

EUREKA_004

Report Supporting Eureka County Objections
In the Matter of Bureau of Land Management Claimed Public Water Reserves in Diamond Valley,
Nevada

January 31, 2019

Prepared for:

Eureka County Board of Commissioners

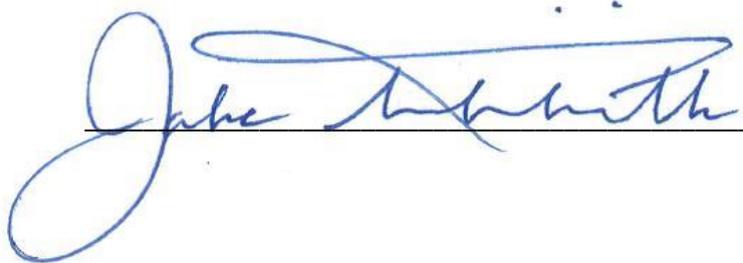
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Qualifications and Introduction

My name is Jacob “Jake” Tibbitts. I am the Eureka County Natural Resources Manager and have been since July 2008. I hold a Bachelor of Science degree in biology with an emphasis in ecology and a Master of Science degree in Geographic Information Science with an emphasis in geo-spatial rangeland sciences. I have over 12 years of experience in natural resources management with over 10 of these years managing the natural resources of Eureka County. I was previously qualified by the Nevada State Engineer as an expert in the areas of natural resources management, geographic information science, and remote sensing. A copy of my resume is submitted with this report.

I prepared the “Field Investigative Report and Analysis of the BLM’s Public Water Reserves in the Preliminary Order of Determination in Support of Eureka County’s Objections” (Field and Analysis Report). The field investigations for this Report were conducted October 16, 18, 19 and 20, 2018 where Dale C. Bugenig, Eureka County Consulting Hydrogeologist, and I completed this field work together. The methodologies employed and description of these field investigations is accurately described in both the Field and Analysis Report as well as Mr. Bugenig’s expert report regarding these same Public Water Reserves (PWR) claims. Mr. Bugenig’s report is dated January 29, 2019.

Below, my opinions and basis for these opinions are outlined. These opinions are based on the Field and Analysis Report and the joint field investigations as well as other research related to the springs and lands claimed by Bureau of Land Management as Public Water Reserves No. 107. My Field and Analysis Report analyzes each PWR found to be valid by the State Engineer in his Preliminary Order of Determination, which analyses helped form these opinions. The documents referenced or considered in preparation of this report are also listed below.

Opinions

Opinion 1

None of the 27 PWR Claims determined to be valid by the State Engineer meet the State Engineer adopted criteria required for the PWRs to be found valid.

Basis for Opinion 1

- In the Preliminary Order of Determination (POD), the State Engineer adopted and incorporated the analysis from his Ruling 5729 including:
 - “PWR 107 claims cannot divert or displace a water right vested under Nevada law prior to April 17, 1926.”

- “PWR 107 claims can only be made on springs that have a discrete natural flow of water emerging...at a reasonable distinct location. It does not apply to a seep or wet spot...”
- “PWR 107 claims do not act upon a source of water that only becomes important through artificial development or man-made structures.”
- “PWR 107 claims do not apply to springs or waterholes that are inaccessible to domestic livestock or are of unsatisfactory quality to satisfy the need for human and stockwatering consumption.”
- “Not more than one PWR 107 claim can be made within any 40-acre parcel and any two PWR 107 claims must be more than ¼ mile apart.”

Yet, the State Engineer did not apply the complete analyses necessary to the PWR claims in the POD issued in this Adjudication to address the findings in Ruling 5729. Applying the analyses adopted in Ruling 5729 to the 27 PWRs found to be valid shows the 27 PWRs are, in fact, not valid.

- As the POD acknowledges, any valid PWR 107 is not just simply a reservation of an amount of water. Valid PWRs are land reservations reserving either the 40 acre land subdivision in which the PWR spring lies, in cases of surveyed land, or one-quarter of a mile of land around every PWR spring, in cases of unsurveyed land. There appears to have been no field investigation by the State Engineer of most of the 27 PWRs found to be valid nor any review or analyses of General Land Office (GLO) records, BLM Master Title Plats and other Plat maps, existing rights and infrastructure recorded through deeds, etc. A review of these records shows that most, if not all, of the lands in question were not actually “reserved,” “vacant” or “unappropriated” as required in the 1926 Executive Order.

