

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

1209

VIOLATION ORDER

WHEREAS, on the basis of the attached Finding of Alleged Violation, which is hereby made a part of this Violation Order, the State Engineer has determined that Young Bros., a Nevada General Partnership, is in violation of the terms of Permits 67295, 67296 and 67297; State Engineer's Ruling No. 5788; and State Engineer's Order No. 733.

WHEREAS, under Nevada Revised Statute (NRS) § 533.481 and Nevada Administrative Code (NAC) Chapter 532, a person found to be in violation of any provisions of NRS 533 or any permit, certificate, order or decision of the State Engineer is to be provided notice and opportunity for a hearing.

NOW, THEREFORE, IT IS HEREBY ORDERED that Young Bros., a Nevada General Partnership, must:

1. **By June 1, 2010**, inform the Division of Water Resources ("Division") of their intent to comply with this order.
2. **By June 8, 2010**, submit to the Division an approvable mitigation plan which sets forth the circumstances under which they will comply with the requirements set forth in the Finding of Alleged Violation.
3. **By June 23, 2010**, comply with the requirements set forth in the Finding of Alleged Violation.
4. **At 9:00 a.m. on July 29, 2010**, appear at a hearing with the Division to be held at the Department of Conservation and Natural Resources, Tahoe Hearing Room, 901 S. Stewart Street, Second Floor, Carson City, NV, in which to determine the manner in which the Finding of Alleged

Violation and this order have been acted upon and to show cause why injunctive relief should not be sought and why penalties should not be incurred.

 P.E.

JASON KING, P.E.
State Engineer

Dated this 24th day of
May, 2010.

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

IN THE MATTER OF YOUNG BROS., A)
NEVADA GENERAL PARTNERSHIP, AND)
THE ALLEGED FAILURE TO COMPLY)
WITH THE TERMS OF PERMITS 67295,)
67296 AND 67297; STATE)
ENGINEER'S RULING NO. 5788; AND)
STATE ENGINEER'S ORDER NO. 733)
WITHIN THE BIG SMOKY VALLEY -)
NORTHERN PART HYDROGRAPHIC BASIN)
(137B), LANDER COUNTY, NEVADA.)

**FINDING OF ALLEGED
VIOLATION
ORDER No. 1209**

LEGAL

I.

The State Engineer, under the authority of Nevada Revised Statutes (NRS) Chapters 532 and 533, has the power and duty to enforce the provisions of NRS 533.

II.

NRS § 533.481 provides that in addition to any other penalty provided by law, the State Engineer may, after notice and opportunity for a hearing, require a person who violates any provision of NRS 533 or any permit, certificate, order or decision of the State Engineer (a) pay an administrative fine not to exceed \$10,000 per day for each violation as determined by the State Engineer and/or (b) in the case of an unauthorized use or willful waste of water in violation of NRS § 533.460 or an unlawful diversion of water in violation of NRS § 533.530, or any other violation of this chapter that, as determined by the State Engineer, results in an unlawful use, waste or diversion of water, replace not more than 200 percent of the water used, wasted or diverted.

FACTS

I.

The decree affirming the order of determination entitled, *In the Matter of the Determination of the Relative Rights In and To the Waters of Kingston Creek (Also Known As Big Smoky Creek) and Its Tributaries*, in Lander County, State of Nevada was adjudged by the Third Judicial District Court of Nevada by the honorable

by the Third Judicial District Court of Nevada by the honorable John F. Sexton on March 22, 1963 ("Kingston Creek Decree"). The Kingston Creek Decree required that all water diverted from Kingston Creek and its tributaries for irrigation purposes shall be measured at a point where the water enters or becomes adjacent to the land to be irrigated, and it required substantial headgates and weirs to be installed wherever necessary for proper measurement, control and distribution of water in accordance with the water rights described in the decree.¹

II.

On December 6, 1979, State Engineer's Order No. 733 required the installation of suitable headgates, measuring devices and/or recording devices as may be required or deemed necessary by the State Engineer for those diversions of water from Kingston Creek and its tributaries as provided in the Kingston Creek Decree and in conformity with the statutes of the State of Nevada.²

III.

