

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

IN THE MATTER OF APPLICATIONS 67295,)
67296 AND 67297, FILED TO CHANGE THE)
POINT OF DIVERSION OF THE PUBLIC)
WATERS OF KINGSTON CREEK AKA BIG SMOKY)
VALLEY CREEK HERETOFORE DECREED UNDER)
V-01527, V-02413, V-02414 V-02415,)
CERTIFICATE 367, AND V-02410, V-02411,)
V-02412, V-02416, CERTIFICATE 366 IN)
ADDITION TO PERMIT 23503, CERTIFICATE)
8294 ALL WITHIN THE BIG SMOKY VALLEY,)
NORTHERN PORTION (137-B) HYDROGRAPHIC)
BASIN, LANDER COUNTY, NEVADA.)

RULING
#5788

GENERAL

I.

Application 67295 was filed on March 1, 2001, by Young Brothers, a Nevada General Partnership, to change the point of diversion of 2.63 cubic feet per second (cfs), not to exceed 525.96 acre-feet annually (afa) of the waters of Kingston Creek (a.k.a. Big Smoky Creek) previously decreed under Proofs V-01527, V-02413, V-02414, and V-02415, Certificate 367.

The existing point of diversion is described as being located within the SW¼ NW¼ of Section 24, T.16N., R.44E., M.D.B.&M. The approval of Application 67295 would transfer the decreed points of diversion to a new location on Kingston Creek that is within the NW¼ NE¼ of Section 35, T.16N., R.43E., M.D.B.&M.

The existing manner and place of use are not being proposed for change and water will continue to be used for decreed purposes within a portion of Section 24, T.16N., R.44E., M.D.B.&M. The remarks section of the application states that the specific water right being selected for transfer is Certificate of Appropriation

367, with this Certificate issued for V-01527, V-02413, V-02414 and V-02415.¹

II.

Application 67296 was filed on March 1, 2001, by Young Brothers, a Nevada General Partnership, to change the point of diversion of 6.0 cfs, not to exceed 1,048.12 afa of the waters of Kingston Creek (a.k.a. Big Smoky Creek) previously appropriated under Permit 23503, Certificate 8294.

The existing point of diversion is described as being located within the SE¼ SW¼ of Section 15, T.16N., R.44E., M.D.B.&M. The approval of Application 67296 would transfer the existing point of diversion to a new site on Kingston Creek that is located within the NW¼ NE¼ of Section 35, T.16N., R.43E., M.D.B.&M. It was confirmed after examining the survey distance and bearing and the supporting water right maps that this point of diversion is identical to that described under Application 67295.

The existing manner and place of use are not being proposed for change and water will continue to be used for permitted purposes within a portion of Section 24, T.16N., R.44E., M.D.B.&M.²

III.

Application 67297 was filed on March 1, 2001, by Young Brothers, a Nevada General Partnership, to change the point of diversion of 1.74 cfs, not to exceed 347.24 afa of the waters of Kingston Creek (a.k.a. Big Smoky Creek) previously decreed under Proofs V-02410, V-02411, V-02412, V-02416, Certificate 366.

The existing point of diversion is described by the Applicant as being located within the NW¼ NE¼ of Section 29, T.16N., R.44E., M.D.B.&M. The approval of Application 67297 would transfer decreed points of diversion to a new site on Kingston Creek that

¹ File No. 67295, official records in the Office of the State Engineer.

² File No. 67296, official records in the Office of the State Engineer.

is located within the NW¼ NE¼ of Section 35, T.16N., R.43E., M.D.B.&M. It was confirmed that this point of diversion is identical to that described under Applications 67295 and 67296.

The existing manner and place of use are not being proposed for change and water will continue to be used for decreed purposes within a portion of Section 21, T.16N., R.44E., M.D.B.&M.³

IV.