Opinion 2

None of the 27 PWR Claims determined to be valid by the State Engineer meet the mandated BLM criteria required to be claimed as PWRs.

Basis for Opinion 2

- **BLM Water Rights Manual 7250 (Rel. No. 7-110 Dated 9/30/2013).** This manual is the current BLM policy and guidance in effect under the Diamond Valley Adjudication and BLM’s PWR claims amended in 2016. None of the PWRs found valid by the State

Engineer meet BLM’s own mandates in BLM Water Rights Manual 7250, including those mandates discussed below.

The stated purpose of the manual “is to establish policy and guidance for the Bureau of Land Management (BLM) in locating, perfecting, documenting, and protecting BLM-administered water rights, which are considered property rights, necessary to manage and conserve the economic and resource values of the public lands.” The manual outlines “objectives of the BLM water rights program are to A. Acquire and Perfect Water Rights...B. Protect and Manage Water Rights...C. Ensure Water Availability to Protect Public Resources.... D. Locate, Describe, and Record Water Rights....” The manual then outlines policy and guidance targeted to these objectives. The manual requires, through State Director delegated authority, many mandates including:

- “Maintaining and periodically updating all records of public water reservations...”
- “Documenting BLM administrative water rights by location, land description, and recordation in the BLM Master Title Plats and Historical Indexes, and in appropriate local and state systems of record for property rights.”
- “Maintaining up-to-date flow data, water use inventory data, and water rights records....”
- “Maintaining up-to-date geospatial data compatible with BLM corporate data standards such as those for the Geographic Coordinate Database (GCDB), National Hydrologic Dataset (NHD), Watershed Boundary Dataset (WBD), Range Improvement Project System (RIPS), Land Status System (LR2000 etc.), NLCS Database (reserved), the Recreation Management Information System, etc. (see 1.6 File and Records Maintenance for additional requirements).”
- “Ensuring that land use authorization granted to third parties contain appropriate terms and conditions to protect water rights administered by the BLM and water uses implemented by the BLM.”

The manual contains various general policies including:

- “Review and secure water rights for BLM programs and projects by affirmation of a Federal reserved water right, if one is available and the water is necessary to preserve the primary purpose of the reservation.”
- “The purposes for which Federal reserved water rights are asserted may include use by third parties. Third-party users shall obtain proper authorization through a formal use authorization, such as a lease. Third-party use must be consistent with the original purpose of the reservation.”

- “In many instances, Federal reserved water rights are created long before or after a comprehensive McCarran Amendment adjudication is completed within the basin where the Federal reserved water right is located. In those instances, the BLM shall collect hydrologic and water use data to determine if the Federal reserved water right is being injured.”

The manual then defines requirements to “implement the BLM water rights policy” where “BLM personnel within a state must:”

- “Collect site-specific information to submit claims and applications for water rights within adjudication and administrative processes. Information collected will include spatially referenced inventories of BLM water uses at point water sources, such as springs...the diversion point, the distribution system, the application locality, and studies to quantify the rate, timing, and location of water needed to support water-dependent values on rivers and streams.”
- “Initiate requests to Cadastral Survey to prepare appropriate Standards for Boundary Evidence Certificate(s) (per IM 2011-122) in adjudications, water rights applications in state-based administrative processes, inventory data base, in support of claims and applications, and as necessary to respond to protests filed by other parties against BLM claims and applications.”
- “In all land use authorizations, the BLM shall include appropriate terms and conditions to protect water rights and water uses on public lands. Clearly inform the permittee that the authorization does not confer any legal right to the use of the water, nor does it provide a basis for acquiring such a right against the U.S.”
- “Verify that each BLM-administered water right is used in accordance with provisions of the law of the state in which the use occurs.”
- “Ensure that each BLM-administered water right is compatible with the BLM corporate data standards.”
- “The BLM and GSA need to determine that the withdrawn lands [for PWRs] are not suitable for the public domain for disposition under the general public-land laws, because such lands are substantially changed in character by improvements or otherwise.”
- “Address availability of water on public lands to support BLM’s mission and programs in all Resource Management Plans (RMPs). All RMPs should address existing surface and groundwater uses, the BLM’s current and future water needs.”

