

IN THE MATTER OF APPLICATION NO. 11918)
IN NAME OF C. C. PERRIN TO APPROPRIATE :
WATER FROM BURKE CHANNEL FOR IRRIGATION :
PURPOSES, LYON COUNTY, NEVADA.)

RULING

Application No. 11918 was filed July 18, 1947 by C. C. Perrin to appropriate 4.0 c.f.s. of water from Burke Channel and its tributaries for the irrigation of 400 acres. The proposed point of diversion is to be at a point within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 25, T. 12 N., R. 23 E., M.D.M. and the land to be irrigated lies within Sections 25 and 26, T. 12 N., R. 23 E.

Protests to the granting of a permit under this application were filed as follows:

February 4, 1948 by August Bunkowski.

February 19, 1948 by William Toner.

February 26, 1948 by Local Improvement District No. 1,
Walker River Irrigation District.

March 20, 1948 by Warren Mollart.

On May 24, 1948 a field investigation was made by J. A. Millar, Office Engineer, who was accompanied by representatives of applicant and protestants. On September 13, 1948 a field investigation was made by Hugh A. Shamberger, Assistant State Engineer, on Application No. 11940 in name of August Bunkowski to appropriate water from the same source and during this investigation the proposed point of diversion under Application No. 11918 was again visited.

On August 4, 1948 this matter came up for hearing before the State Engineer at Carson City, Nevada. Appearances were as follows:

For the State Engineer - Hugh A. Shamberger
Assistant State Engineer.

- Edmund Muth
Special Deputy

For the Applicant - C. C. Perrin
Applicant

- Robert A. Allen
Agent & Engineer

For the Protestant
Walker River Irrig. Dist. - W. M. Kearney
Attorney, Reno, Nevada

- C. O. Gelmstedt
Secretary-Manager, Walker
River Irrigation District

For the Protestant
(con't)

- G. C. Smith
Witness, Smith Valley, Nevada
- John C. Jorgenson
Witness, Smith Valley, Nevada

For the Protestant
August Bunkowski:

- John R. Ross
Attorney, Carson City, Nevada
- August Bunkowski
Protestant

Protestant William Toner was represented by himself as was Protestant Warren Mollart.

The transcript of this proceeding is of record in the Office of State Engineer.

Subsequent to the hearing of August 4, 1948 and being on January 13, 1949 a hearing was held on certain applications in name of August Bunkowski, one of them being Application No. 11940 to appropriate drainage water from Blackwell Drainage Canal which is the same source covered by Application No. 11918, the subject of this ruling. Application No. 11940 was protested by the Walker River Irrigation District. Following this hearing extensive briefs were filed by opposing counsel. Testimony taken at the hearing on the Bunkowski application that is pertinent to this ruling will be considered as well as other records available to this office.

GENERAL HISTORY OF DRAINAGE WORKS:

In about 1890 work on the Colony Canal was started by Frank Simpson. This canal was constructed for the purpose of conveying waters of the West Walker River to irrigate lands owned by Frank Simpson along the westerly side of Smith Valley. The point of diversion on the Walker River was in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 10, T. 10 N., R. 23 E. and the canal extended in a general northerly direction for a distance of about eight or nine miles along the westerly edge of Smith Valley. On May 14, 1910 Mr. Simpson formed a company known as the "Simpson's Colony Reclamation Canal Company" with capital stock of \$300,000 divided into 15,000 shares of the par value of \$20.00 each. Each share of stock entitled the owner thereof a carrying capacity in the main canal of the company to the extent of eight-tenths of an inch, statutory measurement, of water theretofore appropriated from the Walker River for certain specified lands.

Thus, in order for a land owner having a water right from the Walker River through the Colony Canal to obtain his water, he would have to own a share of stock in the Simpson Colony Reclamation Canal Company for each acre irrigated which would entitle him to a

maximum of eight-tenths of a miners inch of water per acre. Some colonists homesteaded land in this vicinity and were able to purchase stock in the company in order to get water to their lands. In most cases these homesteaders filed applications to appropriate water from the Walker River to be conveyed through the Colony Ditch.

As an incident to the irrigation of lands under the Colony Canal, it became apparent in 1922 that a drainage system be designed here and constructed. A report dated June 25, 1923 by E. W. King, Assistant Engineer, Walker River Irrigation District, addressed to J. A. Beemer, Chief Engineer, Walker River Irrigation District, describes the necessity of drainage works and details the work so far done by the Canal Company in constructing drains and the proposed plans for completion of such works. This report is contained in the transcript of the Perrin hearing and marked Protestan's Exhibit "B".