Application 67295 was timely protested by the Kingston Management Association, Inc., on the following grounds.¹

The issuance of the change of diversion under application for water No. 67295, No. 67296 and 67297 (under temporary Permits 67484-T, 67485-T and 67486-T) are contrary to the public interest and a hearing is requested.

An additional protest was received from James L. Wood who states that:¹

Public interest has not been served by diverting any or all of the waters of Kingston Creek out of the natural channel at an illegal diversion point. Nevada State Engineer Order #1164, dated July 25, 2000 cites a cease and desist of any diversion of Kingston Creek (AKA Big Smoky Creek) located within the NW¼ NE¼ of Section 35 T.16N., R.43E, MDB&M. The act of diverting Kingston Creek waters, and effectively bypassing the residential and recreational properties in the Township of Kingston has, and will continue to, decrease property values along what is described on every private and public map and legal description as "Kingston Creek". By definition a creek contains water.

Diverting Kingston Creek waters from the natural channel has resulted in large-scale fish kills on numerous occasions. Many of the trout in Kingston Creek are provided by taxpayers through Department of Fish and Game stocking operations. Allowing all waters from Kingston Creek to remain in the natural channel until

³ File No. 67297, official records in the Office of the State Engineer.

they reach the approved, legal diversion points will have the long-term result of a much healthier ecosystem and harmonious community relations.

V.

Application 67296 was timely protested by Michael Hoffman who contends that:²

As a land owner along Kingston Creek, this application would divert the creek from its natural stream bed, into a pipe. This will lower the value of mine and many other's property, along with killing fish and the large trees that run along its banks. As the waters of Kingston Creek, after they flow through Kingston Village, flow to the Young Bros. Ranch, I see this application as needless.

The Kingston Management Association, Inc., also protested Application 67296 on grounds that were identical to those heretofore stated.²

VI.

Application 67297 was timely protested by James L. Wood and the Kingston Management Association, Inc., on grounds that were identical to their previous protests.³

VII.

The Kingston Town Board submitted protests to the subject applications after the statutory protest period had ended; therefore, the protests were filed for informational purposes only.^{1,2,3}

FINDINGS OF FACT

I.

Nevada Revised Statutes § 533.365(3) provides that it is within the State Engineer's discretion to determine whether a public hearing is necessary to address the merits of a protest to a water right application. As it will be developed in this ruling, similar applications and protest issues have been

considered during a previous public hearing.⁴ A transcript of this proceeding, in addition to the original exhibits is incorporated into the records for review of this matter.

A public hearing was scheduled for November 28, 2001, for review of Applications 67295, 67296 and 67297 and their related protests. Representatives of the Office of the State Engineer appeared at the designated time and place, only to be advised that a possible settlement was being considered. To provide time for additional discussion among the parties, it was agreed to postpone the scheduled hearing. This hope of a compromise was never realized and the opposing parties remain separated by key issues five years after the hearing was continued. These issues have been examined during previous hearings and meetings, to such a degree that additional information is not required to move forward with the subject applications and protests. The State Engineer finds that his existing records contain sufficient information to gain a full understanding of the issues before him and that a new hearing in this matter is not required.

II.

The Applicant holds the majority of the decreed water and permitted water rights on Kingston Creek in addition to five secondary streams and a single spring.⁵ The relative right to the use of the waters of these sources was determined through its formal adjudication by the State Engineer and the Third Judicial District Court, County of Lander. The adjudication process culminated with the issuance of the Kingston Creek Final Decree on

⁴ Public Administrative Hearing, June 14, 1979, official records in the Office of the State Engineer.

⁵ State Engineer's Water Right Database, February 13, 2007, official records in the Office of the State Engineer.