The manual also outlines required measures for “file and records maintenance” including:

- “Water rights are considered property rights, and as such, records pertaining to them must be permanently retained and are not subject to the BLM/Combined Records schedule. The BLM’s water rights records are considered active historical records that must be maintained to support acquisition, maintenance, and protection of water rights.”
- “Water rights data standards will be compatible with BLM corporate data standards such as those for the Cadastral National Spatial Data Infrastructure (NSDI), Land Status System (LR2000 etc.), and the Recreation Management Information System, Range Improvement Project System, National Hydrologic Database, and Watershed Boundary Database with filing in appropriate local and state systems of record for property rights.”
- “Inventory records shall be maintained regarding all water rights and water uses implemented by the BLM on public lands, including the type of water right (reserved, appropriative, acquired, etc.), priority, amount, land description, authorized uses, and recorded usage of the water right, geospatial location of (a) diversion point, (b) distribution system, and (c) application location. Importantly, (1) correctly locate the water feature with XY coordinates and also legal description aliquot part at least to the ¼¼ section, and (2) agree on the exact name for the feature. All databases (such as the BLM’s and the state’s) must reflect the correct location and name exactly (e.g., spelling and capitalization, etc., exact to the character).”

- **BLM Screening Process for PWR 107; PWR 107 Checklist.** The BLM PWR 107 checklist is used by Nevada BLM as the required tool to determine whether or not a water source could be a PWR 107. The checklist was first developed and directed for use in two 1983 BLM Nevada State Office instructional memoranda, IM 83-454 and IM 83-331 (source: BLM March 31, 2017 presentation to Central Nevada Regional Water Authority and April 5, 2017 personal communication with Rudy Evenson, BLM Nevada Deputy Chief of Communications). This was the formal policy in place when BLM first filed on the PWRs in question in 1985¹. The checklist notes that each-and-every item 1 through 6 and at least one circumstance in Item 7 of the checklist must apply for BLM to even file a PWR claim. None of the PWRs found valid by the State Engineer meet BLM’s own mandates in the checklist.

¹ Nevada BLM Instruction Memorandum No. NV-90-145 issued on January 17, 1990, “Water Rights Procedures for the State of Nevada” includes the exact same checklist and states that “This screening process for PWR 107 was developed by the BLM Solicitor in 1984.”

The BLM checklist uses the following criteria to assess the PWR 107 eligibility of springs and waterholes. Using the checklist, BLM is to ask whether:

1. Private control of the spring or waterhole would monopolize the public resources;
2. The source supplies a sufficient quantity of water for public watering purposes;
3. The spring or waterhole came into existence prior to October 21, 1976;
4. A private water right does not exist on this source;
5. The land on which the source is located was not acquired after April 17, 1926;
6. The source is not artificially developed (i.e., well or reservoir); and
7. The source is important. One or more of the following circumstances must be applied for the source to be important.
 - a. The spring or waterhole is used or needed by the public for watering purposes;
 - b. The spring or waterhole is located so that it is of utility and benefit to the general public;
 - c. The availability of the spring or waterhole for public watering purposes affects the use of surrounding lands, water uses and users, habitat, and/or inhabitants of the surrounding lands;
 - d. The distance to the next nearest PWR or available source of water is such that there is no readily available, suitable alternative source of water; and
 - e. Competing private interests could obtain water rights under State law for this water source if it were not reserved.

