

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

IN THE MATTER OF APPLICATIONS)
73262 AND 74699 FILED TO)
APPROPRIATE THE PUBLIC WATERS OF)
KINGSTON CREEK AKA BIG SMOKY CREEK)
WITHIN THE BIG SMOKY VALLEY-)
NORTHERN PART HYDROGRAPHIC BASIN)
(137-B), LANDER COUNTY, NEVADA.)

RULING

#5935

GENERAL

I.

Application 73262 was filed on September 21, 2005, by the Town of Kingston to appropriate 2.0 cubic feet per second (cfs) of the waters of Kingston Creek for irrigation purposes within 9.6 acres of land located within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 36, T.16N., R.43E., M.D.B.&M. The Applicant describes this acreage as being within a public park comprised of trees, grass and shrubs. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 36.¹

II.

Application 73262 was timely protested on September 1, 2006, by Ralph Young on the grounds that Kingston Creek was fully appropriated leaving no water available for additional appropriations.¹

III.

Application 74699 was filed on August 30, 2006, by the Town of Kingston to appropriate 1.66 cfs of the waters of Kingston Creek for wildlife and habitat purposes within the reach of the Kingston Creek service area. The proposed point of diversion is described as

¹ File No. 73262, official records in the Office of the State Engineer.

being located within the SW¼ NW¼ of Section 36, T.16N., R.43E. M.D.B.&M. Application 74699 was not protested.²

FINDINGS OF FACT

I.

The primary user of Kingston Creek is the Young Brothers Ranch, which holds title to the majority of the stream system's decreed and permitted water rights.³ For many years, the town of Kingston and the Young Brothers Ranch have been at odds over the distribution of Kingston Creek water during the irrigation season. The Office of the State Engineer has on occasion received written complaints and formal protests from the town and citizens who contend that the Young's irrigation practices create an adverse impact on the flows of Kingston Creek. Several attempts have been made to resolve this problem, including a stipulation that was signed by the Town of Kingston and the Young Brothers Ranch. Under the terms of this agreement, the town of Kingston receives the first 1.3 cfs of the flow that passes through the Ranch's main diversion structure on Kingston Creek. To insure that this happens, the head gate has been modified to allow this amount of pass through water to continue downstream for use by the town.

In accordance with the Nevada Revised Statutes (NRS), surface water distribution is based upon a priority system that is intended to protect senior appropriators. Decreed water rights represent the most senior water filings on Kingston Creek as set forth by the Final Judgment and Decree that was issued by the Third Judicial Court in and for the County of Lander on

² File No. 74699, official records in the Office of the State Engineer.

³ Nevada Division of Water Resources Water Right Database, June 24, 2008, official records in the Office of the State Engineer.

March 22, 1963.⁴ The order of the right of the respective appropriators to the waters of Kingston Creek and its tributaries, and the order in which they are entitled to divert and use water is determined by the date of the priority of the right as set forth and determined by this decree. The first in order of time according to the date of the relative priority is the first in order of right, and so on down the line from the date of the first to the date of the last priority.⁵

The original decreed water rights established by the Kingston Creek Decree that were issued for appropriations of Kingston Creek water are as follows:

<u>Kingston Creek Decree Claim No.</u>	<u>cfs</u>
V-02410	1.6
V-02435	1.4
V-02443	0.82
V-02415	<u>2.23</u>
Total	6.05 cfs

The right to appropriate Kingston Creek water is not limited to water rights that were established by the decree. Additional appropriations of surface water occur under permitted rights that were approved after the decree. The following table identifies these water rights:⁶

⁴ Final Decree and Judgment in the Matter of the Relative Rights to the Waters of Kingston Creek, Third Judicial Court, in and for the County of Lander, official records of the Office of the State Engineer.

⁵ Humboldt River Water Distribution, Part I - Problems, Nevada Division of Water Resources, Elmo J. DeRicco, State Engineer, April, 1964.

⁶ Nevada Division of Water Resources Hydrographic Abstract Basin 137-B, June 27, 2008, official records in the Office of the State Engineer.

<u>Permit No.</u>	<u>cfs</u>
23503 (flood water)	6.0
25778	2.8
25779	2.8
26284	2.1
26285 (flood water)	2.1
30138	2.8
67296	<u>6.0</u>
Total for direct diversion	16.5 cfs
Total for flood	8.1 cfs

In addition, 192.0 acre feet annually is held under a total combined duty under Permit 24994, which abrogated Kingston Creek Decreed right V-02443, and Permit 24995. Both of these permits allow the Nevada Department of Wildlife to impound Kingston Creek water in Groves Lake.⁶ Combining the decreed and permitted water rights into a single group results in a total combined diversion rate equal to 22.55 cfs. Most of the original proofs and permits listed above have been abrogated through the approval of subsequent change permits, but no additional water has been created. Therefore, the State Engineer finds that the original 22.55 cfs has remained constant and comprises the streams committed resource, excluding the flood rights.

