

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

IN THE MATTER OF APPLICATION 70969 )  
FILED TO APPROPRIATE THE WATERS )  
OF SMITH CREEK FROM THE WHITE )  
RIVER VALLEY HYDROGRAPHIC BASIN )  
207, WHITE PINE COUNTY, NEVADA. )

**RULING**

**# 5732**

**GENERAL**

**I.**

Application 70969 was filed March 22, 2004, by the Douglas W. Carson Trust, dated October 19, 1990, to appropriate 1.2 cubic feet per second of water from Smith Creek. The point of diversion is located in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 31, T.13N., R.61E., M.D.B. &M. The water is to be used for irrigation and domestic purposes. The place of use is described as being within portions of SW $\frac{1}{4}$  SE $\frac{1}{4}$  and SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 30 and portions of the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  and the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 31, all within T.13N., R.61E., M.D.B.&M. The period of use is from March 1 to October 15. Application 70969 proposes to expand the applicant's existing place of use issued under Permit 7251 on the east side of Highway 6, by increasing the place of use by approximately 20 acres.<sup>1</sup>

**II.**

Application 70969 was timely protested by Thomas E. Rosevear on the grounds that the waters of Smith Creek are tributary to the White River and that Mr. Carson is diverting all of the water from Smith Creek into two storage ponds located on the applicant's property. The protestant also contends that the channel of Smith Creek has been changed and the water sinks into the gravel channel bottom.<sup>1</sup>

**III.**

An informal field investigation was conducted on May 17, 2005, by staff of the Division of Water Resources.<sup>2</sup> The observations made during this visit are presented

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<sup>1</sup> File No. 70969, official record in the Office of the State Engineer.

<sup>2</sup> Report of Field Investigation No. 1067, filed June 28, 2005.

within State Engineer's Field Investigation No. 1067. On the date of the field investigation the commingled waters of Ellison and Smith Creek were reaching the White River near the protestant's property. The day prior to the field investigation, a very wet spring storm had passed through the region adding to the already high spring runoff.

The source of water for Permit 7251, Certificate 1330 is from Smith Creek and this permit is currently held in the name of the Douglas W. Carson, Trustee Douglas W. Carson Trust and is the sole source of water for the Hay-U Ranch. Permit 7251 was issued September 14, 1925, for 1.2 cfs for the irrigation of 120 acres. Certificate 1330 was issued February 11, 1928, for 0.4187 cfs, for the irrigation of 41.87 acres.

The major source of water to Smith Creek is derived from a group of springs located approximately 3,000 feet upstream of Mr. Carson's Hay-U Ranch. The 2004 – 2005 water year was above normal in terms of precipitation and runoff. This year, because of the above normal precipitation, the waters of Smith Creek were being commingled with a large volume of water from the Ellison Creek drainage. Ellison Creek originates northwest of the Hay-U Ranch in the Indian Garden Mountains to the west, the Corduroy Range to the southwest, the Shellback Range to the north and the White Pine Range to the east. A large earthen dam and reservoir captures Ellison Creek above the Gardner Ranch and at the time of the field investigation, the reservoir was at or near capacity, with approximately 20 cfs discharging to an unlined channel from the uncontrolled spillway located on the reservoir's southeast side. It was explained by the applicant that the Civilian Conservation Corps probably constructed this dam in the 1930's. There is no record of this structure in the Division of Water Resources' statewide dam inventory. The surface area of the reservoir, as delineated on the Badger Hole Spring 7.5 minute quadrangle, is approximately 35 acres in size.

