

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

IN THE MATTER OF PROTESTED APPLICATIONS)
60140, 60151 AND 60152 FILED TO)
APPROPRIATE THE TAILWATER FROM EXISTING)
FARMING OPERATIONS LOCATED WITHIN THE)
QUINN RIVER VALLEY, OROVADA SUBAREA)
(33A), HUMBOLDT COUNTY, NEVADA.)

RULING

4280

GENERAL

I.

Application 60140 was filed on June 21, 1994, by James L. and Rosalie F. Moser, to appropriate 1.0 cubic feet per second (cfs) from the tailwater from existing farming operations, for the irrigation of 160 acres located within the NE $\frac{1}{4}$ Section 32, T.43N., R.37E., M.D.B.&M. The proposed point of diversion is on an open drain, located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 33, T.43N., R.37E., M.D.B.&M.¹

Applications 60151 and 60152 were filed on June 23, 1994, by McClintick Farms, Inc., to appropriate 2.0 cfs and 1.0 cfs, respectively, from the tailwater from existing farming operations, for the irrigation of 240 acres located within the NE $\frac{1}{4}$ and the E $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 29, T.43N., R.37E., M.D.B.&M. The proposed points of diversion are on an open drain, located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 29 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 32, T.43N., R.37E., M.D.B.&M., respectively.²

II.

Applications 60140, 60151 and 60152 were timely protested by Don L. and Jodi S. Jacaway on the grounds that:

1. There is no unappropriated water in the proposed source.
2. The granting of the subject Application will adversely impact existing rights to waters of the proposed source.

¹ File No. 60140, official records in the Office of the State Engineer.

² File Nos. 60151 and 60152, official records in the Office of the State Engineer.

3. The granting of the subject Application is not in the public interest as the source is waste water and pursuant to AGO 98 (1-22-1944), one who captures waste water for beneficial purposes has limited right to the use of such water.

Therefore, the protestants request that Applications 60140, 60151 and 60152 be denied.³

III.

After all parties in interest were noticed by certified mail,⁴ a public administrative hearing was held to consider Applications 60140, 60151 and 60152 and their protests.⁵ At the hearing, the Hearing Officer took administrative notice of all of the records in the Office of the State Engineer.⁶

FINDINGS OF FACT

I.

Applications 60140, 60151 and 60152 seek to appropriate tailwater that runs off upstream irrigated lands. The proposed points of diversion of Applications 60140 and 60152 are located near the NW corner of Section 33, T.43N., R.37E., M.D.B.&M.⁷ Tailwater in the drainage ditch that would be diverted under these two applications runs off irrigated land, owned by Key Farms, Inc., located in said Section 33 (Figure 1).

³ File Nos. 60140, 60151 and 60152, official records in the Office of the State Engineer.

⁴ Exhibit No. 1, Public Administrative Hearing before the State Engineer, April 18, 1995.

⁵ Transcript of Public Administrative Hearing before the State Engineer, April 18, 1995.

⁶ Transcript, p.8, Public Administrative Hearing before the State Engineer, April 18, 1995.

⁷ Exhibit Nos. 2, 4, 8 and 9, Public Administrative Hearing before the State Engineer, April 18, 1995.

