

FILED
7-2-1976
9:00 A.M.
Neil D. Jensen Clerk
Patricia Heat Deputy

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No. 10389
IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WHITE PINE

* * * * *

IN THE MATTER OF THE DETERMINATION)
OF THE RELATIVE RIGHTS IN AND TO)
THE WATERS OF ODGERS CREEK AND ITS)
TRIBUTARIES IN WHITE PINE COUNTY,)
STATE OF NEVADA.)

FINDINGS OF FACT, CONCLUSIONS OF LAW
JUDGMENT AND DECREE

This matter came on regularly for hearing on the 13th day of May, 1976, before the Honorable Merlyn H. Hoyt, District Judge presiding, the portion of Odgers Creek and its tributaries exemplified in these proceedings, being within White Pine County, State of Nevada, and he being the Judge designated by NRS 533.165 to hear and having jurisdiction to hear the above-entitled matter, of the State Engineer's determination of the relative rights of the petitioner and claimants to the use of the waters of the stream system of Odgers Creek and its tributaries, which Order of Determination and all related documentary evidence had been previously filed by the State Engineer. There being no exceptions to the Order of Determination filed or otherwise submitted to the Court by the claimants, petitioners, or any other person or persons at least 5 days prior to the date set for hearing as provided for under NRS 533.170, the matter was submitted to the Court for its decision.

Harry W. Swainston, Deputy Attorney General, Starr Hill, Jr., Surface Water Engineer, L. Edward Parmenter, Adjudication Engineer and Timothy F. Holt, Hydraulic Engineer,

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appeared in the hearing and proceedings on behalf of the State of Nevada and the office of the State Engineer.

The record disclosed that the claimants had received a certified copy of the Court Order Setting Time for Hearing on the Order of Determination.

Harry W. Swainston, thereupon, at the hearing offered verified affidavits, files and records from the State Engineer's Office, all contained in the Order of Determination, which were entered as evidence in support of the rights of the claimants in and to the above-named stream system.

The Court, having duly considered the entire record and the evidence introduced and received, directed that Findings of Fact, Conclusions of Law, and Judgment and Decree be entered accordingly.

FINDINGS OF FACT

I.

That on June 4, 1971, Delbert D. Eldridge submitted a petition on behalf of George Eldridge and Son, Inc., a water user of waters of Odgers Creek, requesting the determination of the relative rights of the petitioner and other claimants to the waters of Odgers Creek and its tributaries, situate in White Pine County, State of Nevada.

That the State Engineer's investigation report revealed that the waters of Odgers Creek and its tributaries were being placed to beneficial use for irrigation, domestic and stock watering purposes. That the report of the facts and conditions disclosed that a determination of the relative rights was justified, and the State Engineer made and entered his Order on September 20, 1971, granting the petition.

That on the 23rd day of September, 1971, and once

1 each week for four succeeding weeks, the State Engineer did
2 cause to be published a Notice of Order and Proceedings to
3 Determine Water Rights in and to the waters of Odgers Creek and
4 its tributaries in White Pine County, State of Nevada, and that
5 notice was duly given to all claimants as required by law. That
6 on the 18th day of November, 1971, there was filed in the Office
7 of the State Engineer an affidavit of the General Manager of
8 The Daily Times, exemplifying the Proof of Publication of
9 Notice of Order and Proceedings to Determine Water Rights.

10 That the State Engineer did cause to be published on
11 the 9th day of November, 1971, and once each week for four suc-
12 ceeding weeks, a Notice of Order for Taking Proofs to Determine
13 Water Rights, in and to the waters of Odgers Creek and its
14 tributaries in White Pine County, State of Nevada, and that
15 notice was duly given to all claimants as required by law.
16 That on the 29th day of December, 1971, there was filed in the
17 Office of the State Engineer an affidavit of the General Manager
18 of The Daily Times, exemplifying the Proof of Publication of the
19 Notice of Order for Taking Proofs to Determine Water Rights.