II.

Kingston Creek has been gauged by the United States Geological Survey (USGS) since 1967, at a measuring point that is described as Kingston Creek, below Cougar Canyon. From this data, the USGS has compiled a mean monthly flow, expressed in cubic feet per second.⁷

<u>Mean of Monthly Discharge (cfs)</u>			
Jan.	4.7	Jul.	13.0
Feb.	4.5	Aug.	9.4
Mar.	5.1	Sep.	7.1
Apr.	7.4	Oct.	6.2
May	17.0	Nov.	5.6
Jun.	22.0	Dec.	5.0

Using a committed resource equivalent to 22.5 cfs, the State Engineer finds that June represents the only month when the mean monthly flow of Kingston Creek meets this level.

III.

It is the Applicant's plan to irrigate 9.6 acres of park land under Application 73262. The Kingston Creek Decree recognizes that varied amounts of water are required for different crop classifications. Class A represented by Harvest Crop is entitled to 4.0 acre feet per acre per season, with Class B or meadow pasture receiving 2.0 acre feet per acre per season.⁴ The irrigation of a park and its grassy areas would resemble more of a pasture setting, as compared to a cultivated alfalfa field. Accordingly, the lower duty of 2.0 acre feet per acre would seem reasonable. Applied over the

⁷ USGS Surface Water Data for USA: USGS Surface Water Monthly Statistics, Nevada surface water Site No. 10249280, obtained from the USGS-Nevada Water Resource Center website, June 27, 2008.

9.6 acres described on the application, the irrigation use proposed under Application 73262 would require 19.2 acre feet per year which equates to a diversion rate of 0.026 cfs.

The forty year record of monthly flows lists only 35 months where the flow of Kingston Creek exceeded 20.0 cfs with a maximum flow of 104.2 cfs attained in May of 1984. Based upon this accurate and reliable record, Permit 73262 would be in priority approximately 7% of the time, if the flood and storage permits are not considered. If these permits are added to the equation, the percentage falls to 3%.

The State Engineer issues a water right permit with the expectation that it will be placed to its intended beneficial use within a reasonable period of time. In the case of Application 73262, its junior nature and the fact that Kingston Creek is unable to exceed the 20.0 cfs ceiling 93% of the time makes a timely beneficial use unlikely. Under these circumstances the State Engineer finds he agrees with the Protestant that there is insufficient water to support the manner of use proposed under Application 73262 over a sustained period of time.

IV.

A major difference can be found between Application 73262 and Application 74699, which centers upon their respective manner of use. Application 73262 proposes to divert water from Kingston Creek to irrigate a small town park. From a practical sense, this manner of use cannot be supported by Kingston Creek, which is fully committed during most irrigation seasons.

The manner of use described under Application 74699, is not dependent upon a regular delivery of Kingston Creek water. It is meant to take advantage of those infrequent times, when the flow of the stream briefly

exceeds its total committed resource level, including the flood rights. The State Engineer finds that the non-consumptive, instream flow requested under Application 74699 can be considered for approval.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁸

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁹

- 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.

In the matter of Application 73262, the State Engineer concludes that Kingston Creek is incapable of providing sufficient unappropriated water to support its manner of use over the entire irrigation season.

IV.

In the matter of Application 74699, the State Engineer concludes that the unappropriated water issue is moot, since it proposes a non-consumptive, instream use.

V.

Based upon its non-consumptive nature and its junior ranking, the State Engineer concludes that the approval

⁸ NRS chapter 533.

⁹ NRS § 533.370(5).

of Application 74699, will not adversely affect existing surface water rights on Kingston Creek.

RULING

The protest to Application 73262 is upheld and Application 73262 is denied due to the lack of unappropriated water.

Application 74699 is approved subject to:

1. the payment of the statutory permit fee;
2. all senior existing water rights that appropriate surface water from Kingston Creek; and
3. The condition that during those years when it is in priority, no actual diversion of water from Kingston Creek can occur under Permit 74699.

Respectfully submitted,


FOR TRACY TAYLOR, P.E.
State Engineer

TT/MB/jm

Dated this 9th day of
February, 2009.