March 22, 1963.⁶ Once a stream has been decreed, water is distributed on a priority system, with first in time equating to first in water use. Under most circumstances, a senior irrigator must be served before water can be passed to a junior appropriator. The decreed irrigation rights proposed for transfer by the Applicant are junior in nature to Permit 45863, which is owned by the Town of Kingston.⁷ If the history of Permit 45863 is examined, it can be traced back through several abrogations, to its original base right, V-02435, which was granted a priority of 1863. Once the priority date for Proof V-02435 was established, it formed the priority date for any subsequent change permits issued by the State Engineer, including Permit 45863. This water right permit was issued for quasi-municipal purposes, for use within the Kingston Townsite and has a point of diversion that is downstream from that proposed by the Applicant. The State Engineer finds that the Town of Kingston holds the senior priority date on Kingston Creek, and that it is entitled to first use of its water in the manner prescribed under Permit 45863.

III.

A major change in the manner in which water was diverted to the Young Ranch occurred in 1986, when a large concrete diversion structure was constructed above the Town of Kingston. Prior to its construction, Kingston Creek water passed through the developed portion of the canyon, to the benefit of the Town of Kingston. Many of the residential parcels are near or adjacent to the creek, creating an attractive setting. When the Young Ranch diversion structure was built, a new path was created for the irrigation water. Instead of flowing down its natural channel,

⁶ Final Decree in the Determination of the Relative Rights to the Waters of Kingston Creek Nevada, in the Third Judicial District of the County of Lander, March 22, 1963, official records in the Office of the State Engineer.

⁷ File No. 45863, official records in the Office of the State Engineer.

the water was diverted into a pipeline that circumnavigates the townsite. Eventually, the pipe discharges its flow back into the creek, downstream from many of the property owners. Not all property owners are bypassed, and it has been alleged that after its return, a portion of the Applicant's water has occasionally been siphoned off by minor illegal diversions primarily for landscaping purposes.

While this new configuration is intended to increase the efficiency of the Applicant's use of Kingston Creek water, it created an adverse impact upon the Town of Kingston's senior water right. During the irrigation season, when water is being diverted to the Applicant's place of use, sufficient water must be allowed to pass unimpeded through the head gate to satisfy the water demands under Proof V-02435. It is also the Applicant's responsibility to maintain the diversion structure in proper order to minimize blockages of flow to the townsite. The State Engineer finds that if the subject applications are approved, the Applicant's main diversion structure on Kingston Creek must be operated in a manner that does not interfere with the flow of water to the Town of Kingston's senior decreed water right.

IV.

Over the years, the State Engineer has received letters from citizens that are critical of the Young Ranch's diversion of water in the Kingston Creek area.⁸ It is felt by some, that the Town of Kingston and downstream property owners, in addition to the Kingston Creek fishery are unfairly impacted by depleted stream flows, which they attribute to the Applicant.

In an attempt to resolve this problem a stipulation was signed on March 3, 1981, wherein the Young Brothers agreed to allow 1.40 cfs to pass through the Young diversion to the Town of

⁸ Kingston Creek Correspondence File, 1971 through 1991, official records in the Office of the State Engineer.

Kingston's point of diversion at all times. While it was hoped that the stipulation would be effective, an August 15, 1991, letter from the State Engineer's Elko office indicates that this was not the case. After citing several of the ongoing water distribution problems, the letter directs Ralph Young to permanently affix steel blocks to the bottom of the head gate to prevent it from being completely shut. In addition, Ralph Young was directed to keep the diversion structure free of debris. As evidenced by a June 17, 1997, field investigation, the Town of Kingston continued to experience distribution problems, directly attributed to the lack of proper upkeep of the diversion structure. It can be correctly stated, that this problem has continued, as evidenced by the allegations contained in the subject protests.

A permanent answer to the ongoing distribution problems is found in the enforcement of the terms of the Kingston Creek Final Decree and the provisions of the Nevada water law. Nevada Revised Statutes § 533.220 provides in part, from and after the filing of the order of determination in the district court, the distribution of water by the State Engineer or by any of his assistants shall at all times be under the supervision and control of the district court. Such officers and each of them shall, at all times, be deemed to be officers of the court in distributing water under and pursuant to the decree of the court. The State Engineer is empowered to require the installation of suitable head gates, measuring devices and/or recording devices as deemed necessary. The State Engineer may also appoint a water commissioner to oversee the allocation of water as set forth under the decree. The annual cost of the commissioner would be paid on a pro rata basis by the water right holders.⁹ The State Engineer finds that

⁹ NRS § 533.220.

he has sufficient authority to see that a proper distribution can and will be accomplished regarding the waters of Kingston Creek and its tributaries.

