

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

IN THE MATTER OF APPLICATION 62142 FILED TO)
CHANGE THE WATERS OF LAMOILLE CREEK HERETOFORE)
DECREED IN THE HUMBOLDT RIVER DECREE, ELKO)
COUNTY, NEVADA.)

RULING

4501

GENERAL

I.

Application 62142 was filed on May 20, 1996, by the Joe Sustacha Jr. & Son Ranch to change the point of diversion of 0.406 cubic feet per second (cfs) not to exceed 99 acre feet-seasonally (AFS), of the waters of Lamoille Creek, Elko County, Nevada, decreed under Proof 00406 of the Humboldt River Decree.¹ The use is for the irrigation, as decreed, of land located within the NE $\frac{1}{4}$ Section 31, T.33N., R.58E., M.D.B.&M. The proposed point of diversion (O.P. McDermott Ditch) is located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, T.32N., R.58E., M.D.B.&M. The existing point of diversion (Jesson Ditch) is located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 31, T.33N., R.58E., M.D.B.&M.²

II.

Application 62142 was timely protested by the USDA Forest Service on the grounds that:

The applicant proposes to transfer .406 cfs of Proof 00406 Bartlett Decree to a new point of diversion at O.P. McDermott Headgate NWNE Sec. 6 T32N., R.58E., MDB&M which is above the Powerhouse Picnic area. The ditch associated with this diversion runs through the picnic area. In the past the amount of water diverted by this facility has exceeded the capacity of the ditch and done considerable damage to the picnic area. We feel that any additional water assigned to this diversion will only compound the problem of ditch failure.

¹In 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.

²File No. 62142, official records in the Office of the State Engineer.

Therefore, the protestant requests that the application be denied and that an order be entered for such relief as the State Engineer deems just and proper.¹

FINDINGS OF FACT

I.

The Applicant (Sustacha) and the State Engineer have been involved in ongoing litigation since at least 1987, regarding the Applicant's diversions of water from Lamoille Creek, under the Humboldt River Decree. In a 1994 Court hearing, evidence was presented showing that on a particular day, Sustacha diverted an estimated 21.3 cfs through the O.P. McDermott Ditch. As a result, the Sixth Judicial District Court found that Sustacha diverted a quantity of water far in excess of what he was entitled to.³ The Court ordered that a headgate be installed that allows no more than 5.324 cfs to flow into the O.P. McDermott Ditch, which is 200% of the present water right Sustacha holds in the ditch.³ The State Engineer finds that the flooding of the ditch in the Powerhouse Picnic area was caused by repeated excessive diversions of water into the ditch. The State Engineer further finds that limiting the flow in the ditch to 5.324 cfs, as ordered by the Court, will prevent flooding in the future.

II.

Under Application 62142, Sustacha seeks to add 0.406 cfs to his existing decreed right of 2.662 cfs in the O.P. McDermott Ditch. That would bring the total water right in the ditch to 3.068 cfs, which is less than the 5.324 cfs that the new headgate allows to be diverted from Lamoille Creek. The State Engineer finds that the approval of Application 62142 will not exceed the headgate capacity. As a condition of approval, the State Engineer intends to require the installation of a measuring device equipped with a full time flow recorder. This will allow the water

³Order in the Matter of John Sustacha, et al., v. The State of Nevada, et al., Case No. 12221, Sixth Judicial District Court of Nevada, March 9, 1994.

commissioners to ensure that the correct quantity of water is diverted. The State Engineer finds that under these conditions, there would be no conflict with any existing rights.

III.

Application 62142 was filed in compliance with an Order Granting Relief issued by the Sixth Judicial District Court.⁴ The State Engineer finds that Application 62142 complies with the Court's Order and the approval of said Application is in the public interest.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter of this action.⁵

II.

The State Engineer is prohibited by law from granting an application to change the public waters of Nevada where:⁶

- A. The proposed use conflicts with existing rights; or
- B. The proposed use threatens to prove detrimental to the public interest.

III.

Because the Court-ordered headgate limits the flow in the O.P. McDermott Ditch to 5.324 cfs, the State Engineer concludes that no flooding will occur in the Powerhouse Picnic area, under normal operating conditions. It is the intention of the State Engineer and the water commissioners to control the diversions into the ditch by proper management of the new headgate, measuring device, and full time recorder.

⁴Order Granting Relief in the Matter of John Sustacha, et al., v. The State of Nevada, et al., Case No. 12221, Sixth Judicial District Court of Nevada, May 22, 1996.

⁵NRS Chapters 533 and 534.

⁶NRS 533.370.

IV.

The State Engineer concludes that the approval of Application 62142, with the condition that a measuring device and a full time recorder be installed, will not conflict with any existing rights nor will it threaten to prove detrimental to the public interest.

V.

The approval of Application 62142 will result in no water right remaining in the Jesson Ditch. The State Engineer concludes that the Jesson diversion structure must be removed and the ditch permanently blocked so that it is incapable of conveying any water in order to avoid any conflict with existing rights in Lamoille Creek.

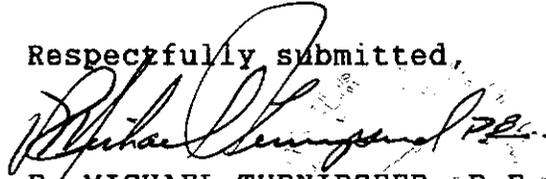
RULING

The protest to Application 62142 is hereby overruled and said Application is hereby approved subject to:

1. The installation of a measuring device equipped with a full time recorder, the design of which must be submitted to the State Engineer within 60 days of the date of this Ruling;
2. The measuring device and recorder must be installed and operating before any water is delivered to the O.P. McDermott Ditch for the 1997 irrigation season;
3. The Jesson headgate must be removed and the ditch permanently blocked so that it is incapable of conveying water before any water is delivered to the O.P. McDermott Ditch for the 1997 irrigation season;
4. Existing rights from Lamoille Creek, particularly the rights of the Westland Ranch which shares the O.P. McDermott Ditch;
5. A lockable headgate being installed at the point where the Jesson Ditch water (Proof 00406) will leave the O.P. McDermott to irrigate the Jesson field.

6. Any other conditions imposed by the Sixth Judicial District Court;
7. The payment of the statutory permit fees.

Respectfully submitted,



R MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 26th day of
February, 1997.