

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

IN THE MATTER OF APPLICATION 60426)
FILED TO CHANGE THE POINT OF)
DIVERSION OF A PORTION OF THE WATERS)
OF BOULDER CREEK, HERETOFORE DECREED)
IN THE EDWARDS DECREE OF THE HUMBOLDT)
RIVER ADJUDICATION, ELKO COUNTY,)
NEVADA.)

RULING

4270

GENERAL

I.

Application 60426 was filed on September 6, 1994, by Harvey A. and Margaret E. Dahl to change the point of diversion of the waters of Boulder Creek, heretofore decreed under a portion of Claim 00482 of the Edwards Decree of the Humboldt River Adjudication. The decreed point of diversion is the point of beginning of the Armstrong Ditches 1 through 6 from Boulder Creek, located within the NE $\frac{1}{4}$ Section 25, T.36N., R.59E., M.D.B.&M. The proposed point of diversion is the point of intersection of the Carlson Ditch and Left Boulder Creek in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 30, T.36N., R.60E., M.D.B.&M. The applicants propose to irrigate decreed lands within the N $\frac{1}{2}$ of said Section 30, which cannot presently receive water from the decreed point of diversion.¹

II.

Application 60426 was timely protested by Frank and Phyllis Hooper, owners of Weathers Ranch, on the grounds that: the proposed change will adversely affect the return flow and the subterranean irrigation value on which the Weathers Ranch depends; moving the point of diversion upstream will move the return flow into another basin which will result in 0.99 cfs not returning to Boulder Creek and being lost to the Weathers Ranch; the proposed change may affect the flow of springs on which the Weathers Ranch depends; and in order to maintain the agreements to assure

¹ File No. 60426, Public Record in the Office of the State Engineer.

equitable and fair usage of water within the Starr Valley Basin, the water rights proposed to be changed by Application 60426 should stand as decreed.²

The protest to Application 60426, filed by Laurence Ranch Partnership simply states "leave as decreed", referring to the water rights proposed to be changed. Therefore, the protestant requests that Application 60426 be denied.³

Application 60426 was timely protested by William Max Spratling on the grounds that its approval would allow the diversion of water, that is presently downstream from his decreed diversion points, to move upstream from his diversions. Therefore, Mr. Spratling requests that Application 60426 be denied.⁴

Application 60426 was timely protested by James R. and Carol R. Wachtel on the grounds that:

1. It is necessary for the protestants to use the same system of ditches (Armstrong Ditches) as the applicants to transport water to a portion of the protestants' irrigated fields. The approval of Application 60426 would adversely affect the flow in the Armstrong Ditches and jeopardize protestants' water rights.
2. Approval of Application 60426 would result in a violation of an agreement which defines the use of water on the protestants' land, dated February 21, 1963, between the applicants and the Lanes (predecessors to the protestants).
3. Application 60426 inappropriately attempts to change the Humboldt River Decree.

² Exhibit No. 3, Public Administrative Hearing before the State Engineer, May 24, 1995.

³ Exhibit No. 4, Public Administrative Hearing before the State Engineer, May 24, 1995.

⁴ Exhibit No. 6, Public Administrative Hearing before the State Engineer, May 24, 1995.

4. Approval of Application 60426 would create additional distribution problems with the water conveyed in the Carlson Ditch, over those that presently exist between the applicants and the protestants.

Therefore, the protestants request that Application 60426 be denied.⁵

III.

After all parties of interest were duly noticed by certified mail,⁶ a public administrative hearing was held before the State Engineer on May 24, 1995, to consider protested Application 60426.⁷ Administrative notice was taken of the records in the Office of the State Engineer.⁸

FINDINGS OF FACTS

I.

Under Claim 00482 of the Humboldt River Decree, the N $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B.&M., is listed among those lands irrigated through the Armstrong 1-6 Ditches.⁹ However, the lands located within the N $\frac{1}{2}$ of said Section 30 are located at a higher elevation than the Armstrong Ditches and, therefore, it is not possible for water to flow by gravity through the Armstrong Ditches

⁵ Exhibit No. 7, Public Administrative Hearing before the State Engineer, May 24, 1995.

⁶ Exhibit No. 1, Public Administrative Hearing before the State Engineer, May 24, 1995.

⁷ Transcript, Public Administrative Hearing before the State Engineer, May 24, 1995.