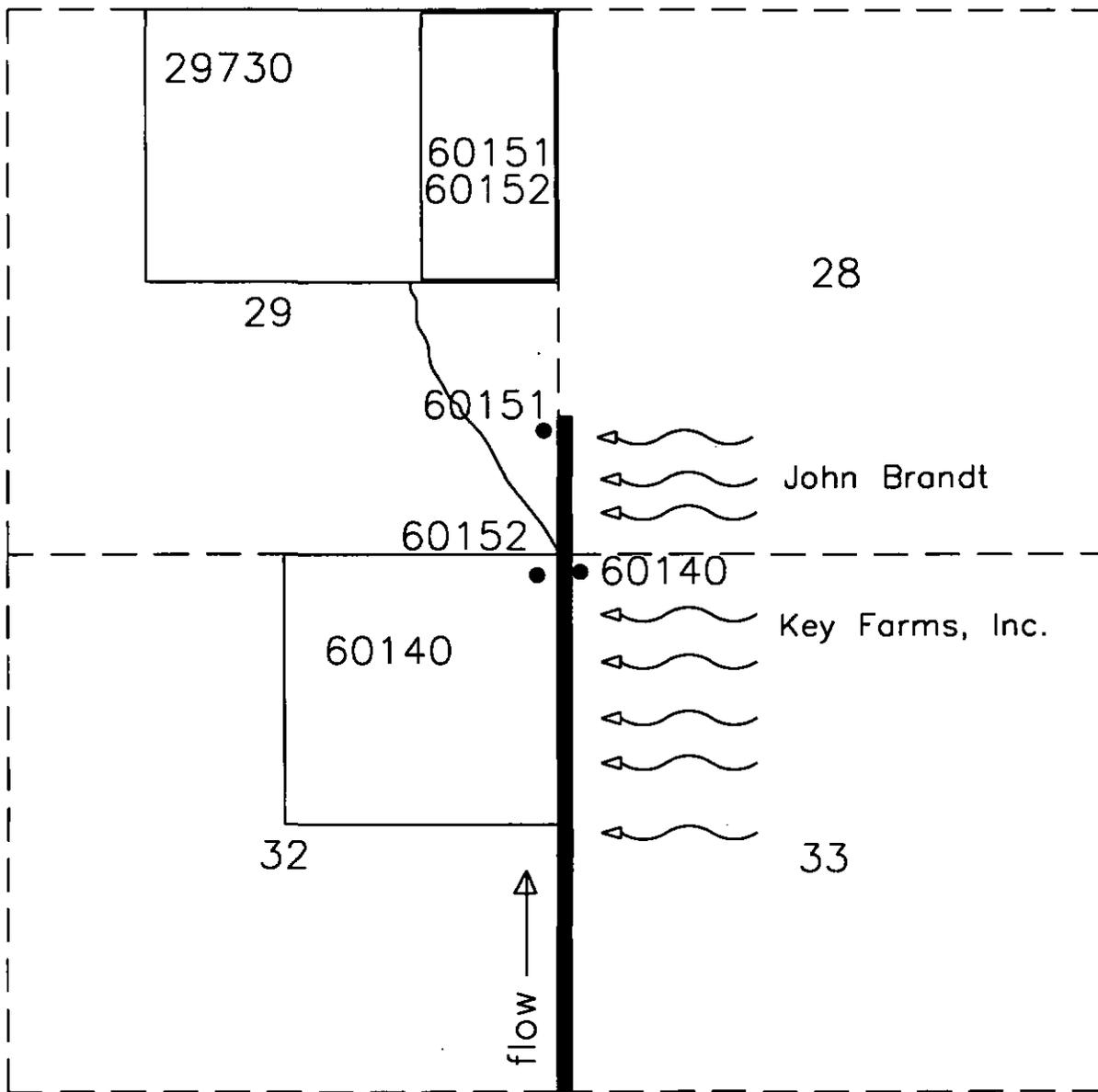


Figure I. Sections 28,29,32,and 33, T.43N.,R.37E.,M.D.B.&M.

The proposed point of diversion of Application 60151 is located about one-quarter mile to the north.⁸ Tailwater which would be diverted at this point runs off irrigated land, owned by John Brandt, located in the SW $\frac{1}{4}$ of Section 28, T.43N., R.37E., M.D.B.&M. (Figure 1). The applicants wish to appropriate only the groundwater component of the tailwater.⁹

The protestant feels that he holds the right to the groundwater component as well as the surface water (Rock Creek) component of the tailwater, under Permit 29730, Certificate 11067.¹⁰ The means of conveyance of tailwater to the place of use under Certificate 11067 is a ditch beginning near the NW corner of Section 33, T.43N., R.37E., M.D.B.&M., lying in a northwest direction to the place of use.¹¹ Tailwater that enters the protestants' ditch is the same as that proposed to be diverted under Applications 60140 and 60152.¹² The source of water shown in Certificate 11067 is "Rock Creek and other storm and flood waters."¹³ Although the language did not include the word "tailwater", Mr. Woodrow Erikson, who filed Application 29730, intended to appropriate and use all waters flowing in the drainage

⁸ Exhibit Nos. 3 and 9, Public Administrative Hearing before the State Engineer, April 18, 1995.

