

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

IN THE MATTER OF APPLICATION 66105)
FILED TO APPROPRIATE THE PUBLIC)
WATERS FROM AN UNDERGROUND)
SOURCE WITHIN THE PANACA VALLEY)
HYDROGRAPHIC BASIN (203), LINCOLN)
COUNTY, NEVADA.)

RULING

#5371

GENERAL

I.

Application 66105 was filed on February 28, 2000, by the United States Department of the Interior, Bureau of Land Management, (BLM) to appropriate 0.0012 cubic feet per second of water from an underground source for watering wildlife and wild horses within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, T.2S., R.69E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 7.¹

II.

Application 66105 was timely protested by Pete T. Delmue on the following grounds:¹

This application states the BLM is seeking water to serve "wildlife". Federal Public Law grants authority to the BLM to manage wild horses and burros. Authority to manage wildlife rests with the Nevada Department of Wildlife; therefore, the BLM has no legal mandate or necessity to obtain or use water to manage or serve wildlife.

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 the issues raised by the protestant have been adequately addressed in the past and a hearing is not necessary to consider the merits of the protest.

¹ File No. 66105, official records in the Office of the State Engineer.

II.

The protestant has implied 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.² 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.

III.

The protestant concedes the BLM has the authority to manage wild horses and burros but argues that the BLM has no legal mandate or necessity to obtain or use water to manage or serve wildlife. These issues have been previously addressed, in part, under State Engineer’s Ruling Nos. 4671 and 4943 and Nevada case law.³

In State Engineer’s Ruling No. 4671, the State Engineer found that while the Nevada Division of Wildlife⁴ 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 wild horses and wildlife.

In the “Blue Lake” case, 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

² Black’s Law Dictionary, 1028(5th ed. 1979).

³ State, Board of Agriculture v. Morros, 104 Nev. 709 (1988).

⁴ Note, the Nevada Division of Wildlife is now the Nevada Department of Wildlife.

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. Therefore, the court concluded that providing water to wildlife is a beneficial use of water.⁵

The State Engineer finds that Nevada water law recognizes wild horse and 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 wild horse and wildlife watering purposes in compliance with state water law.

IV.

The State Engineer's office has long held that federal agencies must comply with state water law.⁶ The State Engineer finds that the BLM, by filing an application to appropriate the public waters of the State of Nevada, has accepted the authority of the State Engineer and is in compliance with Nevada water law.

V.

By letter dated July 27, 1999, the BLM has expressed their authority and need to appropriate water for wild horses and wildlife. The letter references the following federal statutes:⁷

The Wild Horse and Burro Act of 1971 (Public Law 92-195), 43 CFR part 4700
The Federal Land Policy and Management Act of 1971 [1976](Public Law 94-579)
and The Public Rangelands Improvement Act of 1978 (Public Law 95-514).
Specifically: Public Law 92-195 Section 3, par. A
Public Law 94-579 Sec. 102, Par. 7-8; Section 103, par. L

The Office of the State Engineer has consistently recognized that the BLM has the authority under existing federal laws to appropriate water for the management of wild horses and burros as long as the BLM complies with state water law.⁸

The issue of wildlife watering is more abstract. Absent of any physical restrictions, 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

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

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

⁷ See, BLM letter of July 7, 1999, in File No. 64645. official records in the Office of the State Engineer.

⁸ State Engineer's Ruling Nos. 4671 and 4943.

may or may not choose to water at this 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 wild horses, the water is available for all types of wildlife. The State Engineer has noted this incidental use in the past by issuing permits for stockwatering and wildlife or wild horses and wildlife with the type and number of larger wildlife, such as deer and antelope, listed on the application and recognized in the permit.⁹

Applications to appropriate water must be limited to one purpose.¹⁰ Application 66105 was filed for the watering of wild horses and wildlife, a subset of wildlife purposes, which is recognized as a beneficial use of water. "Wildlife purposes" is defined in the Nevada water law as including the watering of wildlife and the establishment and maintenance of wetlands, fisheries and other wildlife habitat.¹¹

The State Engineer finds that the BLM has the authority to appropriate water in accordance with state water law for wild horses and wildlife purposes. The State Engineer finds that the primary purpose of Application 66105 is wildlife purposes, in which the watering of wild horses managed by the BLM and the incidental watering of wildlife would be recognized and allowed in any permit issued under Application 66105. The State Engineer can find no basis or foundation that would dictate a finding that the BLM may not appropriate water for wildlife purposes and finds that Nevada water law does not prohibit the uses filed for under this application.

VI.

While the Nevada Department of Wildlife has statutory duties related to wildlife, the BLM also has statutory duties related to wild horses and wildlife on public lands managed by the BLM. These duties are outlined in the Congressional declaration of policy within the Federal Land Policy and Management Act of 1976 (Public Law 94-579) and are contained within the Wild Horse and Burro Act of 1971 (Public Law 92-195). The BLM administers public lands within a framework of numerous laws. The most comprehensive of these is the Federal Land Policy Act of 1976 (FLPMA). All BLM policies, procedures and management actions must be consistent with FLPMA and the

⁹ File Nos. 43392, 43393, 43394, 43395, 63229, 64645, and 66107 official records in the Office of the State Engineer.

¹⁰ NRS § 533.330.

¹¹ NRS § 533.023.

other laws that govern the use of the public lands. Part of FLPMA states, “[T]he Congress declares that it is the policy of the United States that – (8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;”¹²

The State Engineer finds that the BLM has the authority to appropriate water, in compliance with Nevada water law, for wildlife purposes.

VII.

Application 66105 requests an appropriation of water at a diversion rate of 0.0012 cfs, which would equate to a maximum duty of approximately 775 gallons per day or 0.87 acre-feet annually. The total annual duty applied for is less than half of the amount allowed for the development and use of a domestic well for which no permit is required.¹³ The State Engineer finds that the quantity of water requested in the application is minimal and approval of such a small quantity would not impair existing water rights.

VIII.

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.¹⁴ The State Engineer finds that the approval of Application 66105 would not conflict with existing water rights.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁵

¹² Public Law 94-579, Section 102, Paragraph 8.

¹³ NRS § 534.180.

¹⁴ Water Rights Database, Hydrographic Abstract, official records in the Office of the State Engineer.

¹⁵ NRS chapters 533 and 534.

II.

The State Engineer concludes there is no basis or foundation under applicable law to support the position of the protestant.

III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:¹⁶

- 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.

IV.

Application 66105 requests approximately 0.87 acre-feet annually of underground water from a point of diversion that is far removed from existing well sites that appropriate water from the Panaca Valley Hydrographic Basin. 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.

V.

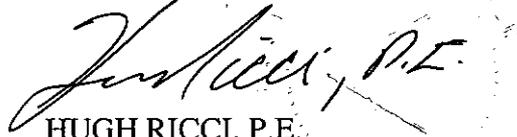
Application 66105 requests an appropriation of underground water for the purposes of watering wild horses and wildlife by the BLM. Nevada water law recognizes these purposes as a beneficial use and recognizes the BLM as an entity entitled to file an application to appropriate water within the confines of state law. The State Engineer concludes that approval of the subject application would not threaten to prove detrimental to the public interest.

¹⁶ NRS § 533.370(4).

RULING

The protest to Application 66105 is hereby overruled and Application 66105 is hereby approved subject to existing rights and payment of the statutory permit fees.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/TW/jm

Dated this 9th day of
June, 2004.