Application 67295 was filed March 1, 2001, to change the point of diversion of the waters of Kingston Creek and its tributaries heretofore appropriated under Proofs of Appropriation 01527, 02413, 02414 and 02415 adjudicated in the Kingston Creek Decree. The proposed point of diversion is located within NW¼ NE¼ Section 35, T.16N., R.43E., M.D.B.M.³

IV.

Application 67296 was filed March 1, 2001, to change the point of diversion of the waters of Kingston Creek and its tributaries heretofore appropriated under Permit 23503, Certificate 8294. The proposed point of diversion is located within NW¼ NE¼ Section 35, T.16N., R.43E., M.D.B.M.⁴

¹ *In the Matter of the Determination of the Relative Rights In and To the Waters of Kingston Creek (Also Known As Big Smoky Creek) and Its Tributaries*, Case No. 3073, Third Judicial District Court of Nevada, In and For the County of Lander, March 22, 1963.

² State Engineer's Order No. 733, dated December 6, 1979, official records in the Office of the State Engineer.

³ File 67295, official records in the Office of the State Engineer

⁴ File 67296, official records in the Office of the State Engineer

V.

Application 67297 was filed March 1, 2001, to change the point of diversion of the waters of Kingston Creek and its tributaries heretofore appropriated under Proofs of Appropriation 02410, 02411, 02412 and 02416 adjudicated in the Kingston Creek Decree. The proposed point of diversion is located within NW¼ NE¼ Section 35, T.16N., R.43E., M.D.B.M.⁵

VI.

Applications 67295, 67296, and 67297 were approved by State Engineer's Ruling No. 5788, subject to the installation of continuous recording devices that have been approved by the State Engineer as to their model and location. The State Engineer concluded in said ruling that there would be no impact to existing rights provided that the measuring, recording and control devices are installed, maintained and monitored so as to guarantee adequate flow in Kingston Creek to satisfy the senior downstream water right, in the amount of 1.40 c.f.s., held by the Town of Kingston.⁶

Permits 67295, 67296, and 67297 were issued December 7, 2007, with in part the following permit terms:^{3,4,5}

This permit is issued subject to the provisions set forth in State Engineer's Ruling No. 5788, dated October 8, 2007.

Prior to the diversion or delivery of water under this permit, the permittee must notify the State Engineer's Office that measuring devices with continuous recorders have been installed pursuant to Ruling No. 5788.

⁵ File 67297, official records in the Office of the State Engineer

⁶ State Engineer's Ruling No. 5788, dated October 8, 2007, official records in the Office of the State Engineer.

VII.

On January 23, 2009, a Proof of Completion of Work form was received in the Office of the State Engineer for Permits 67295, 67296 and 67297. It was returned for correction by a certified letter dated February 20, 2009, and the return receipt was received in the Office of the State Engineer on February 25, 2009. There were two deficiencies preventing the acceptance of the Proof of Completion that are described in the letter. First, that a separate signed and notarized form is required for each permit, and second, that the form did not adequately describe the works and measuring devices required under the terms of the permits and State Engineer's Order No. 5788.^{3,4,5}

VIII.

A letter, dated March 31, 2009, from Steve Del Soldato, the Water Commissioner on Kingston Creek in the Division of Water Resources' Winnemucca Field Office, to Ralph Young, Agent for Young Bros., A Nevada General Partnership, described the measuring and recording devices required to be installed and at what locations such devices required installation.^{3,4,5}

On July 10, 2009, Mr. Del Soldato sent a letter to Kelvin Hickenbottom, Deputy State Engineer, that states in part that at this time he doesn't believe that Mr. Young has made any attempt to correct the Proof of Completion for Permits 67295, 67296 and 67297, and advised that said proof should be rejected.^{3,4,5}

IX.

