

IN THE MATTER OF PROTESTED)
APPLICATIONS 43069 THROUGH 43072)
AND APPLICATIONS 43073 AND 43074)
FILED BY LEROY BUSH TO APPROPRIATE)
WATERS OF RICE (SCHOER) CREEK IN)
ELKO COUNTY, NEVADA.)

RULING

INTRODUCTION

Applications 43069 and 43070¹ were filed on January 9, 1981, by LeRoy Bush to change the points of diversion of Proofs 01706 and 01703², respectively, from Rice (Schoer) Creek in the Clover Valley basin. Applications 43071, 43072, 43073 and 43074³ were also filed on the same date by LeRoy Bush to appropriate 10.08 c.f.s. of additional water from Rice Creek for irrigation purposes. The place of use of Applications 43071 through 43074 includes both decreed lands and new proposed irrigated lands.

Applications 46069 through 43072 were timely protested⁴ on August 3, 1981, by Blair G. Johns for the following reasons:

- 1) A change of the points of diversion will change the flow of water in the sub-irrigated meadows downstream.
- 2) Granting the above applications would interfere and decrease the amount of water to satisfy the many protestant rights downstream.
- 3) All of the water in Rice Creek has been appropriated.
- 4) Protestants rights include Proof 01387 and Permits 3212, 8565 and 29534.⁵

¹ Applications 43069 and 43070 are public records on file in the office of the State Engineer.

² Proofs of Appropriation 01703 and 01706 are decreed rights In the Matter of the Determination of the Relative Rights in and to the Waters of Rice Creek in Elko County, Nevada, May 2, 1922. Public records in the office of the State Engineer.

³ Applications 43071, 43072, 43073 and 43074 are public records on file in the office of the State Engineer.

⁴ Copies of the protests are public records filed with Applications 43069, 43070, 43071 and 43072 in the office of the State Engineer.

⁵ Proof 01387 and Permits 3212, 8565 and 29534 are public records on file in the office of the State Engineer.

Applications 47073 and 47074 were also informally protested by Blair G. Johns.

Protestant requests denial of all above mentioned applications.

GENERAL

After notice to all parties, a hearing was held before the Division of Water Resources in Elko, Nevada, on May 6, 1982,⁶ at which time the applicant, represented by counsel, and the protestant appeared in person.

The hearing was noticed as a hearing in the matter of the formal protest to Applications 43069 through 43072, and informal protest to Applications 43073 and 43074 filed by LeRoy Bush.

The Division of Water Resources was represented by Larry C. Reynolds, Chief, Adjudication and Surface Water Section, and Hugh Ricci, P.E., Chief Office Engineer.

Stewart Wilson, Attorney, represented the applicant, LeRoy Bush. Dr. Blair B. Johns represented himself.

It was noted by the hearing officer at the start of the hearing that, although Applications 43069 and 43070 were represented as applications to change the points of diversion of Proofs 01706 and 01703, the applications indicated that all existing points of diversion would be maintained.

Clarification of these remarks was asked of the applicant.⁷

Blair G. Johns testified that waters from Angel, Rice, Wiseman (Fish) Springs and Signal Creek make up the waters of Clover Valley Slough from which he obtains irrigation water. According to Johns, he holds vested and certificated rights from the slough to water portions of Section 33, T.36N., R.62E., and Sections 4, 9, 10, 23, 24, 25 and 26, T.35N., R.62E. He stated that he believed that he is entitled to all waters of Rice Creek that have not been adjudicated.

On the subject of the proposed pipeline to salvage water for the Bush Ranch, Johns indicated that a pipeline might save water, however, he felt no suitable determination had been made to quantify any amount. A long measurement period, perhaps twenty years, would probably be needed to determine a savings.⁸

⁶ Transcript of May 6, 1982, hearing is a public record in the office of the State Engineer.

⁷ Transcript of May 6, 1982 hearing, pg. 6, is a public record in the office of the State Engineer.

Clare Mahannah, Irrigation Engineer, testified for Bush that he conducted a study⁹ on Rice Creek to determine or quantify the salvage water that could be obtained by diverting Rice Creek into a pipeline that ran for approximately 6,500 feet ending at a proposed power plant site.

A second objective of his study was to determine if Rice Creek was a significant source of water for Dr. Johns' diversion points on the slough and what conditions would be necessary to conduct water to those locations.

From the measurements taken on Rice Creek in November 1981, Mahannah determined that a 60% loss in flow was due to "deep percolation" and if that amount was saved through the pipeline, it would provide adequate water for Applications 43071 through 43074.

He also testified that the average flow of Rice Creek was 4.9 c.f.s. The minimum flow is 3.0 c.f.s. and the maximum flow would be 9.0 c.f.s. At the time the measurements were taken in November 1981, the flow was 1.0 c.f.s. following an extremely dry year.

He indicated the percentage of water saved would decrease as the flow increased.

In the matter of Rice Creek reaching the points of diversion of water rights owned by Dr. Johns, Mahannah projected that it would require a flow of 18.0 c.f.s. from the proposed power plant site to reach Dr. Johns property, a distance of approximately three miles. This was determined from extension of the .4 c.f.s. flow and from the results of percolation tests on the stream bed.

