

IN THE MATTER OF APPLICATIONS 30534,)
34444-34449 INCLUSIVE, 34866, 35015)
AND 35782 FILED TO CHANGE EXISTING)
WATER RIGHTS AND TO APPROPRIATE THE)
PUBLIC WATERS IN THE BIG SMOKY VALLEY,)
LANDER COUNTY, NEVADA)

R U L I N G

137B

INTRODUCTION

Applications 34444 through 34449 inclusive and 34866 were filed to change existing water rights appropriating water from Big Smoky Creek aka Kingston Creek, Big Smoky Valley, Lander County, Nevada.

Application 30534 was filed to appropriate water from Kingston Creek, Big Smoky Valley, Lander County, Nevada.

Applications 35015 and 35782 were filed to appropriate water from an underground source in Big Smoky Valley, Lander County, Nevada.

Judgment and Decree has been entered 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, Nevada No. 3073 in the Third Judicial Court of the State of Nevada in and for the County of Lander. A copy of this Judgment and Decree is available in the office of the State Engineer.

FINDING OF FACTS

I

Application 30534 was filed on August 20, 1976 by the Kingston Hydro-Power Cooperative, Inc., to appropriate 1.283 cfs of water from Kingston Creek for hydroelectric power purposes. The proposed point of diversion is within the NE1/4 NE1/4 of Section 35, T.16N., R.43E., M.D.B. & M. The proposed place of use is described as within portions of Section 35 and 36, T.16N., R.43E., and portions of Sections 29, 30 and 31, T.16N., R.44E., M.D.B. & M. The period of use is to be from January 1 to December 31 of each year. The applicant states the water diverted to generate power will be returned to the stream with no consumptive use. 1/

II

A protest to the granting of Application 30534 was filed on March 1, 1977 by Young Bros. Livestock, Inc. The basis of the protest was that the value of the protestant's prior vested rights would be impaired. 2/

III

A letter of concern dated March 25, 1977 from George L. and Leona B. Wood alleges that the works of diversion and pipeline under Application 30534 had been installed at least 90 days prior to the ready for action date and that the water proposed to be appropriated had already been appropriated. 3/

IV

A field investigation in the matter of protested Application 30534 was held on August 3, 1977. The field investigation established that the works of diversion were complete and that the water was being diverted and used for the generation of power. It also established that a portion of the water diverted was being used for quasi-municipal purposes. 4/

V

A hearing was held before the State Engineer on February 15, 1978 in the matter of protested Application 30534. Testimony at the hearing established that water was illegally being diverted from Kingston Creek for quasi-municipal and power purposes. The State Engineer issued an interim order at the hearing to allow water to be diverted for power generation until a final determination is made on Application 30534. The State Engineer did not authorize the use of water for quasi-municipal purposes but stated he would not curtail that use in the absence of a request for injunctive relief. 5/

VI

Applications 34444 through 34449 inclusive were filed on October 27, 1977 by J. Chester Young to change the point of diversion of the following Proofs and Certificates as determined by the Kingston Creek Decree and the following Permits issued by the State Engineer. The proposed point of diversion is common to all of the above subject applications and is described as within the NW1/4 NE1/4 of Section 35, T.16N., R.43E., M.D.B. & M. 6/

Application 34444 to change the point of diversion of 1.74 cfs not to exceed 347.24 acre-feet of water from Big Smoky (Kingston), Shoshone, Santa Fe and Frenchman Creeks for irrigation, stockwatering and domestic purposes under Certificate 366 issued to Proofs 02410, 02411, 02412 and 02416. The date of priority of Proof 02410 is 1870 and the date of priority of Proofs 02411, 02412 and 02416 is 1874. The applicant states that Kingston Creek is estimated to supply 85% of the water appropriated under Certificate 366.

Application 34445 to change the point of diversion of 2.63 cfs not to exceed 525.96 acre-feet of water from Big Smoky (Kingston), Sheep, Rock Creeks and Gilman Springs for irrigation, stockwatering and domestic purposes under Certificate 367 issued to Proofs 01527, 02413, 02414 and 02415. The date of priority of Proofs 01527, 02413, 02414 and 02415 is 1882. The applicant states that Kingston Creek is estimated to supply 85% of the water appropriated under Certificate 367.

Application 34446 to change the point of diversion of 6.0 cfs not to exceed 1,048.12 acre-feet of flood water from Big Smoky (Kingston) Creek for irrigation purposes under Permit 23503, Certificate 8294. The date of priority of Permit 23503, Certificate 8294 is November 17, 1966.

Application 34447 to change the point of diversion of 2.0 cfs not to exceed 700.12 acre-feet of water from Kingston Creek for irrigation and domestic purposes under Permit 25779, Certificate 8295. The date of priority of Permit 25779, Certificate 8295 is August 26, 1970.

Application 34448 to change the point of diversion of 2.1 cfs not to exceed 515.4 acre-feet of water from Kingston Creek (aka Big Smoky Creek) for irrigation and domestic purposes under Permit 26284, Certificate 8878. The date of priority of Permit 26284, Certificate 8878 is August 31, 1971.

