

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

IN THE MATTER OF APPLICATIONS 47795)
AND 47796 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF STONE CABIN CREEK)
WITHIN THE STONE CABIN VALLEY)
HYDROGRAPHIC BASIN (149), NYE)
COUNTY, NEVADA.)

RULING
5219

GENERAL

I.

Application 47795 was filed on March 14, 1984, by Colvin and Son to appropriate 0.05 cubic feet per second (cfs) of water from Stone Cabin Creek. The proposed manner of use and place of use is for stock watering purposes within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T.4N., R.48E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 34. Item #4(b) of the application form further defines the number and kind of animals as 1,617 head of cattle.¹

II.

Application 47796 was filed on March 14, 1984, by Colvin and Son to appropriate 0.05 cfs of water from Stone Cabin Creek. The proposed manner of use and place of use is for stock watering purposes within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, T.4N., R.48E., and NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 34, T.4N. R.48E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 34. Item #4(b) of the application form, further defines the number and kind of animals as 1,617 head of cattle.²

III.

Applications 47795 and 47796 were timely protested by Stone Cabin Ranch Partnership on the following grounds:

¹ File No. 47795, official records in the Office of the State Engineer.

² File No. 47796, official records in the Office of the State Engineer.

This water derives from springs which rise to the surface and are all located on the Stone Cabin deeded land owned by the protestors and has been continuously utilized year round for the purpose of irrigation and domestic and livestock watering since 1893 by the Cliffords, and the waste waters from this creek, at the expense of the Cliffords have already been diverted once to a point on public domain and used for stock-watering purposes in this grazing area from January 1st to and through December 31st (year-round). Also use by wild-life has been continuous and will remain so as long as protestors are utilizing this source for watering domestic livestock. Protestors have invested time and capital over a long period of years in order to assure a sustained and/or enhanced yield of water from this area to insure an existing and successful operation. Protestors declare that approval of this application to Colvin and Son for their purposes could prove detrimental beyond control and even fatal to their operation. We also stress that wild-life, owned by other entities than the applicant could suffer greatly.

FINDINGS OF FACT

I.

Applications 47795 and 47796 both request appropriations of water from Stone Cabin Creek for stock watering purposes. The remarks section of each application states that it is the applicant's intention to capture what is termed the spring run-off in small reservoirs.^{1,2} The term "spring run-off" can be interpreted to describe either the spring freshet or tail water produced by upstream irrigation. For the purposes of this ruling, the State Engineer finds that this term refers to tail, waste or run off water derived from the protestant's upstream irrigation.³

II.

Applications 47795 and 47796 request appropriations of water from Stone Cabin Creek at points of diversions which are downstream from the irrigated land held by the Stone Cabin

³ See Report of Field Investigation, dated December 11, 2002, File No. 47795, official records in the Office of the State Engineer.

Ranch.^{1,2,4} Much of the land, which is cultivated by this ranch, is irrigated by surface water. The surface water is derived from several large springs, which have been utilized by the ranch for many years.⁵ An unknown portion of the water that is placed upon the ground leaves the irrigated fields as run-off or tail water. This water is conveyed by a manmade ditch which courses south to the points of diversion requested under the subject applications. The State Engineer finds that Applications 47795 and 47796 request new appropriations of water from a source, which is dominated by tail or wastewater from upstream irrigation.

III.

Waste water is stated by the Nevada Supreme Court to consist of surplus water running off from irrigated ground, not consumed by the process of irrigation, or which the irrigated land would not take up.⁶ If tail water is present in sufficient quantity to provide a beneficial use of this water by a downstream user, a request to appropriate this water can be made to the State Engineer. If this request is approved and a water right permit issued, it allows the permittee to appropriate tail water only when it is available. This limitation provides an answer to that portion of the protest, which contends that the approval of the subject applications would prove detrimental to the successful operation of the Stone Cabin Ranch. The issuance of these permits does not place any obligation on the upstream water right holder to maintain his irrigation to satisfy a downstream use derived from wastewater. The right that a claimant to the use of wastewater does acquire was summarized by the Nevada Supreme Court:⁶

These authorities are all to the effect that a claimant to waste water acquires a temporary right to

⁴ Nevada Division of Water Resources Water Right Filing Township/Range Plats, T.4N., R.48E., official records in the Office of the State Engineer.

⁵ Nevada Division of Water Resources Database, Active Irrigation Permits and Certificates, Basin 149, official records in the Office of the State Engineer.