### **FINDINGS**

#### **I.**

Mr. Rosevear's protest contends that Smith Creek is considered tributary to the White River and that Mr. Carson on occasion has diverted the entire flow of the springs into a gravel channel. This diversion causes the water to infiltrate into the streambed

preventing it from flowing downstream to the White River. The protestant claims that the loss of flow creates an adverse effect on his existing water rights. Mr. Rosevear is the owner of record of Permit 13031, Certificate 4550. Certificate 4550 was issued for irrigation of 194.481 acres from the White River and tributaries and from Williams Creek and tributaries from January 1 to April 1 and October 1 to December 31. The question of whether the waters of Smith Creek are tributary to the White River as it exists upstream of the protestant's property is addressed in several letters and a map contained within the records of the State Engineer. Correspondence dated May 13, 1930, and June 24, 1930, to Peter Pastorino, the original applicant of Permit 7251 and Rosevear and Berryman, respectively, state that Smith Creek and Ellison Creek were not considered tributary to the White River. A field investigation of Application 3237 was performed on July 18, 1915,<sup>3</sup> because of protest issues. The report concluded that Smith Creek was not tributary to the White River on most years, but that during years of surplus water it would reach the river. Also, a map depicting the irrigated acreage and appurtenant water rights on the White River and other drainages, drawn by Hugh Shamberger in 1936, indicates that Smith Creek is not tributary to the White River (Attachment 1). The State Engineer finds that Smith Creek was not included in the White River Decree<sup>4</sup> because it was not considered to be tributary to the White River.

## II.

Correspondence dated May 9, 1930, in Permit 7251, Certificate 1330, indicates that the original applicant, Peter Pastorino had sufficient water from Smith Creek to irrigate additional lands that were not certificated under Permit 7251. The State Engineer finds that there is sufficient water at the source to irrigate an additional 33.8 acres. The State Engineer further finds that based on State Engineer's Field Investigation No. 1067 there are years that have above normal stream flow available to be placed to beneficial use.

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<sup>3</sup> File No. 3237, official record in the Office of the State Engineer.

<sup>4</sup> "In the Matter of Determination of the Relative Rights In and To the Waters of White River and its Tributaries, in White Pine County, Nevada", In the District Court of the Seventh Judicial District of the State of Nevada, in and for White Pine County, December 4, 1922.

**III.**

The protestant claims that the channel of Smith Creek has been realigned and has adversely impacted his existing water rights by claiming that Smith Creek is tributary to the White River. The State Engineer finds that Smith Creek is not tributary to the White River and there are no other rights on Smith Creek downstream of the proposed point of diversion to have a detrimental impact on.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>5</sup>

**II.**

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:<sup>6</sup>

- 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.**

Based on the records in the Office of the State Engineer, Smith Creek is not tributary to the White River. Furthermore, the Hay-U Ranch is the lowest user on Smith Creek, so there can be no adverse effect on downstream users. The State Engineer concludes that Smith Creek is not tributary to the White River and there are no downstream rights to have an adverse effect on.

**IV**

The State Engineer concludes that based on State Engineer's Field Investigation No. 1067 there is unappropriated water at the source in years of above normal

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<sup>5</sup> NRS chapter 533.

<sup>6</sup> NRS § 533.370(5).

precipitation, resulting in increased flows that can be placed to beneficial use as proposed under the subject application.

**RULING**

The protest to Application 70969 is hereby overruled and Application 70969 is hereby approved subject to existing water rights, the payment of the statutory permit fee and the following conditions:

1. The period of use will be from March 1 to October 1 of each year;
2. The diversion rate will be limited to 0.34 cfs for the irrigation of 33.8 acres within the described place of use; and
3. A measuring device must be installed.