Mahannah acknowledged that Rice Creek was one of several streams that made up the so called Clover Valley Slough and that Rice Creek could reach Johns property on its own during the spring runoff and during thunderstorm events.¹⁰

⁹ Transcript of May 6, 1982, hearing, Applicant's Exhibit "A", is a public record in the office of the State Engineer.

¹⁰ Transcript of May 6, 1982, hearing, pp. 35-63, is a public record in the office of the State Engineer.

FINDINGS OF FACT

I.

Rice (Schoer) Creek located in Clover Valley is a perennial stream fed by accumulations of snow from the East Humboldt Range of mountains. Its watershed is also subject to sudden storm events during summer and fall.¹¹

II.

The relative rights in and to the waters of Rice Creek were decreed in the Fourth Judicial District Court on June 29, 1922. The successor in interest to the decreed rights is LeRoy Bush.¹²

III.

Clover Valley Slough is made up from Rice, Angel, Wiseman, Winchell and Signal Creeks and from Fish Springs.¹³

IV.

There are vested and certificated rights on the Clover Valley Slough downstream of the Bush Ranch in the name of Blair G. Johns, Protestant.¹⁴

V.

Rice Creek can reach the points of diversion of rights held by Blair G. Johns as surface flow during the spring runoff and during thunderstorm events in an average precipitation year.¹⁵

¹¹ Transcript of May 6, 1982, hearing, Applicant's Exhibit "A", pp. 2 and 3, is a public record in the office of the State Engineer.

¹² Order of Determination and Final Decree for Rice Creek in Elko County (May 2, 1922), and Records of Transfers for Rice Creek are public records in the office of the State Engineer.

¹³ Transcript of May 6, 1982, hearing, pp. 12 and 13, is a public record in the office of the State Engineer.

¹⁴ Transcript of May 6, 1982, hearing, pp. 12-15, is a public record in the office of the State Engineer.

¹⁵ Transcript of May 6, 1982, hearing, pp. 66 and 67, is a public record in the office of the State Engineer.

VI.

The burden of proof is on the applicant to show that, by hastening the flow of water through a pipe, he is able to obtain additional amounts of water that otherwise would be wasted to holders of prior appropriations.

VII.

A distinction is drawn between "salvaged" and "developed" water as cited by the applicant as to his legal right to use the water himself. In Colorado, case law¹⁶ has established that, when one adds to an existing water supply or "develops" new water, he is entitled to a decree or right affirming the use of that water. Salvaged water, on the other hand, is water that would ordinarily go to waste such as in a swamp or is lost through phreatophytes. This water may be saved through the use of a pipeline or by removal of the water - loving plants. Salvaged waters are subject to prior appropriation in a state where the basis of the water law is the prior appropriation doctrine.

VIII.

In W.J. Tonkin vs. Maggie Wingell¹⁷, Justice Talbot stated: "Many streams come out of lakes fed by seepage, melting snow or springs and not infrequently in their course they spread over ponds, swamps and level places, again running into channels from which they have been diverted and are held by right of prior appropriation as securely as if they had followed narrow courses or creek beds all the way...".

Although Rice Creek appears to lose its identity on the Bush Ranch, this does not exclude its contribution to the Clover Valley Slough and water rights emanating therefrom.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.¹⁸

¹⁶ Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc., Supreme Court of Colorado, 1975, 187 Colo. 181, 529 P.2d 1321, Opinion of the Court, Justice Hay.

¹⁷ W.J. Tonkin vs. Maggie Winzell, et al., Nevada Reports 27, p. 99.

¹⁸ NRS 533.325.

II.

The State Engineer is prohibited by law from granting a permit where:

1. There is no unappropriated water in the proposed source of supply, or
2. Where its proposed use or change conflicts with existing rights, or
3. Where the proposed use threatens to prove detrimental to the public interest.¹⁹

III.

The testimony, evidence and information available does not establish that percolating waters in the bed of Rice Creek ordinarily goes to waste and thus may become available for beneficial use by means of the alleged savings of a pipeline.

IV.

The evidence available does indicate that existing water rights on Clover Valley Slough may be impaired if additional appropriations are granted on one of its tributaries, namely, Rice Creek.

V.

There was no evidence presented that indicated that changing the points of diversion of Proofs 01703 and 01706 to a point in the NW1/4 NE1/4 of Section 21, T.36N., R.61E., M.D.B.&M., would impair existing rights in Clover Valley Slough.

RULING

The protests to Applications 43069 and 43070 are hereby overruled on the grounds that granting said permits to change the point of diversion will not tend to impair the value of existing rights or be otherwise detrimental to the public welfare.

Permits will be issued under Applications 43069 and 43070.

Ruling
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Applications 43071, 43072, 43073 and 43074 are hereby denied on the grounds that there is no unappropriated water in the source.

Respectfully submitted



Peter G. Morros
State Engineer

PGM/GC/bl

Dated this 16th day of
JULY, 1984.