⁸ Transcript, p. 7, Public Administrative Hearing before the State Engineer, May 24, 1995.

⁹ In the Matter of the Determination of the Relative Rights of the Waters of the Humboldt River Stream System and Tributaries, Case No. 2804, Sixth Judicial District Court of Nevada, In and for the County of Humboldt, 1923-1938. See Claim 00482, J.W. Johnston, claimant, Edwards Decree, p. 64.

and reach the subject lands.¹⁰ These lands can be irrigated by water diverted through the Carlson Ditch which is located upstream from the Armstrong Ditches. The purpose of Application 60426 is to change the point of diversion of a portion of Claim 00482 to the Carlson Ditch.¹¹ The applicant feels that the omission of the Carlson Ditch from Claim 00482 does not necessarily mean that there is no right to divert water through this ditch.¹² The applicant testified that the lands within the N $\frac{1}{2}$ of said Section 30 had been irrigated with water through the Carlson Ditch for many years, until 1994, when the water commissioner ordered the discontinuance of this practice.¹³

The diversion of water through the Carlson Ditch for the irrigation of lands located within the N $\frac{1}{2}$ of said Section 30, with a priority date of 1875, was claimed under the original Proof 00509.¹⁴ However, Proof 00509 was not included in the Preliminary Order of Determination, the Final Order of Determination or the Decree. Instead, on June 24, 1910, the claimant filed Application 1734 for the irrigation of 33.74 acres within the NW $\frac{1}{4}$ Section 30, T.36N., R.60E., M.D.B.&M., a portion of the same land claimed under Proof 00509. The water was diverted from Left Boulder Creek

¹⁰ Transcript p. 18, Public Administrative Hearing before the State Engineer, May 24, 1995.

¹¹ Exhibit No. 2, Public Administrative Hearing before the State Engineer, May 24, 1995.

¹² Transcript, pp. 9-11, 30, Public Administrative Hearing before the State Engineer, May 24, 1995.

¹³ Transcript, p. 33, Public Administrative Hearing before the State Engineer, May 24, 1995.

¹⁴ Exhibit No. 11, Public Administrative Hearing before the State Engineer, May 24, 1995. After Proof 00509 was filed in 1913, it was modified after an affidavit for permission to change Proof 00509 was filed in 1917 (Exhibit No. 16). The modified Proof 00509 removed the N $\frac{1}{2}$ of said Section 30 and the Carlson Ditch, and retained lands already claimed in Proof 00482.

through the Carlson Ditch. On May 7, 1985, Certificate 11152 was issued under Permit 1734.¹⁵

From the records of the Office of the State Engineer and the records of the Sixth Judicial District Court of Nevada, it is unknown why Proof 00509 was omitted from the decree and why the claimant filed Application 1734. The applicant feels that the land under Proof 00509 was added to Proof 00482 and, therefore, the entire area is water righted ground,¹⁶ but the applicant's position does not explain why Proof 00482 does not include the Carlson Ditch and why Application 1734 was filed.

The applicant does not consider other facts which do not support his position. While Proof 00509 as originally filed in 1912, includes the N $\frac{1}{2}$ of Section 30, T.36N., R.60E., M.D.B.&M.,¹⁷ the claimant, Mrs. H.P. Johnston, through her son, J.W. Johnston, later amended her claim in 1917 and submitted a supplemental map which omitted the N $\frac{1}{2}$ of said Section 30 and the Carlson Ditch from her claim.¹⁸

The applicant feels that the decreed lands in the N $\frac{1}{2}$ of said Section 30 can be legally irrigated by water diverted through the Carlson Ditch.¹⁹ However, H.M. Lane, who claimed that his lands in the NW $\frac{1}{4}$ Section 19, T.36N., R.60E., M.D.B.&M. were irrigated via

¹⁵ File No. 1734, official records in the Office of the State Engineer.

¹⁶ Transcript, p. 28, Public Administrative Hearing before the State Engineer, May 24, 1995.

¹⁷ Exhibit No. 11, Public Administrative Hearing before the State Engineer, May 24, 1995.

¹⁸ Exhibit No. 16, Public Administrative Hearing before the State Engineer, May 24, 1995, and the supplemental map filed on January 12, 1917, to support the affidavit for permission to change Proof 00509, official records in the Office of the State Engineer..