- **Nevada BLM Instruction Memorandum (IM) No. NV-90-145 issued on January 17, 1990, “Water Rights Procedures for the State of Nevada.”**² This IM states that “A number of memorandums were issued that have expired. Some had information that is still pertinent, others are obsolete. This memorandum is intended to consolidate all currently pertinent water rights direction in Nevada into one memorandum and a few references.” This IM would have applied to the PWR claims that were initially

² The two most recent IMs from Nevada BLM outlining Nevada BLM water rights policy are from 2005 (IM-2005-077) and 2013 (IM-2013-007). Both are very similar with minor differences. Both state that “With the changes in Nevada Revised Statutes...BLM-Nevada is revising existing guidance and adding additional guidance regarding policy of water rights.” The cited changes in Nevada law were through SB 76 in 2003 and AB 410 in 2011. The 2013 IM also includes in the PWR section a subsection regarding the 2007 State Engineer Ruling 5729. Neither have policy or guidance inconsistent with the discussion provided in this Report based on prior IMs from BLM.

claimed by BLM in 1985. None of the PWRs found valid by the State Engineer meet BLM's own mandates in this IM including those described below.

The IM outlines BLM's "water rights objective in Nevada is to develop adequate water to serve the needs of beneficial uses under our multiple use management...We are required to accomplish this objective through notifying the State Engineer of our needed Public Water Reserves....The process includes the following four (4) steps: 1. Identify our needs for Multiple Use Management 2. Separate the beneficial uses related to PWRs from those related to state water appropriation 2. Notify the State Engineer of the PWRs that meet our needs....The goal is to complete the task in the early spring of 1990." The IM references BLM Water Rights Manual 7250 