V.

Due to the cancellation of an earlier set of water right permits, the Young Ranch lost the right to appropriate water from its new diversion structure.¹⁰ The approval of the subject applications would correct this, by moving decreed and permitted water rights to a central diversion structure. As has been seen, these applications were timely protested, preventing the proposed transfer from occurring. To find immediate relief, the Applicant has filed temporary transfer applications that were approved and have now expired.¹¹ The State Engineer finds that at the time of this ruling, there are no active water right permits at the proposed point of diversion.

VI.

One of the primary benefits that the Applicant hopes to achieve through the approval of the proposed changes is a reduction in the amount of water that is lost through channel seepage and evaporation. Kingston Creek has many of the characteristics that are found in streams throughout central Nevada. Nearly all the runoff in the Big Smoky Valley is produced directly or indirectly by precipitation on the mountains, with maximum water running off in the spring or early summer. Most perennial streams are diverted to irrigation ditches or pipelines near the canyon mouths to carry water to croplands on nearby ranches.

¹⁰ File Nos. 47401, 47402 and 47403, official records in the Office of the State Engineer.

¹¹ File Nos. 67484-T, 67485-T, 67486-T, 67628-T, 67629-T and 67630-T, official records in the Office of the State Engineer.

Mountain streams generally have their maximum flow at the mountain front with a decrease occurring on the alluvial apron. It has been estimated that Kingston Creek loses approximately 1.0 cfs of its flow per mile of channel, once it begins to traverse the valley fill.¹² While this channel loss adds to the groundwater basin recharge, it clearly affects the decreed water available to the Young Ranch.

The move to the proposed point of diversion would allow the Applicant to reduce the seepage loss by piping the water across the areas of greater permeability. By avoiding these areas, the amount of water required to push the water forward to the Applicant's fields is reduced. From a water conservation and management view, the State Engineer finds that this would appear to be a positive transfer.

VII.

The Young Ranch is not solely dependent upon the flow of Kingston Creek for its irrigation water. Additional water is generated by several tributary streams that lie to the north of Kingston Canyon. The Kingston Creek Final Decree identifies these sources as Sheep Creek, Rock Creek, Frenchman Creek, Santa Fe Creek and Gilman Spring (Northern streams).⁶ The right to use water from these sources has been acquired through both the adjudication and permitting process. Pursuant to the Kingston Creek Decree and the terms under which the permits were issued, substantial head gates and weirs must be installed to facilitate the proper measurement, control and distribution of water. A similar requirement was made under a State Engineer's order that was issued on December 6, 1979.¹³ The State Engineer finds that

¹² Rush and Schroer, Water Resource Bulletin No. 1, Water Resources of the Big Smoky Valley, Lander, Nye and Esmeralda Counties, Nevada, United States Department of the Interior, Geologic Survey, 1970, p. 30.

¹³ State Engineer's Order No. 733, official records in the Office of the State Engineer.

all points of diversion that capture water for irrigation purposes from Kingston Creek, Sheep Creek, Rock Creek, Frenchman Creek, Santa Fe Creek and Gilman Spring must have continuous recording devices installed and maintained in operating order.

VIII.