On January 21, 2010, Applications for Extension of Time were filed for Permits 67295, 67296 and 67297. Under Item 7 of said applications, the diversion works are said to have been installed and the measuring devices purchased, but installation is being delayed until hydro-power generation plans were finalized. These Applications for Extension of Time were approved, and the date for filing the Proof of Completion, Proof of Beneficial Use and Cultural Map was extended to December 12, 2010. The Permittee was informed of this approval in a letter dated February 11,

2010. Upon the approval of the Applications for Extension of Time, the previously filed Proof of Completion form was rejected and returned. The letter dated March 3, 2010, which informed the Permittee of the rejection, made clear that the measuring device requirements under the permit terms and State Engineer's Ruling No. 5788 are still in full effect. It should be noted that even though the timeframe in which to submit the proofs under Permits 67295, 67296 and 67297 was extended, this action did not waive the requirements of the permit terms that the measuring and recording devices be installed prior to diverting water. In other words, the applicant was provided more time to complete the works of diversion as required under the terms of the permit, but should not have been diverting water until such works were complete.^{3,4,5}

X.

In a letter received March 5, 2010, the Town of Kingston, through its Town Board, strongly advised against the approval of any more extensions of time, since there has been a forty (40) year history with respect to the installation, or lack thereof, of measuring devices on Kingston Creek.^{3,4,5}

XI.

On March 25, 2010, Mr. Del Soldato wrote a memo summarizing his activities related to Kingston Creek and its tributaries in the course of carrying out his duties as water commissioner. The summary describes three distinct instances of water being diverted by the permittee since the approval of Permits 67295, 67296 and 67297.

On June 30, 2009, the permittee's diversion from Kingston Creek was estimated to be about 10 cfs.

On July 22, 2009, Mr. Del Soldato met with Mr. Young concerning the measuring and recording devices. At this meeting Mr. Young was advised as to the locations in which to install the devices and how to operate them. Diversion of water from Santa

Fe and Shoshone Creeks, tributaries to Kingston Creek, and Kingston Creek was noted.

On March 2, 2010, water was being diverted from Kingston Creek at the permittee's point of diversion and no measuring devices had been installed.^{3,4,5}

XII.

Per the Nevada Administrative Code (NAC) Chapter 532, on March 31, 2010, the Division sent a certified letter to the alleged violator setting forth the alleged violation and how to correct the violation. It required the immediate cessation of diversion of water from Kingston Creek and its tributaries and established a date of April 30, 2010, in which to take the corrective action of installing the measuring and recording devices. The letter also warned that failing to take such actions could result in additional enforcement actions as provided for under NAC 532. The return receipt for the certified mailing was received in the Office of the State Engineer April 5, 2010, indicating a delivery date of April 2, 2010. Checking the "Track and Confirm" webpage for the United States Postal Service confirmed this delivery date.^{3,4,5,7}

XIII.

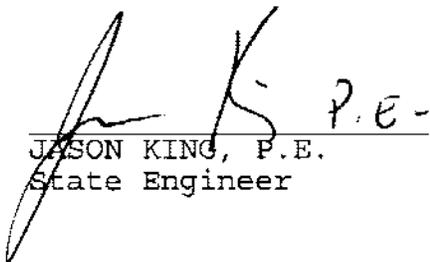
Mr. Del Soldato sent a report by e-mail to Malcolm Wilson, Water Planning Engineer, describing his follow-up compliance investigation and recent contacts with Mr. Young and his agent. On May 5, 2010, Mr. Del Soldato investigated Kingston Creek and determined that the measuring devices had not been installed. He again advised Mr. Young that they should have been installed prior to irrigating. Mr. Young stated that he would install them the following week. This had not yet occurred when Mr. Del Soldato spoke to Mr. Young's engineer, Rett Jesse, on May 18, 2010 and May 20, 2010 concerning the installation of the measuring and recording devices. Plans were made again for the installation of the devices on May 26, 2010. The alleged

⁷ File AV 4, official records in the Office of the State Engineer

violator had not performed the corrective actions described in the warning letter dated March 31, 2010.^{3,4,5,7}

FINDING

The State Engineer finds that the alleged violator has diverted and continues to divert water from Kingston Creek and its tributaries without the prior installation of measuring and recording devices as required under the terms of Permits 67295, 67296 and 67297; State Engineer's Ruling No. 5788; and State Engineer's Order No. 733.



JASON KING, P.E.
State Engineer

Dated this 24th day of
May, 2010.