

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

IN THE MATTER OF APPLICATIONS)
44742, 44759 AND 44761 FILED TO)
APPROPRIATE THE PUBLIC WATERS)
FROM UNDERGROUND SOURCES)
WITHIN THE UPPER REESE RIVER)
VALLEY HYDROGRAPHIC BASIN (56),)
LANDER COUNTY, NEVADA.)

RULING

#5489

GENERAL

I.

Application 44742 was filed on October 29, 1981, by the United States Department of the Interior, Bureau of Land Management (BLM), to appropriate 0.01 cubic feet per second (cfs) of water from Railroad Pass Well for livestock/wild horses within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T.18N., R.41E., 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 34. On December 20, 2004, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wild horses only.¹

II.

Application 44759 was filed on October 29, 1981, by the United States Department of the Interior, Bureau of Land Management, to appropriate 0.01 cfs of water from Ravenswood Well for livestock/wild horses within Lot 2 of Section 31, T.22N., R.43E., M.D.B.&M. The proposed point of diversion is described as being located within the Lot 2 of said Section 31. On December 20, 2004, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wild horses only.²

III.

Application 44761 was filed on October 29, 1981, by the United States Department of the Interior, Bureau of Land Management, to appropriate 0.01 cfs of water from Reese Canyon Well for livestock/wild horses within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 14,

¹ File No. 44742, official records in the Office of the State Engineer.

² File No. 44759, official records in the Office of the State Engineer.

T.23N., R.43E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ SE¼ of said Section 14. On December 20, 2004, the BLM requested to withdraw livestock as a use; requesting that the application be processed for wild horses only.³

IV.

Application 44742 was timely protested by Bill Gandolfo. Application 44759 was timely protested by Dollyruth Ansolabehere. Application 44761 was timely protested by the Ellison Ranching Co. and Dollyruth Ansolabehere. The grounds of each protest refer to attached Exhibit A-1. An examination of the attachments shows that Exhibit A-1 is the same for each protest. Exhibit A-1 lists the protest issues in numerical order from Nos. 1 through 18 as follows:^{1,2,3}

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)
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.

³ File No. 44761, official records in the Office of the State Engineer.

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 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 the 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 a hearing is not necessary to consider the merits of the protest.

II.

A large portion of the protest centers on issues involving BLM ownership of water rights for stockwater use. In this case, Applications 44742, 44759 and 44761 were originally filed for livestock/wild horses. On December 24, 2004, the BLM sent a letter to the Office of the State Engineer requesting that livestock be withdrawn from consideration and that the applications proceed for wild horse watering only. The State Engineer's office has accepted this request.

The State Engineer finds, since the stockwater issue has been rendered moot by the withdrawal of livestock use from the applications, the protest issues relating to stockwater cannot be considered.

III.

The protest implies 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.⁴ 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 alleges 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.⁵

⁴ Black's Law Dictionary, 1028(5th ed. 1979).

⁵ *State Board of Agriculture v. Morros*, 104 Nev. 709 (1988).

In State Engineer's Ruling No. 4671, the State Engineer found that while the Nevada Division of Wildlife⁶ 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 *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. Therefore, the Court concluded that providing water to wildlife is a beneficial use of water.⁷

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

V.

The State Engineer's office has long held that federal agencies must comply with Nevada water law.⁸ 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.

VI.

By letter dated July 27, 1999, the BLM expressed their authority and need to appropriate water for wild horses and wildlife. The letter references the following federal statutes:⁹

⁶ Note, the Nevada Division of Wildlife is now the Nevada Department of Wildlife.

⁷ *State Board of Agriculture v. Morros*, 104 Nev. 709, 766 P.2d 263 (1988).

⁸ State Engineer's Ruling No. 3242, p. 21, dated October 4, 1985, official records in the Office of the State Engineer.

⁹ *See*, BLM letter of July 7, 1999, in File No. 64645, official records in the Office of the State Engineer.

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 (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 Nevada water law.¹⁰

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 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.¹¹

In this case, the BLM has withdrawn livestock watering as a manner of use and has requested that the applications be considered for the watering of wild horses only.¹² No additional wildlife is specifically mentioned in the applications, but Application 44761 does note in the remarks section “[W]ater will be available at the source for miscellaneous wildlife”.

¹⁰ State Engineer’s Ruling Nos. 4671 and 4943.

¹¹ File Nos. 43392, 43393, 43394, 43395, 63229, 64645, and 66107 official records in the Office of the State Engineer.

¹² See, BLM letter of December 20, 2004, File nos. 44742, 44759 and 44761, official records in the Office of the State Engineer.

The State Engineer finds that the BLM has the authority to appropriate water in accordance with Nevada water law for wild horses. The State Engineer finds that the primary purpose of Applications 44742, 44759 and 44761 are for the watering of wild horses managed by the BLM.

VII.

Applications 44742, 44759 and 44761 request a total appropriation of water sufficient to water 64 horses. The standard duty for a horse is 20 gallons per day per head. This equates to a total requested appropriation of approximately 1.433 acre-feet annually. This amount is less than the quantity of water allowed for one domestic well for which no permit is required.¹³ The State Engineer finds that the quantity of water requested in these applications is minimal and approval of such small quantities would not impair existing water rights.

VIII.

There are several references in the protest to existing rights on the three wells for which Applications 44742, 44759 and 44761 are associated. 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 sources.¹⁴ The State Engineer finds that the approval of Applications 44742, 44759 and 44761 would not conflict with existing water rights.

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 shows that the sources of water are on public lands managed by the BLM.^{15,16}

The State Engineer finds that the proposed points of diversion under Applications 44742, 44759 and 44761 are on public lands managed by the BLM and therefore, the BLM does have access to the water sources.

¹³ NRS § 534.180.

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

¹⁵ Edwards Creek Valley 1:100 000 surface management status map, BLM edition 1976.

¹⁶ State of Nevada 1:500 000 surface management status map, BLM edition 1990.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁷

II.

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

III.

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.

IV.

Applications 44742, 44759 and 44761 request approximately 1.433 acre-feet annually of underground water from the Upper Reese River 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.

Applications 44742, 44759 and 44761 request an appropriation of underground water for the purposes of watering wild horses by the BLM. Nevada water law recognizes this purpose as a beneficial use and recognizes the BLM as an entity entitled to file an application to appropriate water for this beneficial use within the confines of state water law. The State Engineer concludes that approval of the subject applications would not threaten to prove detrimental to the public interest.

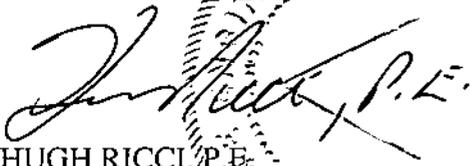
¹⁷ NRS chapters 533 and 534.

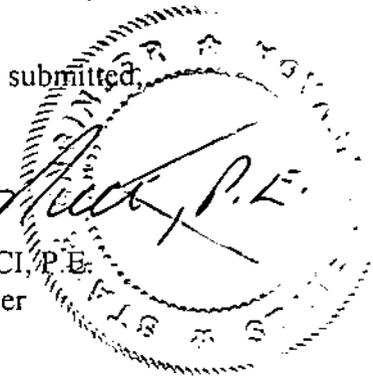
⁴ NRS § 533.370(4).

RULING

The protests are overruled and Applications 44742, 44759 and 44761 are 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 2nd day of
June, 2005.