Some complexity is found in the distribution of the waters of Kingston Creek and the northern streams. The Young Ranch has the option of diverting irrigation water from multiple surface water sources. During a good water year, it may be assumed that some irrigation water is derived from the northern streams. While the amount of water that they generate may not be adequate to sustain a crop during the entire growing season, they have some value during the late spring or early summer. It may also be assumed that during this time, water is also being captured at the main Kingston Creek diversion. If the maximum diversion rates under their decreed and permitted water rights are being taken at the Kingston Creek diversion, the ranch cannot exceed the limit of its combined water rights by taking additional water from the northern streams. Simply put, the total diversion rate measured at all decreed and permitted sources cannot exceed the Applicant's combined diversion rates. The State Engineer finds that the sum total of irrigation water that is captured by the Applicant from Kingston Creek, Sheep Creek, Rock Creek, Frenchman Creek, Santa Fe Creek and Gilman Spring at any point in the irrigation season, must not exceed the levels established by the Kingston Creek Decree and the State Engineer's permit terms.

IX.

The filing of Applications 67295, 67296 and 67297 was preceded by an earlier set of transfer permits that were filed during the 1970s by J. Chester Young. Permits 34444, 34445 and 34446 moved the same decreed base rights to the same point of

diversion found under Applications 67295, 67296 and 67297. Two separate protests were filed in opposition, one by a private citizen, the second by the Nevada Division of Fish and Game. In summary, it was alleged by the citizen that the approval of Applications 34444, 34445 and 34446 would in part, be contrary to the public interest, adversely impact the Kingston Creek fishery and the property values of the downstream parcel owners. The Nevada Department of Fish and Game limited its concerns to those relating to the continued health of the Kingston Creek's flora and fauna.¹⁴

To resolve the protest issues, a public hearing was held before the State Engineer on June 14, 1979.⁴ Information was received from the Applicant and Protestants, with the proceedings transcribed by a court reporter. Upon consideration of the evidence and transcript, a written ruling was signed on August 27, 1979, by State Engineer William Newman.¹⁵ It was the State Engineer's decision that the protest to the applications be upheld and said applications denied. An appeal to the denials was timely filed by J. Chester Young with the Third Judicial Court, County of Lander, the Honorable Judge Legarza, presiding, with the issue remanded back to the State Engineer for additional consideration of a select group of issues.¹⁶ In accordance with the remand order, State Engineer Morros, responded with a written ruling that overruled the protests and granted the permits.¹⁷ A second remand was issued by the Court, and with a new ruling submitted back to the Court. At this point, the State Engineer's approval of the

¹⁴ File Nos. 34444, 34445 and 34446, official records in the Office of the State Engineer.

¹⁵ State Engineer's Ruling No. 2776, September 28, 1982, official records in the Office of the State Engineer.

¹⁶ Notice of Petition for Judicial Review, September 19, 1979, Kingston Creek Decree Adjudication File, official records in the Office of the State Engineer.

¹⁷ State Engineer's Ruling No. 2740, official records in the Office of the State Engineer.

permits stood, and the Applicant was allowed to transfer his decreed water rights upstream to the new point of diversion. Having been the subject of two administrative hearings, three State Engineer's rulings and two court remand actions, the State Engineer finds that the written record, findings of fact, conclusions, and legal opinions, which emerged from these actions, can be applied to Applications 67295, 67296 and 67297 and the subject protests.

X.

Protestants Wood and Hoffman contend that the approval of Applications 67295, 67296 and 67297 is not in the public interest and will reduce the property value of downstream parcels. An answer to the land value question is provided by State Engineer Morros in his ruling of September 28, 1982, and by Judge Legarza in his decision of October 12, 1982.¹² State Engineer Morros stated that:

The Young Applications were represented as necessary in the best interests of conserving water and to reduce seepage and evaporation losses of 60 to 70 percent in the creek channels lower reaches. The record further set forth the substantial cost involved in the new diversion works and delivery system to the place of use. The public interest identified here is the protection of private property rights as represented by decreed water rights and the conservation of the resource and efficient use of the limited resource in the best interests of these rights and the resource. This interest was weighed against the interest of property owners who purchased subdivided lots within the Kingston development in reliance on the stream flow being maintained without the benefit of water rights.