many times stating that it "is current and is the cornerstone of the water rights procedures." The IM also outlines the "PWR-107 procedures" that "will be used." The PWR 107 checklist is identified in the section titled "Identification" as the "screening process...developed by the BLM Solicitor in 1984." The IM states that "**After** going through the identification process above [PWR 107 checklist]...we notify the State Engineer that we have identified the location and use of waters that were set aside for BLM management use in 1926" (emphasis added). The IM directs BLM offices to "Provide the Lands and Withdrawal Review Section at the Nevada State Office with a copy of all PWRs that are sent to the State Engineer for notification so that they can be identified on the Master Title Plats." The IM also states that "Development of PWRs can begin **following BLM notification** to the State Engineer. PWRs that were developed before notification should be included in the notification process" (emphasis added).

Opinion 3

The 39 PWR Claims determined to be invalid and rejected by the State Engineer have additional criteria that if considered thoroughly would provide additional evidence supporting the State Engineer's determinations the Claims are not valid.

Basis for Opinion 3

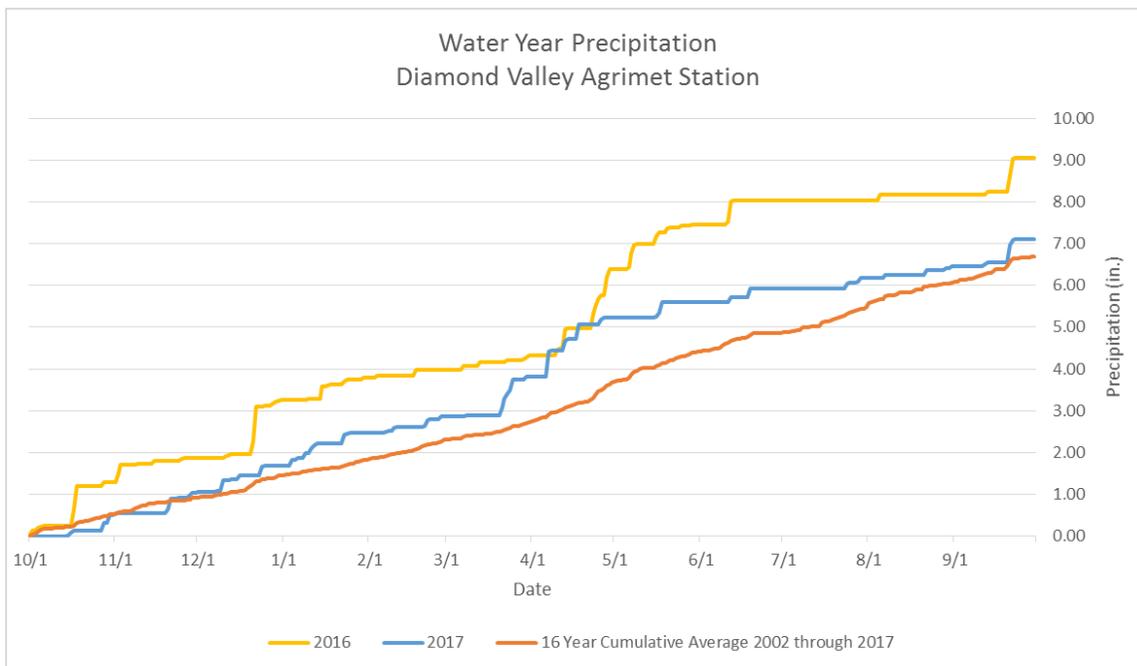
The same discussion above related to the PWRs found to be valid by the State Engineer applies to the 39 PWRs found to be invalid. In addition to the findings made by the State Engineer that these springs are not PWRs due to being already fully appropriated or having insufficient flows, additional analysis by the State Engineer applying all criteria in Ruling 5729, reviewing records regarding whether or not lands were actually "reserved," "vacant" or "unappropriated" in 1926, and applying BLM mandated criteria would further support the findings in the POD that these 39 springs are not valid PWRs.