⁹ Transcript, pp. 10 and 43, Public Administrative Hearing before the State Engineer, April 18, 1995.

¹⁰ Transcript, pp. 67-68, Exhibit No. 11, Public Administrative Hearing before the State Engineer, April 18, 1995.

¹¹ See the cultural map filed with the Proof of Beneficial Use for Permit 29730, official records in the Office of the State Engineer.

¹² The protestants' ditch as shown on the cultural map would pick up the tailwater from the irrigated land in Section 33 (Key Farms, Inc.) but would not pick up the tailwater from the irrigated land in Section 28 (John Brandt).

¹³ Exhibit No. 11, Public Administrative Hearing before the State Engineer, April 18, 1995.

ditch.¹⁴ The applicants feel that the description of the source of water in Certificate 11067 only includes tailwater originating from Rock Creek and does not include the tailwater from the groundwater irrigation system.

When Application 29730 was filed in 1975, the upstream land contributing tailwater to the drainage collection ditch was irrigated with surface water (Rock Creek) and groundwater.¹⁵ Rock Creek generally flows early in the irrigation season¹⁶ but the period of use of Permit 29730, Certificate 11067 is May~~1~~ to October 31 of each year. Any water flowing in the drainage ditch after Rock Creek quits running, originates from groundwater. This is consistent with Mr. Erikson's testimony that he intended to appropriate and use all the tailwater from the upstream irrigated lands.

Prior to the issuance of Certificate 11067 under Permit 29730, it was reported to the State Engineer that the tailwater from Sections 33 and 34, T.43N., R.37E., M.D.B.&M., is composed of Rock Creek water and underground water and is collected at the northwest corner of said Section 33, where it is then conveyed to the place of use.¹⁷ This is further evidence that the tailwater originating from both surface and groundwater sources was put to beneficial use under Permit 29730.

¹⁴ Transcript, pp. 67-68, Public Administrative Hearing before the State Engineer, April 18, 1995.

¹⁵ See Permits 19835, 19836, 24791 and 23638 for the irrigation of land within Sections 33 and 34, T.43N., R.37E., M.D.B.&M., from an underground source.

¹⁶ Transcript, pp. 88-89, Public Administrative Hearing before the State Engineer, April 18, 1995.

¹⁷ File 29730, official records in the Office of the State Engineer. See Report of Informal Field Investigation of Proof of Beneficial Use, dated July 13, 1984.

The State Engineer finds that the tailwater collected from irrigated land located in Sections 33 and 34 is composed of both surface and underground water. The State Engineer further finds that all of this tailwater was appropriated under Permit 29730, Certificate 11067.

II.

The tailwater appropriated under Permit 29730, Certificate 11067 is conveyed through a ditch which begins at the northwest corner of Section 33, T.43N., R.37E., M.D.B.&M.¹¹ The tailwater collected at this point runs off of irrigated land, owned by Key Farms, Inc., located in Sections 33 and 34, T.43N., R.37E., M.D.B.&M., (Figure 1). The tailwater appropriated under Permit 29730, Certificate 11067 does not include the runoff from land owned by John Brandt, located in the SW $\frac{1}{4}$ Section 28, T.43N., R.37E., M.D.B.&M. Application 60151 seeks to appropriate this tailwater. The State Engineer finds that the tailwater from irrigated land owned by John Brandt located within the SW $\frac{1}{4}$ of said Section 28 is unappropriated.

