st through December 31st.

**VII.**

Application 62440 was filed on September 4, 1996, by the USFWS to change the place of use and manner of use of 1.0 cfs, not to exceed 723.795 afa previously appropriated under Permit 28295, Certificate 10019. The place of use is identified as being within the boundaries of the Pahranagat National Wildlife Refuge. The existing places of use are lands found within portions of Section 10, T.8S., R. 61E., Section 11, T.8S., R.61E., Section 14, T.8S., R. 61E., Section 15, T.8S., R.61E., Section 23, T. 8S., R.61E., Section 24, T.8S., R.61E., Section 25, T.8S., R.61E., Section 31, T.8S., R.62E., Section 32, T.8S., R.62E., Section 4, T.9S., R.62E., Section 5, T.9S., R.62E., M.D.B.&M.[8] The application indicates that the use will change from the operation and maintenance of a National Wildlife Refuge including supplemental irrigation to wildlife and the period of use will remain the same being January 1st through December 31st.

**VIII.**

Applications 62434, 62435, 62436, 62437, 62438, 62439 and 63440 were timely protested by the Lincoln County Commissioners and the Alamo Irrigation Corporation on the grounds that the change of use from irrigation [and domestic] to wildlife is not necessary. The traditional use of the reservoir is for irrigation, which also serves wildlife by its very existence. Also, the proposed use may cause economic hardship on the residents and other users of the water in that area due to a proposed recovery plan, which has been vigorously opposed by the entire group of water right holders and users. The proposed changes allow the Fish and Wildlife Service to continue to ignore economic, custom and culture concerns that the residents of the valley have raised. The current uses allow for multiple uses, which better serves all public uses.

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[7] File No. 62439, official records of the Office of the State Engineer.
[8] File No. 62440, official records of the Office of the State Engineer.

## IX.

The Lincoln County Public Land Commission timely protested Applications 62434, 62435, 62436, 62437, 62438, 62439 and 62440 on the grounds that the USFWS has proposed a Recovery Plan for the Pahranagat Valley Chub and other aquatic species that will infringe upon private property and water rights of the residents of the valley. The owners of said property and water right holders, as well as residents of the community have unanimously opposed the USFWS proposal. The applications are seen as a way to avoid settling the USFWS disagreement with the citizens of Pahranagat Valley. The various recovery plans proposed will adversely affect the economy, custom and culture of Pahranagat Valley residents and the residents of Lincoln County. The proposed use is to support and maintain wildlife, which is the current use, and the change does not seem to make sense. The Protestants object to the extension of the season of use and the manner of beneficial use. They allege that the change of season and extension of season of use can and will have negative impacts on surrounding water right holders. They question federal ownership of water indicating that in 1995 an addition was made to the Nevada Revised Statutes (NRS), which allowed federal water holdings jointly with residents. They allege that the USFWS does not maintain the channel that feeds their storage areas, and if they did they would not need more water. They allege that the channel is a flood hazard to all private property owners, because it is not maintained. Additionally, that the proposal does not seem necessary in view of the fact that the USFWS already has rights and the proposed change of customary uses can have a negative impact on the other water rights that are used for irrigation. It is a concern that if the season of use is extended then the USFWS will try to usurp other rights to see these ponds filled. If the USFWS can no longer irrigate under the change of use, their noxious weed problem will be a bigger threat to the neighboring agricultural community. They allege that the USFWS has not proven to be a good neighbor and has not kept up with their agreements to allow cattle to use the water by fencing the area off after agreeing to allow continued use. These Protestants allege that this history, along with other proposals that the agency is involved with, is seen as a threat to property rights, the economy and the culture of the valley and that the USFWS took all the water 20 years ago and then courts gave it back, and that this history leaves no room for trust.

As to Applications 62435 and 62436, the Protestants allege that the stock-water rights must be maintained.

As to Applications 62436, 62437, 62438, 62439 and 63440, the Protestants allege that the stock-water rights must be maintained and the USFWS should not be allowed to 'take' water in times of drought.

As to Applications 62437, 62438, 62439, 62440, the Protestants allege that the changes can stop current stock watering and allow the USFWS to 'take' water in times of drought.