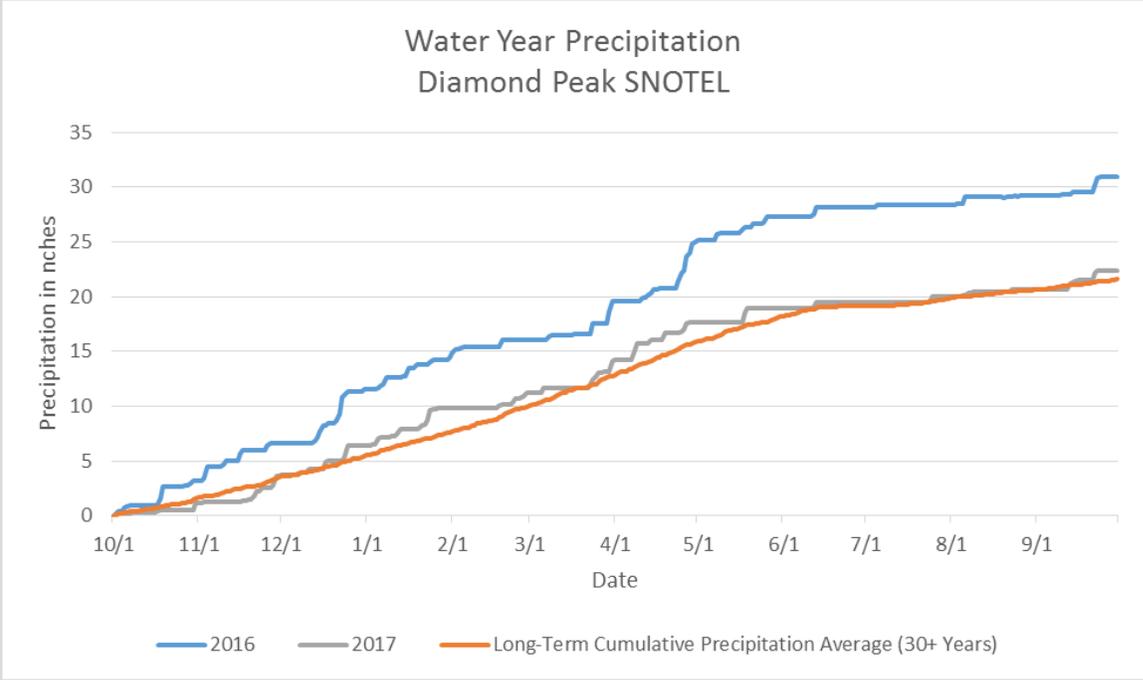
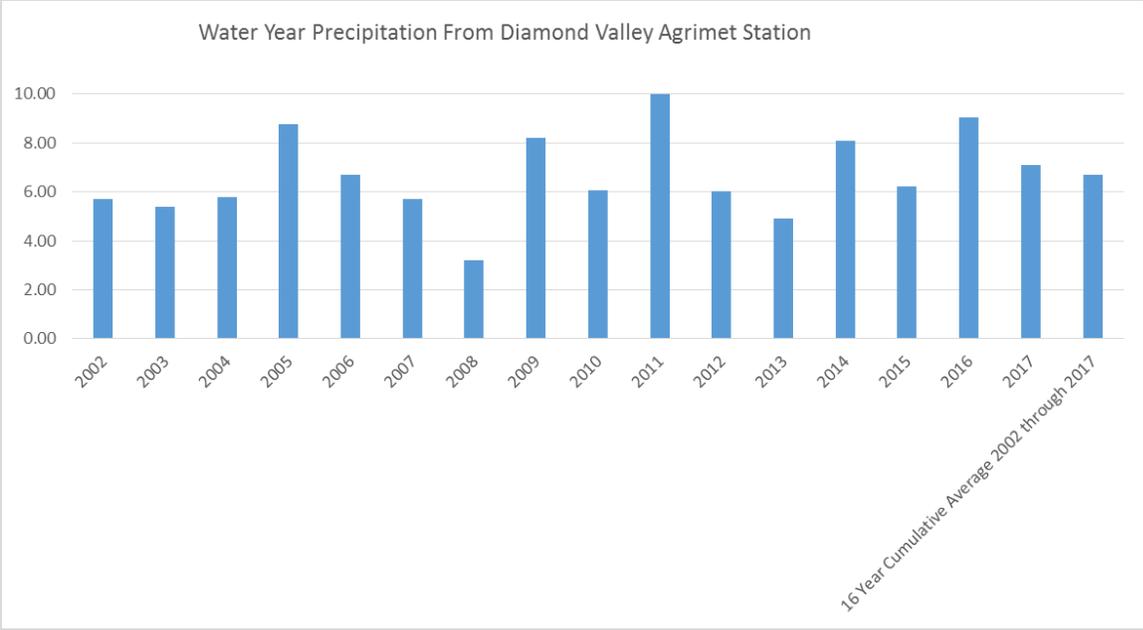
Opinion 4