Application 34449 to change the point of diversion of 2.1 cfs not to exceed 515.4 acre-feet of flood water from Kingston Creek for irrigation and domestic purposes under Permit 26285, Certificate 8906. The date of priority of Permit 26285, Certificate 8906 is August 31, 1971.

VII

Protests to the granting of the above subject Applications 34444 through 34449, inclusive, were filed on February 22, 1979 by Gordon C. Shelley and on February 26, 1979 by the State of Nevada Department of Fish and Game. Protests not timely filed were received from the Town of Kingston and the Kingston Hydro-Power Cooperative, Inc. 7/

The protest of Gordon C. Shelley is based upon the following grounds:

1. Contrary to the public interest.
2. Proposed pipeline would kill the fish.
3. Value of Kingston Town properties could be destroyed.
4. The application, if granted, would result in the loss of power to the Town of Kingston.
5. Resultant Extinction of plant life in and around the stream bed would increase flood danger.

The Nevada Department of Fish and Game asks denial of Applications 34444 through 34449, inclusive, on the grounds that approval of the applications could prove fatal to a valuable fishery, riparian habitat, and several species of game and non-game birds and animals at all points below the proposed point of diversion.

VIII

Application 34866 was filed on January 12, 1978 by the Town of Kingston to change the point of diversion, manner and place of use of Proof 02435, Certificate 369 as determined by the Kingston Creek Decree. The proposed point of diversion is described as within the NE1/4 NE1/4 of Section 35, T.16N., R.43E., M.D.B. & M. 8/

Certificate 369 was issued for 1.4 cfs not to exceed 241.8 acre-feet of water from Kingston Creek (aka Big Smoky Creek) for irrigation, stock-watering and domestic use. The date of priority of Proof 02435, Certificate 369 is 1863.

In addition to changing the point of diversion, Application 34866 proposes to change the manner and place of use from irrigation, stock-watering and domestic use to quasi-municipal use.

IX

Protest to the granting of Application 34866 was filed on March 1, 1978 by George L. and Leona B. Wood on the following grounds:

1. Sets a precedent for other upstream diversions.
2. Water has been appropriated and illegally used from the requested point of diversion since December 1, 1976.
3. Has a negative effect on the ecology of the entire community.
4. Has a substantial negative effect on protestants property.
5. Water running to waste because of defective water installations.
6. Water has not been used in conformance with Certificate 369 for at least five years.
7. Not in best interest of majority.
8. Application unknown to at least 90 percent of property owners.
9. Otherwise detrimental to the public interest. 9/

X

Protest to the granting of Application 34866 was filed on March 17, 1978 by Young Bros. Livestock, Inc., on the grounds that the proposed change from irrigation to quasi-municipal use would affect the protestant's decreed rights in that return flows upon which they have depended would be adversely affected. The protestant also contends that permitted rights which they own would be adversely affected. In addition, Young Bros. believe, if Application 34866 were to be granted, that the Town of Kingston has no intention to treat the waters to make them potable, thus creating a serious health problem. The protestant alleges that the Town of Kingston intends to use the water on a temporary basis until such time as electrical power is available and the application should have been filed accordingly. The protestant further alleges that Application 34866 does not disclose that the Town of Kingston has the legal right to use the water decreed under Certificate 369. 10/

XI

Application 35015 was filed on February 21, 1978 by the Town of Kingston to appropriate 5.57 cfs of water from an underground source (well) for quasi-municipal purposes. The point of diversion is within the SW1/4 NW1/4 of Section 36, T.16N., R.43E., M.D.B. & M. The well is an existing well drilled under cancelled Permit 27127. 11/

XII

Protest to the granting of Application 35015 was filed on October 4, 1978 by J. Chester Young on the grounds that the granting would adversely affect his prior decreed rights in that the proposed appropriation would actually be developing water from Kingston Creek and that the appropriation would be detrimental to the public interest in that the amount of water that could be put to beneficial use under the protestant's rights would be reduced by the amount of the proposed ground water appropriation. 12/

XIII

Application 35782 was filed on August 21, 1978 by the Town of Kingston to appropriate 5.57 cfs of water from an underground source (well) for hydro-electric power generation. The proposed point of diversion is the same source as Application 35015 within the SW1/4 NW1/4 of Section 36, T.16N., R.43E., M.D.B. & M. 13/

XIV

Protest to the granting of Application 35782 was filed on November 6, 1978 by J. Chester Young on the same grounds as those contained in the protest to the above Application 35015. 14/

XV

Protest to the granting of Application 35782 was filed on December 4, 1978 by George L. and Leona B. Wood on the grounds that the proposed appropriation would adversely affect the flow of Kingston Creek and be detrimental to the value of the protestant's property and therefore detrimental to the public interest. 15/

XVI

A hearing was held before the State Engineer on June 14, 1979 in the matter of protested Applications 34444 through 34449, inclusive, filed by J. Chester Young and protested Applications 34866, 35015 and 35782 filed by the Town of Kingston. 16/

Testimony presented by the protestant, Nevada Department of Fish and Game, indicated that the cumulative diversion of Applications 34444 through 34449, inclusive, totals some 17.17 cfs which is considerably more than the low flow of lower Kingston Creek from August through December. Documented flows by the Department in August and December of 1977 at the U. S. Forest Service boundary were 9.9 and 9.5 cfs, respectively. The Department of Fish and Game alleges that the granting of these applications would potentially dewater the entire stream system below the proposed point of diversion and a valuable fishery would be lost.