¹⁹ Transcript, pp. 9-11, 30, Public Administrative Hearing before the State Engineer, May 24, 1995.

the Johnston and Armstrong Ditch and the Carlson Ditch, stated that he was the "full owner" of the Carlson Ditch.²⁰ Therefore, Johnston, the applicants' predecessor, did not have a legal right to divert water through the Carlson Ditch to irrigate the N½ of said Section 30. He applied for the right to use the Carlson Ditch to irrigate 33.74 acres in the N½ of said Section 30, when Application 1734 was filed in 1910.

After considering the facts summarized above, the State Engineer makes no finding regarding the apparent inconsistency in Claim 00482.

Instead, the State Engineer finds that it is not within his jurisdiction to determine certain matters related to the Humboldt River Decree, namely, if the N½ of Section 30, T.36N., R.60E., M.D.B.&M., was incorrectly included under Proof 00482 or if the Carlson Ditch was mistakenly not added to Proof 00482.²¹ Anyone wishing to resolve these matters is referred to the Sixth Judicial District Court of Nevada, which is the court that entered the Humboldt River Decree. The State Engineer will consider Application 60426 on its merits and will take action in accordance with his statutory authority.

II.

The average flow of water in the Humboldt River, measured at the Palisade gauge, is 282,800 AFA.²² The sum of the water rights

²⁰ Proof 00483, dated February 24, 1913, official records in the Office of the State Engineer.

²¹ Attorney General's Opinion 69, February 2, 1932, states in part, that the State Engineer does not have the jurisdiction to hear and determine disputes over water rights which have been previously adjudicated by court, even though the decree contains an erroneous description of the source of water.

²² USGS Water Data Report NV-94-1, Water Resources Data Nevada, Water Year 1994.

on the Humboldt River is approximately 700,000 AFA.²³ Therefore, it is clear that the delivery of water to satisfy this large quantity of water rights depends on return flows, that is, the runoff or tailwater from an upstream irrigated field that returns to the river (or creek or tributary) and is available to the downstream users. An example is Starr Creek, where much of the flow is return flow from the upstream irrigated lands.

Application 60426 seeks to remove a portion of the decreed flow from the Armstrong 1-6 Ditches, and place it in the Carlson Ditch for the irrigation of lands located within the N $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B.&M.²⁴ This land is located farther upstream and the return flow off this land, especially in dry years, does not reach the downstream users as it does off the lands irrigated through the Armstrong Ditches.²⁵ One of the protestants, the Wachtels, receives water through the Armstrong Ditches for the irrigation of decreed lands located immediately adjacent to and downstream from the applicants' lands.²⁶ A reduction in flow in the Armstrong Ditches, as proposed in Application 60426, results in less water available to the Wachtels.²⁵ The State Engineer finds that the approval of Application 60426 would result in a lower quantity of water running back onto the Wachtels' decreed lands.

²³ In the Matter of the Determination of the Relative Rights of the Waters of the Humboldt River Stream System and Tributaries, Case No. 2804, Sixth Judicial District Court of Nevada, In and for the County of Humboldt, 1923-1938. See Bartlett Decree, p. 28.

²⁴ Application 60426, official records in the Office of the State Engineer.

²⁵ Transcript, pp. 76, 117-118, Public Administrative Hearing before the State Engineer, May 24, 1995.

²⁶ Exhibit No. 7, Public Administrative Hearing before the State Engineer, May 24, 1995.

III.

Certificate 11152 was issued under Permit 1734 for the irrigation of 33.74 acres located within the NW $\frac{1}{4}$ Section 30, T.36N., R.60E., M.D.B.&M.; the date of priority is 1910.²⁷ This acreage is located entirely within the area described as the proposed place of use of Application 60426.²⁸ If Application 60426 were approved, then the land under Certificate 11152 would be irrigated along with the rest of the land under said application, ahead of and to the detriment of the downstream users' decreed lands. Because of the topography, it would be impossible to cut off the certificated land when it is out of priority and at the same time, deliver water to the place of use of Application 60426. This would be a violation of the Humboldt River Decree when certificated lands receive water but are out of priority. The State Engineer finds that the approval of Application 60426 would result in a violation of the Humboldt River Decree and also would threaten to prove detrimental to the public interest.

IV.

A portion of the proposed place of use of Application 60426 is located in the S $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B.&M.²⁹ This portion lies along the ditch used to irrigate the proposed place of

²⁷ Certificate 11152, issued under Permit 1734, official records in the Office of the State Engineer.