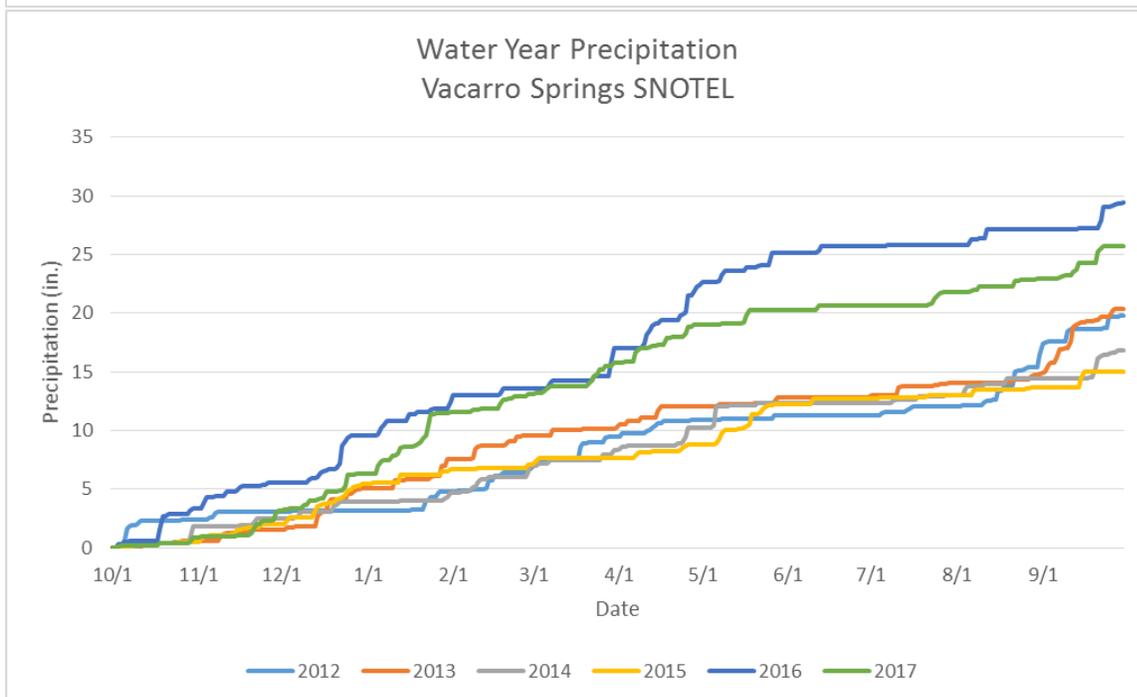
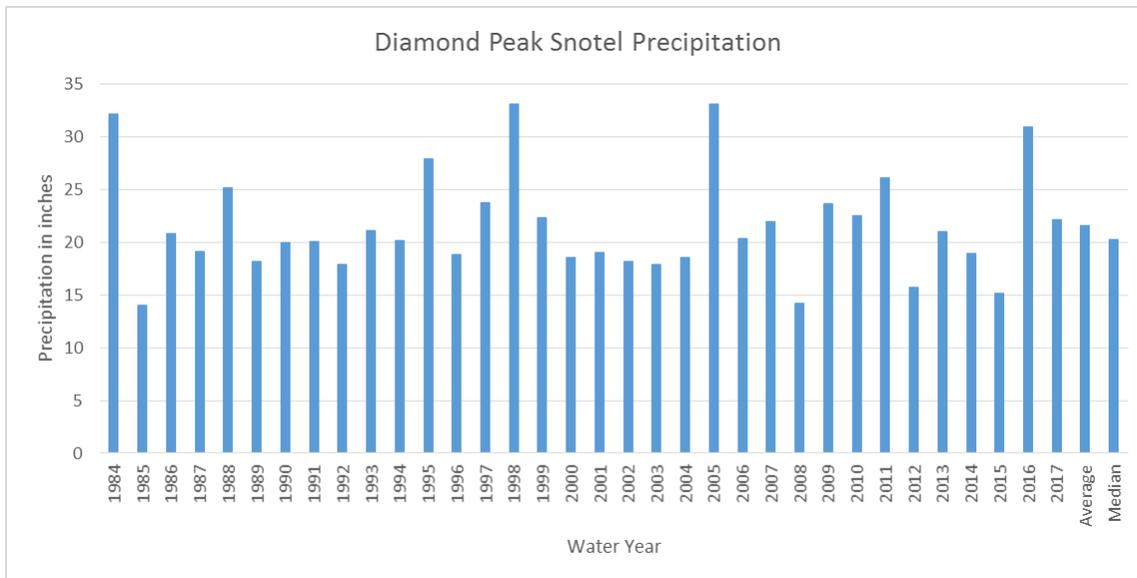
Precipitation preceding and during the period of BLM field measurements of spring flows was well above average likely contributing runoff as a component of the total flow.