Judge Legarza, in his written decision made a finding that:

...it is noticed that the water law of the State of Nevada is one of prior appropriation (Jones v. Adams 19 Nev. 78 (1875)) and there are no statutes or case law in this state providing for the preservation or protection the

value of land adjoining a running stream by maintaining the stream flow. NRS 533.030(1) provides that "subject to existing rights, all such water may be appropriated for beneficial use as provided in this chapter and not otherwise." (Emphasis added). To date, no beneficial use has been declared for preservation of land values.¹²

An examination of the State Engineer's water rights database confirmed that there are no active water rights held in the Protestants' names. For clarity, it must be stated that the Kingston Management Association, Inc., (Protestant), which is a non-profit corporation, is not associated with the Town of Kingston, (Proof V-02435), which is a town board established pursuant to NRS chapter 269. Currently, there are no water rights approved or decreed on Kingston Creek for strictly in-stream flows. Under these circumstances, the State Engineer agrees with the positions taken by State Engineer Morros and Judge Legarza and finds that the protest issue specific to property values can be overruled.

XI.

Protestants Wood and Hoffman also assert that the approval of the subject applications would have an adverse effect upon the Kingston Creek fishery that exists downstream from the proposed point of diversion. Guidance is again provided by State Engineer Morros, who found:

...there is no record of the establishment of a water right for the maintenance of in-stream flows for fishery purposes on Kingston Creek, he later added, ...the conservation of the resource, based on the record, simply overwhelmed any consideration of a detrimental effect on a questionable fishery that was not supported by established water rights.

Judge Legarza's decision followed a similar path with the finding that:

...there is no basis in Nevada water law for the conclusion that there is a public interest in maintaining a quantity of water in a stream when the party or entity desiring to maintain the flow has no appropriative right.¹²

It has been confirmed that neither of the Protestants hold water rights on Kingston Creek. It was further determined that there are no wildlife or in-stream flow permits downstream of the Applicant's proposed point of diversion. The State Engineer finds that the protest issue relating to the Kingston Creek fishery has been previously addressed and can be overruled.

CONCLUSIONS

I.

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

II.

The State Engineer is prohibited by law from granting a permit under a change application that requests to appropriate the public waters where:¹⁹

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

¹⁸ NRS chapter 533.

¹⁹ NRS § 533.370(5).

III.

A water right application may be filed to change the point of diversion of water already appropriated. Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate that is considered to be in good standing. The decreed and permitted base rights that are being proposed for transfer are considered to be in good standing and are available for change.

With the exception of the Town of Kingston's right to use the first 1.40 cfs of water, there are no decreed or permitted Kingston Creek water rights owned by outside parties, downstream from the proposed point of diversion. The State Engineer concludes that the approval of Applications 67295, 67296 and 67297 will not conflict with existing water rights on Kingston Creek or what has been referred to as the northern streams provided that adequate diversion control structures and continuous recording devices are installed, maintained and properly monitored.

IV.

Regarding the issue of public interest, the State Engineer agrees with the conclusion made by State Engineer Morros in his ruling of September 28, 1982, that:

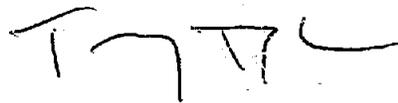
...it is expressly concluded that there is no detrimental effect on the public interest and welfare by the granting of the Young Applications and further that the granting of the applications will provide a substantial conservation and efficient use of the limited resource which is in the public interest.

RULING

The protests to Applications 67295, 67296 and 67297 are hereby overruled and Applications 67295, 67296 and 67297 are approved subject to:

1. existing water rights,
2. the payment of the statutory permit fees, and
3. the installation of continuous recording devices that have been approved by the State Engineer as to their model type and location. These devices will be installed at locations determined by the office of State Engineer, the cost of their installation; monitoring and continued maintenance will be borne by the water right holders.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/MB/jm

Dated this 8th day of

October, 2007.