Respectfully submitted,



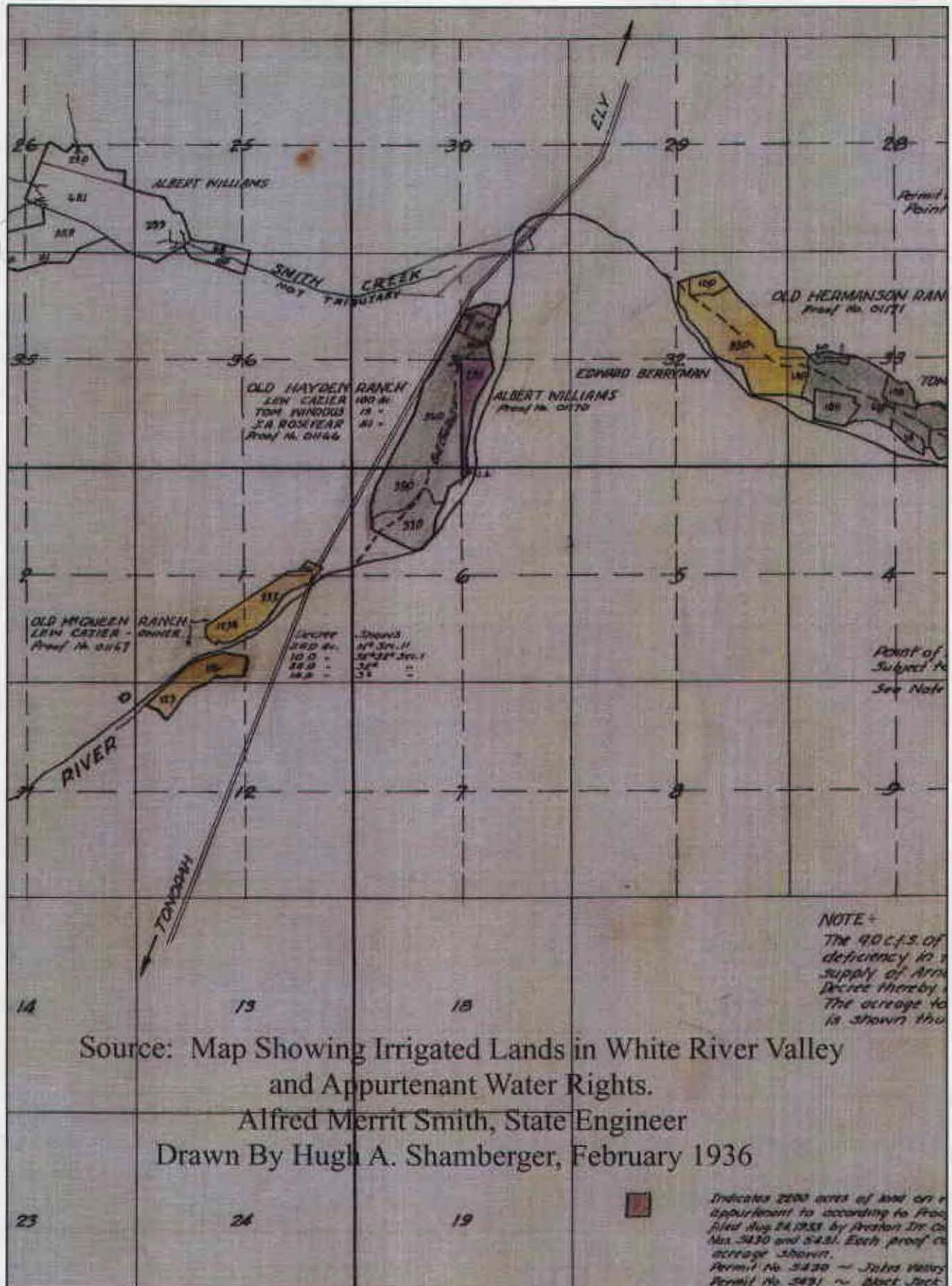
TRACY TAYLOR, P.E.  
State Engineer

TT/KH/jm

Dated this 2nd day

of May, 2007.

# Attachment 1



Source: Map Showing Irrigated Lands in White River Valley and Appurtenant Water Rights.

Alfred Merrit Smith, State Engineer

Drawn By Hugh A. Shamberger, February 1936

Indicates 2200 acres of land on a...  
 application to according to proof...  
 filed Aug 24, 1933 by Preston Dr. Co...  
 Nos. 5430 and 5431. Each proof of...  
 acreage shown.  
 Permit No. 5430 - John Henry...  
 Permit No. 5431 - Black Jack...