20 That thereafter, in accordance with NRS 533.125, the
21 State Engineer did file in the records of his office, on May 1,
22 1972, and on August 31, 1972, requests to extend the time in
23 which proofs may be filed. That he did grant extensions of
24 time to file proofs and that notice thereof was given to all
25 claimants.

26 That the State Engineer, in accordance with NRS 533.
27 140, did enter and file in the records of his office, on the
28 5th day of July, 1973, an Abstract of Claims, a Preliminary
29 Order of Determination and Notice and Order Fixing and Setting
30 Time and Place of Inspection, stating when and where the

1 evidence taken or filed with him and the proofs of claims were
2 open to the inspection of all interested persons; and that notice
3 thereof was duly given to the claimants as required by law.

4 That on September 4, 1973 Objections to the Prelimi-
5 nary Order of Determination were filed in the State Engineer's
6 Office by Reed Robison as Executor of the Estate of B. H.
7 Robison.

8 That on December 4, 1973, a Hearing on the Objections
9 to the Preliminary Order of Determination was held before the
10 State Engineer of the State of Nevada pursuant to NRS 533.150.

11 That the State Engineer, in accordance with NRS 533.
12 160 entered in the records of his office, on the 11th day of
13 February, 1974, an Order of Determination defining the rights
14 of the claimants and appropriators to the waters of Odgers Creek
15 and its tributaries and reflecting the change in the period of
16 use as presented in the Objections to the Preliminary Order of
17 Determination and that notice thereof was duly given to the
18 claimants as required by law.

19 That upon the filing of the certified copy of the
20 Order of Determination and the original evidence with the Clerk
21 of the Court of White Pine County, State of Nevada, the Court,
22 at the request of the State Engineer, made and entered an Order
23 on the 12th day of February, 1974, setting a time for hearing
24 of any exceptions to the Order of Determination on Tuesday, the
25 4th day of June, 1974, at 2:00 o'clock in the afternoon in the
26 courtroom of the Court House in Ely, White Pine County, Nevada;
27 and that the Clerk of said Court did furnish the State Engineer
28 with a certified copy thereof.

29 That the State Engineer, in accordance with NRS 533.
30 165, gave notice to the claimants by service of a certified

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copy of the Court Order Setting Time for Hearing.

That on the 15th day of March, 1974, and once each week for four succeeding weeks, the State Engineer did cause to be published the Court Order Setting Time for Hearing, and that thereafter on the 15th day of April, 1974, there was filed in the Office of the State Engineer an affidavit of the Book-keeper of The Daily Times, exemplifying the Proof of Publication of the Court Order Setting Time for Hearing.

That on June 6, 1974, a Stipulation for Continuance of Hearing was filed with the Clerk of the Court of White Pine County, and on that date an Order Continuing Hearing was signed by the District Judge.

That on March 26, 1976, the Court, at the request of the State Engineer, made and entered an Order setting a time for hearing of any exceptions to the Order of Determination for Thursday, the 13th day of May, 1976, at 2:00 o'clock in the afternoon, in the court room of the Court House in Ely, White Pine County, Nevada.

That the State Engineer gave notice to the claimants by service of a certified letter directing attention to the new date set for hearing of the Order of Determination.

That the Court finds that all and singular the Proceedings, Orders, and Notices required by Chapter 533 of NRS were duly had, made, and given as required by law, and that all and singular, the matters and things contained in the record were done, performed, given and made in strict compliance with the statutes, and that this Court had and has jurisdiction to hear and determine this matter.

II.

The Court Further Finds: That the portion of Odgers

1 Creek and its tributaries exemplified in these proceedings, is
2 situated wholly within White Pine County, State of Nevada.

3 III.

4 The Court Further Finds: That the name of the claim-
5 ants and appropriators, the source of water supply, the period
6 of use, the duty of water, the diversion of water and method
7 of use, the measurement of water, the domestic and stock watering
8 use, the change of place of use, and the rights of appropriation
9 of the water all as set forth in the Order of Determination are
10 true, proper and correct, and all and singular, the same should
11 be approved and confirmed as follows:

12 I. PREFACE

13 On September 20, 1971, the State Engineer entered an
14 Order granting the petition and made proper arrangements to
15 proceed with the determination of the relative rights of the
16 water users in accordance with NRS 533.090.