According to the "King Report" the stockholders of the Canal Company, on November 1922, authorized the Board of Directors to borrow the necessary funds with which to start work on a drainage system. Apparently this was done, for work was started almost immediately on four separate units known as the Beeman Lakes, Long, Connell and Jessen units. The Beeman Lakes unit was in the southern portion of the valley where the drainage was southerly towards the Walker River. The Long, Connell and Jessen units were located in the northern portion of the area where the drainage is northerly towards and into Alkali Flat Lake. The Long unit was the most easterly and the Connell unit the most westerly with the Jessen unit lying in between. A ridge running easterly and westerly through about the center of Section 2, T. 11 N., R. 23 E. constitutes the drainage divide.

In this ruling we are only concerned with the Long unit, this name being synonymous with Burke Channel, the source of water applied for under Application No. 11918, and with the Blackwell Drainage Canal applied for under Application No. 11940 by August Bunkowski which will be the subject of a later ruling.

According to the King report, the work on the Long Drain Canal was started late in 1922 at a point 1192 feet east of the N.W. Corner of Section 36, T. 12 N., R. 23 E. By means of a drag line a drain ditch was constructed southwesterly from such point some 7582 feet at a cost of \$2723.50. The point of commencement as heretofore described can be further described as being on Flanigan Lane, a road running easterly and westerly across the valley, which separates the property now owned by applicant Perrin and protestant Bunkowski. The proposed point of diversion is located just north of Flanigan Lane. The report further described the proposed continuation of work which would extend the drain northward some 8929 feet, a portion of which would be through the property now owned by applicant Perrin.

Up to the time of the King report, the Simpson's Colony Reclamation Canal Company had expended approximately \$6000 on drainage work on the four units. Engineer King estimated that an additional amount of \$2650 would have to be spent to complete the drainage works.

Subsequently, and pursuant to the "Nevada Irrigation District Act", Local Improvement District No. 1 of the Walker River Irrigation District was organized, and on September 4, 1923 the State Irrigation District Bond Commission approved the formation of Local Improvement District No. 1, and granted it authority to issue \$10,000 worth of bonds. On May 13, 1924 Local Improvement District No. 1, through the Walker River Irrigation District, paid the Simpson Colony Reclamation Canal Company the sum of \$7000 as purchase price for the drainage system. Whether or not this was the total purchase price is not clear; nevertheless the Improvement District became owner of the drainage works within the confines of the Improvement District.

A map prepared by E. W. King and filed as Protestants Exhibit "F" in the Perrin hearing, shows the boundaries of the Improvement District and the various main drain canals.

The testimony would indicate that sometime between 1924 and 1926 the Long Drain (Burke Channel) was extended northward from Flannigan Lane through the Flannigan property (now Perrins) and the Chris Jurgenson property for a distance of about 1/2 mile beyond where the topography was such that the water was confined to a ravine or gully until it reached Alkali Flat Lakes.

THE PROTESTS:

Protest of August Bunkowski:

Mr. Bunkowski's protest was based on the grounds that the applicant plans to construct a dam across the channel which would cause the water to back up and raise the water table on his land.

Protest of William Toner:

The basis of this protest is that the dam constructed by applicant will be a detriment to the natural stream flow and furthermore, that his predecessors and himself have used this water for more than two decades.

Protest of Local Improvement District No. 1, of Walker River Irrigation District:

This protest is as follows:

"That the Burke channel is an artificial channel appropriated and used by and for Local Improvement District No. 1 of Walker River Irrigation District and that the said channel is in fact a drain ditch widened, deepened and strengthened for the purpose of draining

lands within Walker River Irrigation District. That said drainage is an adjunct of necessary irrigation to protect the district lands; that the waters of Burke channel are not public waters but consist wholly of drainage waters in a private channel constructed and improved by Local Improvement District No. 1 of Walker River Irrigation District. That to grant said application would invade and impair existing and vested private right of protestant."

Protest of Warren Mollart:

That the water is drainage water and has been used by protestant for over 15 years for pasture land, and any diversion of water from its present course will not return to channel so that it can be reused.

PRESENT USE OF DRAINAGE WATER FROM BURKE (LONG) DRAIN:

The first diversion out of the drain is by applicant, C. C. Perrin at a point about 600 feet north of Flanigan Lane. On May 29, 1948 when the first field investigation was made, there was an earth dam across the channel with diversions on both sides. Mr. Perrin was requested to remove the dam which he did, and replaced such means of diversion by a sump on the east side of the drain from which water was pumped into a sprinkling system.

The second diversion out of this drainage canal is in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 24, T. 12 N., R. 23 E. owned by Wm. Toner, a protestant in this case. This is the old Godward Brothers property and a diversion at this point was applied for by the Godward Brothers in 1919 under Application No. 5394. The protest of Nat L. Hurd and Catherine Flanagan were disposed of by means of a stipulation and subsequently a permit was granted in the amount of 0.4 c.f.s. Proofs of Commencement and Completion were filed, but due to failure to file Proof of Beneficial Use, said permit was cancelled in 1923. The map filed in support of the application showed 40 acres of land in the E $\frac{1}{2}$ SW $\frac{1}{4}$ Section 24, being irrigated. The report of the field investigation states that continuous use of this water has apparently been made to irrigate a strip of pasture.