²⁸ The proposed place of use on line 7 of Application 60426 is described "As Decreed". At the hearing held on May 24, 1995, the applicant introduced Exhibit No. 9, a map which outlined the area proposed to be irrigated under Application 60426. By comparing the map supporting Certificate 11152 with Exhibit No. 9, it is clear the 33.74 acres lies entirely within and is surrounded by the proposed place of use under Application 60426.

²⁹ Exhibit No. 9, Public Administrative Hearing before the State Engineer, May 24, 1995. This exhibit is a drawing of the proposed place of use of Application 60426, that was prepared by Mr. Demar Dahl. The outline of the proposed place of use on Exhibit No. 9 agrees with the map filed in support of Proofs 00482, 00483 and 00509.

fields. Any proposed change in the point of diversion must be reviewed to determine the impact on return flows and the availability of these flows to the downstream users.

In the instant case, the applicants propose to move the point of diversion of a portion of their decreed water rights upstream from the decreed point of diversion. The water would then irrigate land located within the N $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B.&M. This land is farther removed from the Wachtels' land which then would receive less return flow as a result of moving the point of diversion upstream. Therefore, the State Engineer concludes that the approval of Application 60426 would result in the delivery of less water to the Wachtels' decreed lands and conflict with their existing decreed rights.

V.

The place of use under Permit 1734, Certificate 11152 is located entirely within the proposed place of use of Application 60426. It would be impossible to deliver water under Application 60426 and avoid the place of use of Permit 1734, Certificate 11152. There would be occasions when the certificated land is out of priority, but would still receive water. The State Engineer concludes that the approval of Application 60426 would violate the Humboldt River Decree and would threaten to prove detrimental to the public interest.

VI.

If Application 60426 were approved, the applicants would be allowed to irrigate the land within the N $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B.&M. However, non-decreed land, located within the S $\frac{1}{2}$ of said Section 30, lies between the ditch carrying the water and the N $\frac{1}{2}$ of said Section 30. The irrigation of the field located within the N $\frac{1}{2}$ of said Section 30 cannot be accomplished without the irrigation of the non-water righted land. The State Engineer

concludes that the irrigation of non-water righted land with water from Boulder Creek is a violation of the Humboldt River Decree and the approval of Application 60426 would result in such a violation.

VII.

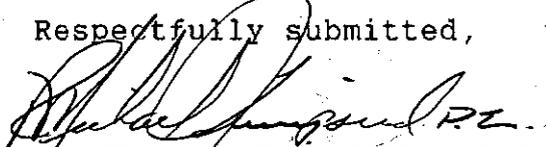
In the Humboldt River Decree, under Claim 00482, the number of acres and the priority of this land located within the N $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B&M., are not specified. Under the terms and conditions of the Decree, the holder of the claim was not limited to a specific area, but could irrigate any lands described within the brackets with the quantity of water that was determined to be in priority at the time. When a permit is issued by the State Engineer, the exact number of acres and quantity of water are stated. The permittee is required to prove beneficial use of an exact quantity of water. After said proof is filed, a certificate is issued for that quantity of water.

The quantity of water requested to be changed by Application 60426 is unknown. If Application 60426 were approved without stating the quantity of water to be changed, the water commissioner would not know how much water to remove from the Armstrong Ditches and place into the Carlson Ditch. It is not sufficient to state "as decreed" where the decree is vague as to the number of acres and quantity of water decreed to the N $\frac{1}{2}$ of said Section 30. The State Engineer concludes that Application 60426 does not contain enough information that is necessary for a full understanding of the proposed change. The State Engineer further concludes that the approval of Application 60426 without specifying the quantity of water changed, would prove detrimental to the public interest.

RULING

The protests to Application 60426 are hereby upheld and said application is hereby denied on the grounds that the application does not contain enough information for a full understanding of the proposed change and its approval would conflict with existing rights, threaten to prove detrimental to the public interest, and violate the terms and conditions of the Humboldt River Decree.

Respectfully submitted,



F. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 21st day of
December, 1995.

use of Application 60426. When irrigation is taking place, water from the ditch would flow onto this land, then onto the land located within the N $\frac{1}{2}$ of said Section 30. It is not possible to irrigate the land in the N $\frac{1}{2}$ of said Section 30 and avoid this portion of land located within the S $\frac{1}{2}$ of said Section 30. This land, located within the S $\frac{1}{2}$ of said Section 30, is not included in the Humboldt Decree.³⁰ The State Engineer finds that under Application 60426, the applicant seeks to irrigate non-decreed land, a clear violation of the Humboldt River Decree.