⁶ Gallio v. Ryan. 52 Nev. 330,344, 286 Pac. 963 (1930).

whatever water escapes from the works or lands of others, and which cannot find its way back to its source of supply; that such use of the water does not carry with it the right to any specific quantity of water; nor the right to interfere with the water flowing in the ditches or works of others lawfully appropriating it.

In no instance, would the Stone Cabin Ranch be prevented from changing its irrigation practices and operations solely to preserve the flow of tail water to the applicant. If permits are granted for Applications 47795 and 47796, the State Engineer finds that their approval would in no way obligate the Stone Cabin Ranch to maintain a flow of tail water in Stone Cabin Creek to service these permits.

IV.

The report of field investigation generated by the November 7-8, 2002, site inspection states that a flow rate of 0.25 cfs was measured from Stone Cabin Creek at a point in the vicinity of the proposed points of diversion. This number may represent an above average flow rate due to the fact less acreage would be under irrigation at this time of year, allowing more water to pass directly to the main ditch. Any variations in stream flows which occur downstream from the irrigated land are not being considered, since the appropriation of tail water is strictly a "use if its available" proposition. The fact that 0.25 cfs of water was present at this time of year, does however increase the probability that some degree of beneficial use for stock watering can be achieved at this source. The State Engineer finds that the stream flow measurement taken on Stone Cabin Creek demonstrates that it has the capability of producing sufficient water to meet the stock water use applied for under Applications 47795 and 47796.

V.

One of the contentions brought forth in the protest to Applications 47795 and 47796 is the claim that the approval of

these applications would create a negative impact on wildlife that relies upon Stone Cabin Creek. Under NRS 533.367, before an appropriation of water can be approved from a surface water source, the applicant must ensure that sufficient water will remain at the source to continue a customary use of the water by wildlife. The State Engineer finds, given the measured flow rate of Stone Cabin Creek and the protection afforded under NRS 533.367, that the occasional watering of cattle as proposed under Applications 47795 and 47796 would not adversely impact the use of this source for wildlife purposes.

VI.

Nevada Revised Statute 533.503 requires that any applicant who submits a water right application for stock watering purposes on public land must be legally entitled to place livestock on the public lands for which the permit is sought. Information obtained from the Tonopah field office of the Bureau of Land Management, indicates that Colvin and Son are recognized as the co-permittee of the federal range allotment containing the proposed points of diversion.^{1,2} The State Engineer finds that the applicant is entitled to place livestock upon the federal grazing allotment that contains the respective points of diversion and places of use described under Applications 47795 and 47796.

VII.

The records of the Office of the State Engineer contain an accounting of the history of water right filings as they pertain to a particular water source. An examination of the water right records relating to Stone Cabin Creek indicates there are no active water right applications, permits or claims of vested rights, downstream from the applicant's proposed points of diversion.^{3,4} The State Engineer finds that the approval of Applications 47795 and 47796 would not conflict with existing water rights.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁸

- 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.

III.

The approval of Applications 47795 and 47796 would allow the recognized federal range permittee to appropriate water from a source, which is not claimed or permitted under rival existing or pending water rights. The State Engineer concludes that under this scenario, the approval of Applications 47795 and 47796 would not conflict with existing water rights.

IV.

The issue of unappropriated water must be viewed with the understanding that the source of water requested for appropriation is comprised almost entirely of tail or run-off water. A recent flow measurement taken in the general vicinity of the proposed points of diversion suggests that sufficient tail water is present in Stone Cabin Creek to support the applicant's proposed manner of use. The State Engineer concludes that the waters of Stone Cabin Creek are available for capture and use by the applicant, but this represents the limit and extent of the right.

⁷ NRS chapter 533.

⁸ NRS § 533.370(3).

v.

The State Engineer concludes that any appropriation of water from this source would be conditioned with the requirement that sufficient water must remain to support a customary use of this source by wildlife. This conclusion is made with the assumption that the protestant is under no obligation to maintain a flow of tail water solely for the benefit of other users, including wildlife.

RULING

The protests to the subject applications are overruled and Applications 47795 and 47796 are approved with the following conditions:

- A. the combined appropriation is limited to run off or tail water not to exceed 0.05 cfs for the watering of 1,617 head of cattle;
- B. the payment of the statutory permit fees;
- C. any existing water rights that appropriate water from the subject stream system.

Respectfully submitted,


HUGH RICCI, P.E.
State Engineer

HR/MB/jm

Dated this 19th day of
February, 2003.