17 On October 29, 1971, the State Engineer entered a
18 Notice of Order for Taking Proofs to Determine Water Rights.

19 II. CLAIMANTS

20 The investigation disclosed that the waters of Odgers
21 Creek and its tributaries were being placed to beneficial use
22 on the lands of B. H. Robison, for irrigation, domestic and
23 stock watering purposes. Evidence contained in title documents,
24 affidavits and proofs of appropriation submitted by the present
25 claimant, indicates that he is the successor in interest to
26 vested rights initiated by his predecessors.

27 The United States of America, Forest Service filed
28 Proof of Appropriation 02807 claiming vested rights for stock
29 watering purposes.

30 III. SOURCE

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The headwaters of Odgers Creek originate at an elevation of 9,200 feet on the eastern slopes of the Schell Creek Range, two miles southeasterly of North Schell Peak and 20 miles northeasterly of Ely, Nevada. The stream flows four miles in an easterly direction down the mountain slopes, and there it is diverted by means of a pipeline and conveyed to the Odgers Ranch of B. H. Robison. Odgers Creek is fed by melting snow and springs, having a relatively high spring runoff which later recedes to a minimum flow for the remainder of the year.

IV. PERIOD OF USE

It has been the custom of ranchers in the area to irrigate crops other than alfalfa during the winter months when water was available.

The claimant shall be permitted to irrigate all meadow pasture acreages listed herein, for the entire year.

The irrigation season for the acreage classified as harvest herein, shall begin on April 1st and extend to October 1st of each year.

V. DUTY OF WATER

The lands irrigated from Odgers Creek are situated adjacent to the Schell Creek Range, the soils being gravelly and pervious in nature, require a high duty of water. The seasonal duty of waters from Odgers Creek and its tributaries is herein fixed and shall not exceed:

- Class A - - Harvest Crop - - - - 6.0 ac.ft./ac./season
- Class B - - Meadow Pasture - - - 3.0 ac.ft./ac./season

VI. DIVERSION OF WATER AND METHOD OF USE

The claimant shall have the right to divert 2.5 cubic feet per second of water per 100 acres of land irrigated, but not to exceed the seasonal duty as established herein.

1 The claimant or his successors in interest will not
2 be required to take or use the amount of water allotted to him
3 in a continuous flow, but may cumulate the same or any part there-
4 of in rotation or periodic turn within the seasonal limits with
5 the approval of the water commissioner and subject to the control
6 and direction of the State Engineer

7 VII. MEASUREMENT OF WATER

8 All measurements of water diverted are to be made at
9 a point where the main ditch enters or becomes adjacent to the
10 land to be irrigated or as near thereto as practicable; the
11 location if not selected by the State Engineer, to be approved
12 by him. The claimant shall install and maintain at his own ex-
13 pense, substantial and easily operated regulating headgates and
14 measuring devices in his ditch or ditches or channel. Due allow-
15 ance for losses in ditches will be made by the State Engineer in
16 case it becomes necessary.

17 Priorities are fixed by years and where the years are
18 the same, the priorities are equal.

19 VIII. STOCK WATERING AND DOMESTIC

20 The rights to the diversion and use of water for
21 stock watering and domestic purposes shall be continued by the
22 claimants named herein or their successors in interest at any
23 time during the year that stock are grazing on the range, ex-
24 cept as otherwise specified under stock watering rights of
25 appropriation, and such diversions shall be according to the
26 dates of priorities of such users and limited to the quantity
27 of water reasonably necessary for such use.

28 The amount of water diverted for irrigation purposes
29 shall not be increased by any amount to be used for stock
30 watering and domestic purposes, but the quantity allowed and

1 diverted for irrigation during the irrigation season, shall
2 include water for stock watering and domestic purposes.

3 IX. CHANGE OF PLACE OF USE

4 All water allotted in the Decree shall be appurtenant
5 to the place of use designated herein. Any water user desiring
6 to change the point of diversion, manner of use or place of
7 use of the waters allotted herein, must make application to
8 the State Engineer for permission to make the change pursuant
9 to NRS 533.345.