V.

In the Humboldt River Decree, the Armstrong Ditches 1-6 are stated as the means of conveyance of water to the lands within the brackets under Claim 00482.⁹ If Application 60426 were approved, then the Carlson Ditch would be used to convey a portion of the waters decreed under Claim 00482. It would be necessary to know how much water is changed so that the water commissioner would know how much water, along with a certain ditch loss, to place into the Carlson Ditch.

In Application 60426, the quantity of water requested to be changed is "a portion of the water as Decreed under the Bracket."³¹ At the hearing, the Hearing Officer attempted to ascertain from the applicant, the quantity of water requested to be changed, or the number of acres proposed to be irrigated under Application 60426. The applicant did not give a specific answer, but instead relied on the Humboldt River Decree in stating that the quantity of water and

³⁰ The land located within the S $\frac{1}{2}$ of said Section 30 was claimed in Proof 00478. However, Proof 00478 is not included in the Humboldt River Decree.

³¹ Application 60426, line 2, official records in the Office of the State Engineer. In the remarks, line 15, the applicant refers to "water as presently decreed and used from 1875 to the present..." But the applicant did not state that he is requesting to change the water under Claim 00482 that has a priority of 1875, and the State Engineer does not assume this to be the case.

the number of acres under Application 60426 are "as decreed".³² But the number of decreed acres within the N $\frac{1}{2}$ Section 30, T.36N., R.60E., M.D.B.&M., is not stated in the decree, under Claim 00482. The map filed in support of Proof 00509 shows 83.25 acres of grain land within the N $\frac{1}{2}$ of Section 30. However, this number cannot be presumed to be accurate for several reasons. The first is that Proof 00509 was modified and the land within the N $\frac{1}{2}$ of Section 30 was omitted.³³ Secondly, Proof 00509 was not included in the decree and it cannot be assumed that Claim 00509 in its entirety was incorporated into Claim 00482. Finally, the sum of the acreages shown on the map (508.03 acres) as listed in Table I does not agree with the sum of the acreages listed under Claim 00482 (486.03 acres). The reason for this difference is unknown.

Table I.

Decreed Location, Claim 00482				Number of Acres shown on Map
Subdivision	Section	T.	R.	
SW $\frac{1}{4}$	18	36	60	160.00
W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$	18	36	60	1.00
W $\frac{1}{2}$ NW $\frac{1}{4}$	19	36	60	80.00
NE $\frac{1}{4}$	19	36	60	0
S $\frac{1}{2}$	19	36	60	65.15
N $\frac{1}{2}$	30	36	60	83.25
E $\frac{1}{2}$ NE $\frac{1}{4}$	25	36	59	38.63
E $\frac{1}{2}$ SE $\frac{1}{4}$	24	36	59	80.00
TOTAL				508.03

³² Transcript, pp. 67-71, Public Administrative Hearing before the State Engineer, May 24, 1995.

³³ Exhibit No. 16, Public Administrative Hearing before the State Engineer, May 24, 1995.

The State Engineer finds that the quantity of water proposed to be changed by Application 60426 is an essential component for a full understanding of the proposed change. After a review of the record, this quantity of water remains unknown. The State Engineer further finds that the approval of Application 60426 without specifying the exact diversion rate and annual duty, would have serious impacts on the distribution and regulation of the waters of Boulder Creek and Starr Creek, and threatens to prove detrimental to the public interest.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the action taken on and subsequent administration of Application 60426.³⁴

II.

The State Engineer is prohibited by law from granting an application to change where:

1. The proposed change conflicts with existing rights or
2. The proposed change threatens to prove detrimental to the public interest.³⁵

III.

Every application for a permit to change the point of diversion, manner or place of use of water already appropriated must contain such information as may be necessary for a full understanding of the proposed change, as may be required by the State Engineer.³⁶

IV.

The distribution of water on the Humboldt River and its tributaries is dependent upon return flows from upstream irrigated fields that are made available for diversion and use on downstream

³⁴ NRS 533.325.

³⁵ NRS 533.370.

³⁶ NRS 533.345.