**X.**

Application 62435 was timely protested by the Lincoln County Commissioners and the Alamo Irrigation Corporation on the grounds that:

> That change of use from irrigation and domestic to solely wildlife is unnecessary, that under NRS 533.030 wildlife is encompassed in definition of recreation, stock-watering and wildlife watering purposes. Wildlife uses of existing water will not be enhanced by a change of use, however those that depend upon the water there for stock watering purposes may be denied access on the basis of not being wildlife. This would pose an economic threat to those users of that water. The traditional uses of the lake is the current designation which has adequately protected and provided for wildlife.

**XI.**

Joe Higbee timely protested application 62435 on the grounds that the USFWS has proposed a Recovery Plan for the Pahranagat Valley Chub and other aquatic species that will infringe upon private property and water rights of the residents of the valley. The owners of said property and water right holders, as well as residents of the community have unanimously opposed the USFWS proposal and the application is seen as a way to avoid settling the USFWS disagreement with the citizens of Pahranagat Valley. The additional water is not necessary to their operation. The various recovery plans proposed will adversely affect the economy, custom and culture of Pahranagat Valley residents and the residents of Lincoln County. The extended seasons of use, the change from irrigation to wildlife and the proposed use for irrigation, make no sense. The change of season and extension of season of use can and will have negative impacts on surrounding water right holders. The proposal does not seem to be necessary in view of the fact that the USFWS already has rights and the proposed change of customary uses can have a negative impact on the other water rights that use the water for irrigation. USFWS has not proven to be a good neighbor and has not kept up with their agreements to allow cattle to use the water and they fenced it off after agreeing to allow continued use. This history along with other proposals that the agency is involved with is seen as a threat to property right, economy and the culture of the valley.

## FINDINGS OF FACT

### I.

The Lincoln County Commissioner's and the Alamo Irrigation Company's protests to the applications were based on the grounds that the USFWS has proposed a Recovery Plan that would infringe upon their private water and property rights and that the proposed Recovery Plan has been opposed by the residents of the valley. Additionally, that the proposed changes allow the USFWS to ignore economic, custom and cultural concerns of the residents of the valley and that the applications are seen as a way for the USFWS to avoid settling disagreements with the residents of the valley. The State Engineer finds Nevada water law is not the means by which to address many of the concerns raised by these protests. The water right application process is not the method by which issues with the USFWS Recovery Plan proposal are to be addressed and those issues are not relevant to his review of the water right applications. Additionally, it should be noted that the proposed USFWS Recovery Plan was approved subsequent to the filing of the protest.

### II.

The Lincoln County Commissioner's and the Alamo Irrigation Company's protests to Applications 62434, 62435, 62436, 62437, 62438, 62439 and 62440 allege that the additional water is not necessary to the refuge operation. NRS § 533.023 provides for wildlife as a beneficial use of water under Nevada water law, including the establishment and maintenance of wetlands, fisheries and other wildlife habitats. The State Engineer finds that this is a wildlife refuge and that the use of water to enhance habitat and attract wildlife is a beneficial use of said water.

### III.

The Lincoln County Public Lands Commission protested Applications 62434, 62435, 62436, 62437, 62438, 62439 and 62440 on the grounds that it questions federal ownership of water rights and the Nevada Revised Statutes, which were added in 1995 to allow federal water holdings to be made jointly with residents. The State Engineer finds that NRS § 533.010 defines a person who can file a water right application to include the United States; thus, the USFWS is a qualified applicant under Nevada water law.

### IV.

The Lincoln County Public Lands Commission protested Applications 62434, 62435, 62436, 62437, 62438, 62439 and 62440 on the grounds that the USFWS does not maintain the channel that

carries water to the refuge causing a flood hazard and denying themselves the water that could flow there and that this causes flooding to occur on neighboring property souring their soil. They protest any new water going to the refuge until they conserve what they have, maintain channels and become good neighbors. The State Engineer finds the issue of whether or not to grant these change applications does not go to the current maintenance of the channel that carries water to the refuge and any resolution of flood damage caused due to the failure of the USFWS to maintain the ditch that carries water to the refuge is a matter to be resolved between the Applicant and those alleging damage.