The third diversion takes place in about the southwest corner of Section 13, T. 12 N., R. 23 E. on the property now owned by Alex and Edith Castaing. On September 12, 1919 a Mr. Nat L. Hurd, a predecessor of the Castaings, filed Application No. 5734 to appropriate 1.0 c.f.s. of drainage water at a point within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 31, T. 12 N., R. 23 E. for the irrigation of eighty acres of land within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 13, and SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 14 of said township and range. A protest was filed by Guy W. Rogers et al. No action has been taken by this office.

The next diversion is by Warren Mollart with the diversion point being within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 14, T. 12 N., R. 23 E. In his protest Mr. Mollart stated that he has used this water for over fifteen years for pasture land. His testimony was to the further effect that his predecessors, a Mr. Lyon, was using water from this

drain prior to 1925. No application to appropriate was ever filed.

In June 1918 Application No. 5110 was filed by Guy W. Rogers, Edgar J. & Solomon J. Springer to appropriate drainage water at a point within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 11, T. 12 N., R. 23 E. for the irrigation of 480 acres of lands in Sections 1, 2, 11 and 12 of said township and range. This application was approved February 1919 for 4.8 c.f.s. and cancelled in 1933 for failure to file proof of beneficial use. According to maps on record in this office, this land is mostly within the confines of Alkali Flat Lake and from information in the field report, irrigation has been abandoned.

At the time of the field investigation in May 1948, the field engineers estimated a flow of about 1.5 c.f.s. at the Perrin, Toner and Mollart diversions. On July 19, 1949 a current meter measurement at the proposed Perrin diversion showed a flow of 2.02 c.f.s. The field engineers were informed that at times the flow was very much greater.

As nearly as could be ascertained by visual observation it appears that not over 100 acres of land are presently being irrigated on the Toner, Castaing and Mollart properties. The topography is such that water not consumed must return to the drainage channel. The evapo-transpiration use on this type of culture should not exceed 24 inches during the growing season. On the basis of 100 acres being irrigated, the net use would be in the magnitude of 200 acre-feet.

If the average flow of the drain channel was 2.0 c.f.s., the total flow for a six month period would be about 720 acre-feet. Thus it appears that there is considerable excess of water over and above the present net use by Toner, Castaing and Mollart, which excess water upon reaching Alkali Flat Lake is consumed by evaporation.

THE ISSUES:

Following the conclusions of the hearing on Application No. 11940 in name of August Bunkowski to appropriate the waters of Blackwell Drainage Canal and also other applications by Bunkowski to appropriate the waters in the Beeman Lakes drainage, held in Carson City on January 13, 1949, respective counsel filed extensive briefs. Insofar as the Blackwell Drainage Canal is the same source covered by Application No. 11918 and that respective counsel appeared in the Perrin hearing, we feel at liberty to refer to these briefs in this ruling.

As we see it, the issues on which we must base this ruling are:

1. Is the water such as here applied for subject to appropriation under the laws of Nevada.

2. If such water can be appropriated, would the granting of permits for its use be detrimental to existing rights and/or public interests.

In considering the first issue named above, we are of the opinion that the waters applied for are subject to appropriation under the laws of the State. The water flowing in the Burke Channel is made up of seepage water from irrigated fields, overflow water from the Colony Canal system, ground-water from the watershed and precipitation. The seepage water from irrigation that has percolated downward to the zone of saturation (ground-water table) becomes ground-water and as such is subject to the ground-water law of 1939, (7993.10 NCL Supp. 1931-41) as amended. Section 1 of this act is as follows:

"Section 1. All underground waters within the boundaries of the state belong to the public, and subject to all existing rights of the use thereof, are subject to appropriation for beneficial use only under the laws of the state relating to the appropriation and use of water and not otherwise, therefore it is the intention of the legislature, by this act, to prevent the waste of underground waters and pollution and contamination thereof and provide for the administration of the provisions hereof by the state engineer, who is hereby empowered to make such rules and regulations within the terms of this act as may be necessary for the proper execution of the provisions of this act."

We must hold that the Burke Drain is a watercourse. It has all the characteristics of a natural watercourse and drains water from many fields, as well as carrying natural drainage. The man-made portion of this drain has been in operation for at least 26 years and the natural portion has no doubt carried runoff and natural seepage water for hundreds of years. As a natural watercourse, the water conveyed therein must be construed as surface water and subject to appropriation under the General Water Law.

Section 1 of the General Water Law (7890 NCL 1929) reads as follows:

"The water of all sources of water supply within the boundaries of the state, whether above or beneath the surface of the ground, belong to the public."