Basis for Opinion 4

Precipitation data from local sources, including the two nearby NRCS SNOTEL sites, Vacarro Springs (ID 1137) and Diamond Peak (ID 443), and the Diamond Valley USBR AgriMet Station, amongst others, irrefutably show that precipitation for water year 2016 leading up and during the timeframe of BLM’s measurements was well above average. See the figures below:







Opinion 5

Vegetation at certain BLM claimed PWRs is upland, not riparian, vegetation which is evidence that spring flows are not sustained at these locations.

Basis for Opinion 5

Based on my background in rangeland science and familiarity with different vegetation types, the vegetation documented during my field investigations at locations which are claimed as PWRs are not the types of vegetation that would be present with sustained

water availability on a year-to-year basis. These PWRs include, without limitation, R-04237, R-04256, R-04264 and R-04270.

Opinion 6

BLM uses PWR claims as leverage to force certain management on public land authorized uses by requiring certain projects to develop mitigation outside of the involvement of the State Engineer and asserting authority over these waters precluding maintenance efforts and access.

Basis for Opinion 6

The PWRs claimed by BLM state the claims are for wildlife, riparian vegetation, and wild horses (in some cases) in addition to stockwater and human watering. Eureka County has multiple, documented examples of BLM asserting un-adjudicated PWR claims as “rights” and requiring certain projects to develop mitigation outside of the involvement of the State Engineer and asserting seniority over other vested claims or permits (i.e., stockwater and irrigation) on federally administered lands precluding maintenance efforts and access of others to these waters. In a 2001 letter, BLM states “providing water for wild horses...is also consistent with the BLM’s Public Water Reserve on the water sources identified herein.” Recently, BLM asserted PWR 107 claims in the Fish Creek Herd Management Area are for watering wild horses. BLM has also protested water rights applications based on the potential to affect claimed PWRs 107 (e.g., Mt. Hope Project, SNWA groundwater development project) and resolved these protests through settlement agreements.

For example, the EIS for the Mt. Hope Project referenced the settlement agreement and requires mitigation by General Moly (GMI) **regardless of final determination** of PWR validity. Many of the PWRs claimed do not meet the standard of PWR 107. The PWR claims under this Diamond Valley adjudication are included in the settlement agreement. Under the mitigation requirements listed on page 12, item 2 of the agreement, GMI agreed to “augment, replace or provide an alternative source of water suitable to meet BLM needs.” Even if these sources were found to be valid PWR 107s, “important water holes” replaced or provided from alternative sources of water is against the intent of PWR 107. The agreement also required GMI to “jointly share” both certificated and vested stockwatering rights for wild horses (page 13, item 6) and for BLM to obtain a shared, certificated water right on these sources for wild horses. What is most egregious is the use of vested stockwatering rights for wild horses and the requirement for GMI to sign over part of the vested right to BLM. Eureka County believes it is improper and unlawful for a vested right for stockwater to be used for a wild horse water right especially given wild horses were not protected pre-1905 and the vesting of the right was not for wild horses. We see this as a form of coercion by BLM to obtain unneeded water rights and

allows additional wild horse use in areas where horses historically have not used the range extensively.

Eureka County has also seen BLM use a claimed PWR as leverage against a rancher to impose grazing restrictions. I have seen some claimed PWRs fenced off completely with no access whatsoever to livestock and domestic use unless a member of the public wanting to use the water for domestic use climbs the fence to access the water. This is counter to the purpose of the PWR which was for use by livestock, not the exclusion of use by livestock.

Documents Referenced or Considered

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Bureau of Land Management. *Instructional Memorandum NV IM-2005-077, BLM Nevada Water Rights Policy*. 30 June 2005.

Bureau of Land Management. *Instructional Memorandum NV IM-2013-007, BLM Nevada Water Rights Policy*. 12 December 2012.

Bureau of Land Management. *Public Water Reserve (PWR 107) Checklist*.

Bureau of Land Management. Protest of Application 83902 in the Office of the State Engineer of the State of Nevada. Filed 28 July 2014.

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Bureau of Land Management. Shoshone-Eureka Resource Management Plan Environmental Impact Statement. 27 January 1984.

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Cook, Christopher J. (BLM Mount Lewis Field Office Manager). Letter to J.J. Goicoechea regarding BLM protest of Application 83902. 12 September 2014.

Plats and Indices for Each PWR Associated Township and Range. General Land Office Plats and BLM Master Title Plats with Historical Indices. Retrieved and consolidated from <https://glorerecords.blm.gov/LandCatalog/Catalog> and <https://www.nv.blm.gov/LandRecords/index.php>.

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Simpson, Jo (BLM Office of Communication Chief). Letter to Luther K. (Luke) Wise regarding use of Public Water Reserves for wild horses. 29 October 2001.

Stipulation for Withdrawal of Protests between General Moly Inc. and Bureau of Land Management. 6 August 2008.

Tibbitts, Jake. "Re: Follow-ups from CNRWA presentation last Friday, 3/31/17." Message to Ronald (Rudy) Evenson. 25 April 2017. E-mail.

Tibbitts, Jake. "Re: PWR Checklist for filings in Diamond Valley." Message to Douglas Furtado and Jon Sherve. 25 April 2017. E-mail.

Todd, Marci L (BLM Acting State Director). Letter to Jake Tibbitts regarding Public Water Reserves. 12 June 2017.