10 X. RIGHTS OF APPROPRIATION

11 From the Order of Determination and the documentary
12 evidence submitted in support thereof, the Court finds that the
13 name of the claimants and appropriators of the waters of Odgers
14 Creek and its tributaries, the source of the water supply, the
15 means of diversion, the points of diversion for beneficial use,
16 the periods of use, the years of priority, the cultural acreages,
17 the places of use, the legal subdivisions, sections, townships,
18 ranges, and the duty of water are as listed, stated and set forth.

19 CONCLUSIONS OF LAW

20 From the evidence presented and received in this
21 matter, and from the foregoing FINDINGS OF FACT, the Court makes
22 the following CONCLUSIONS OF LAW.

23 I.

24 That the State Engineer has the right, authority and
25 jurisdiction pursuant to Chapter 533 of NRS to make the investi-
26 gation made by him, receive the proofs and maps, enter and file
27 in his office the original Order of Determination and file a
28 certified copy thereof in this Court, and to determine the rel-
29 ative rights of the claimants and appropriators in and to the
30 waters of Odgers Creek and its tributaries in White Pine County,

1 State of Nevada; that the State Engineer duly made all orders
2 necessary and proper in connection therewith and entered the
3 same in his office as required by Chapter 533 of NRS; that each
4 and every notice required by law to be given herein to the claim-
5 ants and appropriators was duly served by the State Engineer in
6 the manner and within the time required by Statute, and that
7 the notices contained all of the statements required by law,
8 and that the claimants and appropriators of the waters of the
9 above-named stream system and its tributaries duly received the
10 information and notices as required by law.

11 II.

12 That the Seventh Judicial District Court of the State
13 of Nevada, in and for the County of White Pine, had and has
14 jurisdiction to hear and try this matter, and has jurisdiction
15 to find, make and enter the foregoing Findings of Fact and
16 these Conclusions of Law and enter its Decree herein.

17 III.

18 That B. H. Robison and the United States of America,
19 Forest Service are the only claimants of vested rights recog-
20 nized in this Decree who were and are now appropriators and
21 users of the waters of Odgers Creek and its tributaries on the
22 date the Order of Determination was filed with the Clerk of the
23 Court, and on the date of the trial and hearing of this matter.

24 IV.

25 That it has been the custom of ranchers in the area
26 to irrigate crops other than alfalfa during the winter months
27 when water was available.

28 That the claimant shall be permitted to irrigate all
29 meadow pasture acreage listed herein for the entire year.

30 That the irrigation season for the acreage classified

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as harvest herein, shall begin on April 1st and extend to
October 1st of each year.

V.

That the lands irrigated from Odgers Creek are situated adjacent to the Schell Creek Range, the soils being gravelly and pervious in nature require a higher duty of water. That the seasonal duty of water from Odgers Creek and its tributaries is herein fixed and shall not exceed:

- Class A --- Harvest Crop ----- 6.0 ac ft./ac./season
- Class B --- Meadow Pasture----- 3.0 ac.ft./ac./season

VI.

That the claimant shall have the right to divert 2.5 cubic feet per second of water per 100 acres of land irrigated but not to exceed the annual duty as established herein.

That the claimant or his successors in interest will not be required to take or use the amount of water allotted to him in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits, with the approval of the water commissioner and subject to the control and direction of the State Engineer.

VII.

That all measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to the land to be irrigated, or as near thereto as is practicable, that the location if not selected by the State Engineer, to be approved by him. That the claimant shall install and maintain at his own expense, substantial and easily operated regulating headgates and measuring devices in his ditch or ditches or channel. That due allowance for losses in ditches will be made by the State Engineer in the event it becomes necessary.

1 cultural acreages, the places of use, the legal subdivisions,
2 sections, townships, ranges, and the duty of water are as
3 listed, stated and set forth.

4 XI.

5 That the Order of Determination made, filed and caused
6 to be entered of record in this matter by the State Engineer
7 should be affirmed.