Testimony presented in behalf of the protestant Gordon C. Shelley alleges that the granting of Applications 34444 through 34449, inclusive, filed by J. Chester Young would remove the water necessary to operate the hydro-electric plant, have an adverse effect on the ecology of the area and the fishery below the proposed point of diversion and cause grave problems with the culinary water system.

Testimony presented by and in behalf of the applicant J. Chester Young claims the development of the Town of Kingston has decreased the amount of water required to satisfy his decreed and permitted water rights. Witnesses claimed a loss of between 60 and 70 percent of the water in Kingston Creek through evaporation and seepage across the alluvial fan from the mouth of Kingston Canyon to the Young Ranch.

In testimony by and in behalf of the protestant J. Chester Young, the protest to the granting of Application 34866 was withdrawn. Witnesses testified that the well under Applications 35015 and 35782 was located and constructed in such a manner that water would be drawn from Kingston Creek to the detriment of Mr. Young's downstream rights.

XVII

By affidavits received in the office of the State Engineer on July 20, 1979, the applicant Town of Kingston withdrew Application 35015 and 35782. 17/

CONCLUSIONS

I

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

II

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

- A. There is no unappropriated water at the proposed source, or
- B. The proposed use conflicts with existing rights, or
- C. The proposed use threatens to prove detrimental to the public welfare. 19/

III

The granting of a permit under Application 30534 for hydroelectric purposes from Kingston Creek would tend to impair the value of existing rights and threaten to prove detrimental to the public interest by removal of water from a reach of Kingston Creek in addition to that quantity sought for the same purpose under Application 34866.

IV

The granting of permits under Applications 34444 through 34449, inclusive, would tend to prove detrimental to the public interest by removal of a large quantity of water from a reach of Kingston Creek. No substantial evidence was presented to demonstrate the advantage or conservation of a specific quantity of water by the granting of permits to Applications 34444 through 34449.

V

The granting of a permit to Application 34866 would require a portion of a decreed water right to be transported by pipeline for a short reach of Kingston Canyon for hydroelectric generation then be released into the stream to satisfy downstream rights. It is in the public interest to have this power generation facility in operation until commercial power is available and then for standby purposes in this isolated community. It is equally in the public interest to have a firm right to a quantity of water for municipal purposes. The protest filed by the Young Bros. Livestock, Inc., was withdrawn at the time of the hearing.

VI

Application 35015 has been withdrawn by the applicant and no further action is necessary.

VII

Application 35782 has been withdrawn by the applicant and no further action is necessary.

VIII

Testimony and information available to this office indicates that distribution of the waters of Kingston Creek as decreed would be in the public interest for recreation purposes.

RULING

The protest is upheld in part and Application 30534 is hereby denied on the grounds that the granting would be detrimental to the public interest.

The protests are upheld in part and Applications 34444 through 34449, inclusive, are hereby denied on the grounds that the granting would be detrimental to the public interest.

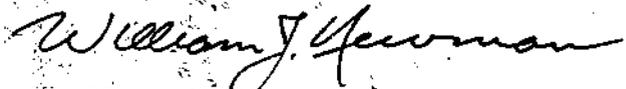
The protest is overruled and Application 34866 will be granted to preserve the public interest.

Application 35015 was withdrawn on July 25, 1979 by the applicant and no further action is necessary.

Application 35782 was withdrawn on July 25, 1979 by the applicant and no further action is necessary.

An Order will be issued to remove all existing points of diversion in Kingston Creek other than that provided under the Kingston Creek Decree and Permits 23503, 24994, 24995, 25779, 26284, 26285 and 34866 and to prohibit the installation of any new points of diversion except as provided by statute.

Respectfully submitted,



William J. Newman
State Engineer

WJN/bc

Dated this 27th day

of August, 1979.

FOOTNOTES

1. Public record available in the office of the State Engineer.
2. Public record available in the office of the State Engineer.
3. Public record available in the office of the State Engineer.
4. Public record available in the office of the State Engineer.
5. Transcript of February 15, 1978 hearing is a public record available in the office of the State Engineer.
6. Public record available in the office of the State Engineer.
7. Public record available in the office of the State Engineer.
8. Public record available in the office of the State Engineer.
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12. Public record available in the office of the State Engineer.
13. Public record available in the office of the State Engineer.
14. Public record available in the office of the State Engineer.
15. Public record available in the office of the State Engineer.
16. Transcript of June 14, 1979 hearing is a public record available in the office of the State Engineer.
17. Public record available in the office of the State Engineer.
18. NRS 533.025 and NRS 533.030, Section 1.
19. NRS 533.370, Section 4.