**V.**

As to Applications 62435, 62436, 62437, 62438, 62439 and 62440, the Lincoln County Public Lands Commission argues that all stock waters must remain as they are or negative economic impacts will occur. They allege that the USFWS has not proven to be a good neighbor in that it has not kept its agreement to allow cattle to use the water and they fenced off an area after agreeing to allow continued use. Further, that the change of use means the refuge will no longer be irrigated and the noxious weed problem the USFWS is not taking care of, threatens the entire valley's agricultural community. The State Engineer finds no allegation was made that specifically identifies a vested or permitted stock water right that will be interfered with under the proposed changes. The State Engineer finds that the enforcement of an agreement between the USFWS and citizens of Pahranagat Valley is not within his jurisdiction. The State Engineer finds that whether the USFWS is allowing a noxious weed problem to develop is not within the State Engineer's jurisdictional review of these change applications.

**VI.**

Protestants allege that the requested extension of the season of use will interfere with other existing water right holders. As to Applications 62434, 62435, 62436, 62437, 62438, 62439, and 62440, the Lincoln County Public Lands Commission argues that the change of season and extension of months of use will have negative impacts on the surrounding water rights holders. As to Application 62435, Joe Higbee says that the extended season of use does not make sense and that the change of season and the extension of that can and will have negative impacts on surrounding water rights holders.

The State Engineer finds that as to Applications 62436, 62439 and 62440 the period of use proposed under the change applications is the same period of use as the right being changed; therefore, the protest issue lacks merit.

The State Engineer finds as to Application 62434 that the application does propose to change the period of use from March 1st through September 1st to January 1st through December 31st. The State Engineer finds that the source of water to be used under Application 62434 originates as winter flow adjudicated under the Pahranagat Lake and its Tributaries Decree, Proof 01793, and is stored in Pahranagat Lake from October 1st through March 14th. The State Engineer finds that Pahranagat Lake is located entirely on property controlled by the Applicant, Pahranagat Lake is the terminus of flow from Ash Spring and Crystal Spring, flow into Pahranagat Lake does not leave the property controlled by the Applicant and other than the Applicant there are no holders of water rights from Pahranagat Lake. The State Engineer finds that while the period of use under Application 62434 is changing from March 1st through September 1st to January 1st through December 31st the period of storage and annual duty of water stored in Pahranagat Lake remains unchanged and there is no impact to existing water rights; therefore, the protest issue lacks merit.

The State Engineer finds as to Application 62435 that the application does propose to change the period of use from March 1st through September 1st to January 1st through December 31st. The State Engineer finds that Permit 878, Certificate 327, which Application 62435 is requesting to change, was filed on March 30, 2008, and approved on November 18, 1910, approximately 19 years before the completion of the Pahranagat Lake and its Tributaries Decree. The State Engineer finds that Permit 878 was not included in the Pahranagat Lake and its Tributaries Decree and is not a Vested right. The State Engineer finds that the source of water for Application 62435 is the same as Application 62434 being water stored in Pahranagat Lake, which originates as winter flow subsequently adjudicated under the Pahranagat Lake and its Tributaries Decree, Proof 01793 with Permit 878, Certificate 327 having a different place of use than Proof 01793. The State Engineer finds that Pahranagat Lake is located entirely on property controlled by the Applicant, Pahranagat Lake is the terminus of flow from Ash Spring and Crystal Spring, flow into Pahranagat Lake does not leave the property controlled by the Applicant and other than the Applicant there are no holders of water rights from Pahranagat Lake. The State Engineer finds that while the period of use under Application 62435 is changing from March 1st through September 1st to January 1st through December 31st the period of storage and total combined duty of water under Applications 62434 and 62435 will be unchanged and there is no impact to existing water rights; therefore, the protest issue lacks merit.