8 JUDGMENT AND DECREE

9 THEREFORE, BY REASON OF THE FINDINGS OF FACT, AND CONCLUSIONS
10 OF LAW HEREINBEFORE SET FORTH, IT IS ORDERED, ADJUDGED AND
11 DECREED BY THE COURT AS FOLLOWS:

12 I.

13 That the State Engineer made all necessary and proper
14 orders as required by law, and that each and every notice re-
15 quired by law was duly given to the claimants and appropriators;
16 that the claimants and appropriators had full opportunity to
17 appear and be heard in objection to and file exceptions to the
18 Order of Determination, that B. H. Robison and the United States
19 of America, Forest Service are the only claimants of vested
20 rights recognized in this Decree as appropriators of the waters
21 of Odgers Creek and its tributaries and this Decree determines
22 the limit and extent of all vested water rights on the source.

23 That the Court has full and complete jurisdiction to
24 hear, try and determine this matter and to make and enter
25 herein, this Decree.

26 II.

27 That the flow of water from Odgers Creek and its
28 tributaries is being placed to beneficial use by B. H. Robison
29 and the United States of America, Forest Service for irrigation,
30 domestic and stock watering purposes.

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III.

That it has been the custom of the ranchers in the area to irrigate crops other than alfalfa during the winter months when water was available.

That the claimant shall be permitted to irrigate all meadow pasture acreage listed herein, for the entire year.

That the irrigation season for the acreage classified as harvest herein, shall begin on April 1st and extend to October 1st of each year.

IV.

That the lands irrigated from Odgers Creek are situated adjacent to the Schell Creek Range, the soils being gravelly and pervious in nature require a higher duty of water. That the seasonal duty of water from Odgers Creek and its tributaries is herein fixed and shall not exceed:

Class A --- Harvest Crop ----- 6.0 ac.ft./ac./season

Class B --- Meadow Pasture----- 3.0 ac.ft./ac./season

V.

That the claimant shall have the right to divert 2.5 cubic feet per second of water per 100 acres of land irrigated, but not to exceed the annual duty as established herein.

That the claimant or his successors in interest will not be required to take or use the amount of water allotted to him in a continuous flow, but may cumulate the same or any part thereof in rotation or periodic turn within the seasonal limits, with the approval of the water commissioner and subject to the control and direction of the State Engineer.

VI.

That all measurements of water diverted are to be made at a point where the main ditch enters or becomes adjacent to

1 the land to be irrigated, or as near thereto as is practicable;
2 that the location if not selected by the State Engineer, to be
3 approved by him. That the claimant shall install and maintain
4 at his own expense, substantial and easily operated regulating
5 headgates and measuring devices in his ditch or ditches or chan-
6 nel. That due allowance for losses in ditches will be made by
7 the State Engineer in the event it becomes necessary.

8 That priorities are fixed by years and where the
9 years are the same, the priorities are equal.

10 VII.

11 That the right to the diversion and use of water for
12 domestic and stock watering purposes shall be continued by the
13 claimants named herein or their successors in interest at any
14 time during the year that stock are grazing on the range except
15 as otherwise specified under stock watering rights of approp-
16 riation and such diversions shall be according to the dates of
17 priorities of such users and limited to the quantity of water
18 reasonably necessary for such use.

19 That the amount of water diverted for irrigation
20 purposes shall not be increased by any amount to be used for
21 domestic and stock watering purposes, but the quantity allowed
22 and diverted for irrigation during the irrigation season shall
23 include water for domestic and stock watering purposes.

24 VIII.

25 That all water allotted in this Decree shall be
26 appurtenant to the place of use designated herein. That any
27 water user desiring to change the point of diversion, manner
28 of use or place of use of the waters allotted herein, must
29 make application to the State Engineer for permission to make
30 the change pursuant to NRS 533.345.

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IX.