Section 2 of the same act reads:

"Subject to existing rights, all such water may be appropriated for beneficial use as provided in this act and not otherwise."

Section 63 of the General Water Law (7948 NCL 1929) sets up the criteria which the State Engineer must use in approving an application to appropriate water. This section reads in part as follows:

"Section 63. It shall be the duty of the State Engineer to approve all applications made in proper form - - - - - which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights or be other wise detrimental to the public welfare - - - - -".

Protestant Improvement District claims that the waters in the Burke Channel are drainage water and as such are not subject to appropriation and in support of such contention relies primarily on three Nevada cases, namely:

Cardelli v. Comstock Tunnel Co., 26 Nev. 284

Gallio v. Ryan, 52 Nev. 330, and

In Re Bassett Creek, 62 Nev. 456.

We are of the opinion that these cases do not control in this proceeding. The Cardelli v. Comstock Tunnel Company was decided in 1901, four years prior to a state water law proceeding a method to appropriate water.

The situation here as between the Gallio v. Tyan and In Re Bassett Creek cases is entirely different. In the present case, the waters applied for are made up mainly from seepage water from irrigated lands and overflow from Colony Canal. The seepage water comes from many farms and by virtue of the slope of the country, reaches the Burke Drain which is considered as a natural watercourse. In each of the two cases cited above, the controversy is between two individuals and involves the use of waste water as it percolates or flows off of an adjoining field in no defined channel.

In answering the second issue - that is, would the granting of a permit be detrimental to existing rights and/or public welfare, we must answer in the negative. On the contrary - the granting of a permit would prove beneficial to the welfare of the State without interfering with any existing rights. It is plain from the testimony taken and other data before the State Engineer that the sole purpose of Improvement District No. 1 was to take over the existing drainage works of the Simpson Colony Reclamation Canal Company, maintain such works and in accordance with the King report, to add to such works. Never at any time, according to the testimony, did the Improvement District or the Walker River Irrigation District have any intention of using such drain waters for a beneficial purpose. This is substantiated by the following testimony by Carl Gelmstedt, Secretary-Manager,

Walker River Irrigation District, appearing on pages 66 and 67 of the transcript.

"Mr. Shamberger:

"This water that goes down this drain and into Alkali Lake, does the District still consider that district water in the drain?

A. Yes, it is developed by the drainage system and flows in the drainage canals that were constructed by the drainage district.

Q. When it gets to Alkali Lake what happens to it?

A. It dissipates in the alkali lake.

Q. Does the District have any objections to anybody putting that to beneficial use if they can?

A. In view of the fact that it does not find its way back to the river, they have had no particular objection to people using it, but if it becomes public property and it is all appropriated by one man in that drainage canal we would be very liable to have a multiplicity of applications upon other drainage canals where the water does return to the river and become part of the water supply used by the users of the District as a whole.

Q. But this is a different situation, is it not, when water does not return to the river and it is lost if allowed to remain in the drainage channel and into the lake and is lost by evaporation?

A. Yes, it is."

It would appear that if water could be diverted from the canal in such a manner that the purpose for which the canal was constructed, namely drainage, was not affected there would be no impairment to the rights of protestant Improvement District. As far as protestant's fears regarding the granting of permits for drainage water which returned to the Walker River and is used by legal appropriation therefrom, it should be remembered that each application must be considered separately, and if the granting of a permit would impair rights that have been legally acquired, such application would of necessity have to be denied.

We fail to find where Alex Castaing has any right under Application No. 5734 to appropriate water from the Drain. While it is true that Application No. 5734, filed September 12, 1919 by Nat L. Hurd (predecessor of Castaing) to appropriate 1.0 c.f.s. of drainage water, has never been acted on, and further that water from the Drain has apparently been used to irrigate land on the property now owned by Castaing for many years, it appears that the deed from the Walker River Irrigation District to Helen Calvin reserves all water and water rights appurtenant to said land. Therefore, when Helen Calvin transferred the property to Alex and Edith Castaing, no water rights were attached.

OPINION:

1. That the waters applied for under Application No. 11918 are subject to appropriation.

2. A permit to appropriate such water must be predicated on the presence of available water at the point of diversion and would not obligate the Improvement District in any way as to the continuance of such flow of water.

3. A permit to appropriate water does not carry with it any right of way privileges, and further that the purpose of the Drain must be recognized and not molested by any works of diversion.

4. It appears that protestants William Toner; Warren Mollart and Alex and Edith Castaing do not have a legal right to appropriate water from the Burke Drain.

RULING:

The protests to the granting of a permit under Application No. 11918 are herewith overruled and a permit will be granted following receipt of the statutory permit fee, subject to all existing rights and including the foregoing provisions.

Respectfully submitted,



ALFRED MERRITT SMITH
State Engineer

Dated this 3rd day of April, 1950.