III.

After Certificate 11067 was issued under Permit 29730, the location of the ditch conveying the water to the place of use was changed. Presently, the ditch begins at a point about one-quarter mile to the north, where the proposed point of diversion of Application 60151 is located. With this configuration, the unappropriated tailwater running off John Brandt's property is commingled with the other tailwater and potentially can be diverted by the protestant. As found earlier, the tailwater running off the Brandt property is not appropriated.

If Application 60151 were approved, then an agreement between the holder of Permit 29730, Certificate 11067 and the applicant (McClintick Farms, Inc.) regarding the distribution of the two tailwaters is necessary to avoid any future conflicts. The State Engineer finds that the approval of Application 60151 will not

conflict with any existing rights, if these two parties can agree on the distribution of the tailwaters.

IV.

In general, the tailwater off of an irrigated field cannot be regarded as a constant and continuous supply of water. For example, if the irrigator of an upstream field chose not to irrigate the field, then there would be no tailwater available. Likewise, if the original appropriator applied only enough water to match the infiltration rate of the irrigated soils, there would be no tailwater. Therefore, the holder of any permit to appropriate tailwater has a limited right to the use of such water.¹⁸ He may not demand that the tailwater be delivered if none is available. If Application 60151 is approved, then the State Engineer finds that the tailwater may be diverted only when it is available.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter of this action.¹⁹

II.

The State Engineer is prohibited by law from granting a permit to appropriate the public waters of Nevada where:

1. There is no unappropriated water at the proposed source of supply;
2. The proposed use conflicts with existing rights; or
3. The proposed use threatens to prove detrimental to the public interest.²⁰

¹⁸ Attorney General's Opinion 98, January 22, 1944.

¹⁹ NRS 533.

²⁰ NRS 533.370.

III.

Applications 60140 and 60152 seek to appropriate the tailwater running off of the land owned by Key Farms, Inc., located in Sections 33 and 34, T.43N., R.37E., M.D.B.&M. However, this tailwater is already appropriated under Permit 29730, Certificate 11067. The State Engineer concludes that there is no unappropriated water regarding this source of tailwater. The State Engineer further concludes that the approval of Applications 60140 and 60152 would conflict with existing rights and be detrimental to the public interest.

IV.

Application 60151 seeks to appropriate the tailwater running off land owned by John Brandt, located in Section 28, T.43N., R.37E., M.D.B.&M. This tailwater was found to be unappropriated but is now commingled with tailwater appropriated under Permit 29730, Certificate 11067. The State Engineer concludes that the approval of Application 60151 would not conflict with any existing right as long as an agreement is reached between the holder of Permit 29730, Certificate 11067 and the applicant, regarding the distribution of the tailwaters. If the parties cannot agree the State Engineer will order a rotation schedule based on the percentage of water from Sections 33 and 34 versus the percentage of water from Section 28.

V.

The State Engineer concludes that the tailwater may be diverted when it is available but the appropriator may not demand the tailwater when it does not runoff the upgradient land.

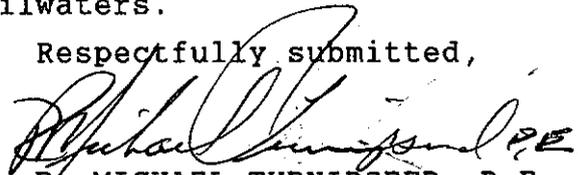
RULING

The protests to Applications 60140 and 60152 are hereby upheld and said Applications are hereby denied on the grounds that there is no unappropriated water at the source and their approval would conflict with existing rights and prove detrimental to the public interest.

The protest to Application 60151 is hereby overruled and said application is hereby approved subject to:

1. Payment of statutory permit fees and
2. An agreement filed with the State Engineer prior to the issuance of Permit 60151, between the applicant and the holder of Permit 29730, Certificate 11067, regarding the distribution of tailwaters.

Respectfully submitted,


B. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 4th day of
January, 1996.