That the names of the claimants and appropriators of the waters of Odgers Creek and its tributaries, the source of the water supply, the means of diversion, the points of diversion for beneficial use, the period of use, the years of priority, the cultural acreages, the places of use, the legal subdivisions, sections, townships, ranges, and duty of water are hereby adjudged as follows:

PROOF NO.: 02804
 CLAIMANT: B. H. Robison
 SOURCE: Odgers Creek and Tributaries
 USE: Irrigation, Stock Watering and Domestic
 MEANS OF DIVERSION: Dams and Ditches
 POINT OF DIVERSION: SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 24, T.18N., R.66E., M.D.B. & M., or at a point from which the SW corner of said Section 24, bears S. 65° 00' W., a distance of 450.0 feet.
 Pipeline - SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 23, T.18N., R.66E., M.D.B. & M., or at a point from which the SE corner of said Section 23 bears S. 80° 45' E., a distance of 2,100.0 feet.

PRIOR- ITY:	CULTURAL ACREAGE		SUBD.:	LOCATION			DUTY OF WATER	
	HAR- VEST	MEADOW PASTURE:		SEC.:	TWP. N.:	RGE. E.:	C.F.S.:	AC.FT.:
1871	--	10.79	SW $\frac{1}{4}$ NW $\frac{1}{4}$	24	18	66	0.270	32.37
1871	--	38.11	SE $\frac{1}{4}$ NW $\frac{1}{4}$	24	18	66	0.953	114.33
1871	--	39.03	SW $\frac{1}{4}$ NE $\frac{1}{4}$	24	18	66	0.976	117.09
1871	--	14.92	SE $\frac{1}{4}$ NE $\frac{1}{4}$	24	18	66	0.373	44.76
1871	--	16.53	NW $\frac{1}{4}$ SW $\frac{1}{4}$	24	18	66	0.413	49.59
1871	--	40.00	NE $\frac{1}{4}$ SW $\frac{1}{4}$	24	18	66	1.000	120.00
1871	--	40.00	NW $\frac{1}{4}$ SE $\frac{1}{4}$	24	18	66	1.000	120.00
1871	--	12.73	SW $\frac{1}{4}$ SW $\frac{1}{4}$	24	18	66	0.318	38.19
1871	--	36.73	SE $\frac{1}{4}$ SW $\frac{1}{4}$	24	18	66	0.918	110.19

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PROOF NO.: 02804 (Continued)

PRIORITY:	CULTURAL ACREAGE		LOCATION				DUTY OF WATER	
	HAR-VEST	MEADOW PASTURE:	SUBD.:	SEC.:	TWP. N.:	RGE. E.:	C.F.S.:	AC.FT.:
1871	--	12.70	SW $\frac{1}{4}$ SE $\frac{1}{4}$	24	18	66	0.318	38.10
1871	20.00	--	NE $\frac{1}{4}$ NW $\frac{1}{4}$	25	18	66	0.500	120.00
Total	20.00	261.54					7.039	904.62

PROOF NO.: 02807

CLAIMANT: United States of America, Forest Service

SOURCE: Odgers Creek and Tributaries

USE: Stock Watering

MEANS OF DIVERSION: Natural Channel

POINT OF DIVERSION: The natural channel of Odgers Creek between a point in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 29, T.18N., R.66E., (unsurveyed), from which the NW corner of Section 26, T.18N., R.66E., M.D.B. & M., bears N. 89° 56' E., a distance of 13,714.0 feet, and a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 27, T.18N., R.66E., M.D.B. & M., (unsurveyed), from which the NW corner of Section 26, T.18N., R.66E., bears due North a distance of 400.0 feet.

PERIOD OF USE: June 1 through October 31st of each year.

PRIORITY 1878

AMOUNT OF APPROPRIATION: 0.00495 c.f.s., or sufficient to water 3 horses and 777 sheep.

DESCRIPTION OF WORKS OF DIVERSION, MANNER AND PLACE OF USE:
Livestock are watered in the reach of the natural channel of Odgers Creek situated between the points previously described, traversing through portions of Sections 27, 28 and 29, T.18N., R.66E., M.D.B. & M. (unsurveyed).

DONE IN OPEN COURT THIS 2 DAY OF November, A.D. 1976.

/s/ Merlyn H. Hoyt
DISTRICT JUDGE