

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

IN THE MATTER OF APPLICATION 41882 FILED)
TO APPROPRIATE THE PUBLIC WATERS OF UPPER)
ELKHORN SPRINGS, LOCATED WITHIN THE UPPER)
REESE RIVER GROUNDWATER BASIN (56),)
LANDER COUNTY, NEVADA.)

RULING

4632

GENERAL

I.

Application 41882 was filed on July 25, 1980, by Jim and Ida Gallagher to appropriate 1.0 cubic foot per second (cfs) of water from Upper Elkhorn Springs for domestic purposes and for the irrigation of 11.80 acres of land located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17, and the S $\frac{1}{2}$ S $\frac{1}{2}$ of Section 8, both in T.20N., R.44E., M.D.B. & M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 17.¹

II.

Application 41882 was timely protested by United States Government, Bureau of Land Management (BLM) on the following grounds:¹

The water is not available for appropriation under state law because it is a public water reserve. The lands contained in this public water reserve were withdrawn by Executive Order 107 of April 17, 1926 (43 C.F.R. 2311).

Wherefore, the protestant requested that the application be denied.

FINDINGS OF FACT

I.

Application 31000 was filed on January 17, 1977, by Jim and Ida Gallagher to appropriate 0.5 cfs of water from Upper Elkhorn Canyon Springs. Permit 31000 was approved on August 26, 1977, for 0.25 cfs of water from said springs for the irrigation of 10.0 acres of land located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.20N., R.44E., M.D.B. & M. On June 24, 1980, the Proof of Beneficial Use required under the provisions of Permit

¹ File No. 41882, official records in the office of the State Engineer.

31000 was filed in the office of the State Engineer describing the irrigated acreage upon which beneficial use had been established as 21.8 acres of land which was located within the NE¼ NE¼ (0.60 acres) and the NW¼ NE¼ (0.20 acres) of Section 17 and the SE¼ SE¼ (0.40 acres) the SW¼ SE¼ (6.60 acres), the SE¼ SW¼ (9.75 acres) and SW¼ SW¼ (4.25 acres) of Section 8, all in T.20N., R.44E., M.D.B.&M.² The State Engineer finds that beneficial use of the waters of Upper Elkhorn Springs for irrigation purposes has been established upon a place of use which exceeds the acreage permitted under Permit 31000 by approximately 11.8 acres of land.

II.

By letter dated July 11, 1980, the office of the State Engineer instructed the applicant's agent to submit a second application to appropriate water from Upper Elkhorn Springs to include the excess 11.8 acres of unpermitted non-water righted land which was claimed as irrigation under the subject Proof of Beneficial Use.² The applicant complied with this request on July 25, 1980, when Application 41882 was filed to request an appropriation of water from the subject springs for the unpermitted non-water righted 11.8 acres claimed as irrigation under the Proof of Beneficial Use submitted under Permit 31000. Subsequently, Permit 31000 was issued Certificate 9584 on September 29, 1981, for the irrigation of 21.0 acres of land which was claimed or irrigated within the SE¼ and the SW¼ of Section 8, T.20N., R.44E., M.D.B. & M. The State Engineer finds that Application 41882 is not a request for a new appropriation of water from Upper Elkhorn Springs, but rather an attempt on the applicant's part to obtain a water right permit for that portion of the certificated place of use which has been historically irrigated from the springs without an existing water right permit, but certificated under Permit 31000.

² File No. 31000, official records in the office of the State Engineer.

III.

Application 41882 was protested by the BLM on the grounds that said application would conflict with the BLM's claim of a public water reserve for the waters of Upper Elkhorn Springs. An informal field investigation in the matter of the water use under Permit 31000, Certificate 9584 and Application 41882 was conducted by representatives of the office of the State Engineer on January 29, 1998. Information obtained during the course of the field investigation revealed that said springs are located upon land which is currently under federal control in a location which is upstream a short distance from the applicant's privately owned place of use with only the spring flow, which flows across the property line, available for use by the applicant.³ The State Engineer finds that even if Application 41882 represented a new appropriation of water from Upper Elkhorn Springs, this appropriation of water is limited to that portion of the total spring flow which crosses the applicant's property line, after any first use by the BLM for the purposes contained within their claim of a public water reserve, therefore it does not represent a conflicting appropriation of water at the spring source.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴

II.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public waters where:⁵

- A. there is no unappropriated water at the proposed source;
or

³ Report of Field Investigation, No. 975, February 27, 1998, official records in the office of the State Engineer.

⁴ NRS § Chapter 533.

⁵ NRS § 533.370(3).

- B. the proposed use conflicts with existing rights; or
- C. the proposed use threatens to prove detrimental to the public interest.

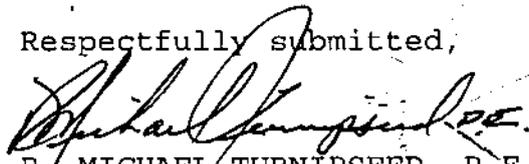
III.

Application 41882 was filed to obtain a water right permit for a portion of the place of use described under Certificate 9584 which has been historically irrigated with water obtained from Upper Elkhorn Springs without the benefit of an active water right. The State Engineer concludes that the approval of Application 41882 would resolve the current discrepancy between the permitted and certificated acreage described under Permit 31000, Certificate 9584, and would not constitute a new appropriation of water from the source; therefore, the issue of any detrimental effect on existing rights is moot.

RULING

The protest to Application 41882 is hereby overruled on the grounds that there is no interference with the protestant's existing rights and Application 41882 is approved subject to existing rights and the payment of the statutory permit fees. The total combined duty of Permit 41882 and Permit 31000, Certificate 9584 shall not exceed 84.0 acre-feet annually from any and all sources.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/MDB/cl

Dated this 22nd day of
May, 1998.