The State Engineer finds as to Applications 62437 and 62438 that the applications do propose to change the period of use from March 1st through September 1st to January 1st through December 31st. The State Engineer finds that Permit 11478, Certificate 3426-1 and 3426-2, which Applications 62437 and 62438 are requesting to change respectfully, was filed on January 9, 1946, approved on July 17, 1946 and is not a vested right. The State Engineer finds that the source of water under permit 11478 and subsequent change Applications 62437 and 62438 is the unappropriated winter flow from Ash Spring and Crystal Spring, which flows into Pahranagat Lake from October 1 through March 14. The State Engineer finds that Pahranagat Lake is located entirely on property controlled by the Applicant, Pahranagat Lake is the terminus of flow from Ash Spring and Crystal Spring, flow into Pahranagat Lake does not leave the property controlled by the Applicant and other than the Applicant there are no holders of water rights from Pahranagat Lake. The State Engineer finds that while the period of use under Applications 62437 and 62438 is changing from March 1st through September 1st to January 1st through December 31st the period of storage is unchanged, the permits will be subject to existing rights on the sources and the water stored in Pahranagat lake is limited to that which is available without demand upon existing rights for release. The State Engineer finds that while the period of use under Application 62437 and 62438 is changing from March 1st through September 1st to January 1st through December 31st the period of storage and duty of water under Applications 62434 and 62435 will be unchanged and there is no impact to existing water rights; therefore, the protest lacks merit.

**VII.**

Application 62438 was filed on September 4, 1996, by the USFWS to change the point of diversion, place of use, manner of use and period of use of a portion of 1,379.20 afa of the water of Pahranagat Lake previously appropriated under Permit 11478, Certificate 3426-2. A review of records on file in the Office of the State Engineer shows that the USFWS has been assigned a portion of Certificate 3426-2 being 1,186.0 afa appurtenant to 296.5 acres of land.[9]

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[9] *See*, Notice of Summary of Ownership Changes, March 4, 1999, File No. 11478, official records in the Office of the State Engineer.

The State Engineer finds that the duty of water eligible for change under Application 62438 is limited to the amount of water assigned to the Applicant, being 1,186 afa. The State Engineer finds State Engineer's Ruling No. 5945 identified an incorrect quantity of water available for change under this application.

## CONCLUSIONS OF LAW

### I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.[10]

### II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:[11]

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 the Applicant is qualified under Nevada Water Law to file these change applications, the use of water for wildlife purposes is a beneficial use under Nevada Water Law, and no Protestant specifically identified an existing or permitted water right that would be affected by these change applications. The State Engineer concludes there is no evidence the proposed use would conflict with any protectible interests in existing domestic wells as set forth in NRS § 533.024; or would threaten to prove detrimental to the public interest.

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[10] NRS chapters 533 and 534.
[11] NRS § 533.370(5).

## RULING

The protests to Applications 62434, 62435, 62436, 62437, 62438, 62439 and 62440 are hereby overruled and the applications are granted subject to:

1. the payment of the statutory permit fees; and
2. the duty under Permit 62434 is unchanged from the base right and is limited to 1,514.38 acre-feet annually, the period of storage under permit 62434 is unchanged from the base right and is limited to October 1 through March 14 and the period of use under Permit 62434 shall change to January 1 through December 31; and
3. the total combined duty under Permit 62434 and 62435 remains unchanged from the base rights and is limited to 1,514.38 acre-feet annually; the period of storage under permit 62435 is unchanged from the base right and is limited to October 1 through March 14 and the period of use under Permit 62435 shall change to January 1 through December 31; and
4. the duty under Permit 62436 is unchanged from the base right and is limited to 795.0 acre-feet annually, the period of use under Permit 62436 is unchanged from the base right and is limited to January 1 through December 31; and
5. the duty under Permit 62437 is unchanged from the base right and shall be limited to 729.6 acre-feet annually, the period of storage under permit 62437 is unchanged from the base right and is limited to October 1 through March 14 and the period of use under Permit 62437 shall change to January 1 through December 31; and
6. the duty under Permit 62438 is unchanged from the base right and shall be limited to 1,186.0 acre-feet annually, the period of storage under permit 62438 is unchanged from the base right and is limited to October 1 through March 14 and the period of use under Permit 62438 shall change to January 1 through December 31; and
7. the duty under Permit 62439 is unchanged from the base right and is limited to 960.94 acre-feet annually, the period of use under Permit 62439 is unchanged from the base right and is limited to January 1 through December 31; and

8. the duty under Permit 62440 is unchanged from the base right and is limited to 723.795 acre-feet annually, the period of use under Permit 62440 is unchanged from the base right and is limited to January 1 through December 31.

Respectfully submitted,

JASON KING, P.E.
State Engineer

Dated this 28th day of April, 2010.