

IN THE MATTER OF APPLICATION NO. 12059)
FILED BY J. J. BALLARD & ROY PERSSON : RULING
TO APPROPRIATE THE WATER OF WHITE'S CREEK.)

Application No. 12059 was filed October 22, 1947 by J. J. Ballard and Roy Persson to appropriate 0.2721 c.f.s. of the waters of White's Creek for irrigation purposes. The proposed point of diversion is given as being within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, T. 36 N., R. 38 E. and the place of use, consisting of 27.21 acres is described as an irregular shaped tract of land in the E $\frac{1}{2}$ NE $\frac{1}{4}$ Section 29, T. 36 N., R. 38 E.

On December 17, 1947 a protest was filed against the granting of this application by W. S. Jones and Beatrice E. Jones. The basis of the protest was

"that there is no surplus water and no unappropriated water in said source and that all of the waters of said source are owned and held under vested right, and that protestants are the owners of a vested right to the use of the waters of said source".

On February 18, 1948 a field investigation on this application was made by Edmund Muth, Deputy State Engineer.

On February 18, 1949 a hearing was held on the application. Appearances were as follows:

For the State Engineer - Hugh A. Shamberger,
Assistant State Engineer.

For the Applicants - A. V. Tallman,
Civil Engineer

For the Protestant - Orville B. Wilson,
Attorney at Law,
Elko, Nevada.

Transcript of such hearing, together with exhibits filed are on record in the office of State Engineer.

Protestant Jones is the owner of about 44 acres of river bottom land in portions of the W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 20 and E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 19, T. 36 N., R. 38 E. Mr. Jones stated that this land was formerly owned by Mrs. James Marr and was inherited by Henry Merchant. Mr. Jones purchased the property from Helen DeLoam Merchant in 1936. Mr. Jones stated that he leased the property in 1933 and since that time has used the waters from White's Creek for irrigation purposes.

He was of the opinion that the property had a vested water right from this source.

The records of the office of State Engineer show that this land has a decreed water right from the Humboldt River. In the Bartlett Decree on page 92, the following decreed water right is set forth:

Claimant - Mrs. James Marr
 Source - Humboldt River
 Ditch - Water Wheel

<u>Priority</u>	<u>Diversified Pasture</u>	<u>Location</u>	<u>Length of Season</u>	<u>Duty of Water c.f.g.</u>	<u>Acre-Feet</u>
1886	30.41	NWSW 20-36-38	3/15 4/28	.247	22.81
1886	5.21	NESE 19-36-38	3/15 4/28	.042	3.91
1886	9.02	SESE 19-36-38	3/15 4/28	.073	6.77
1886	1.78	SWSE 19-36-38	3/15 4/28	.014	1.34

It is thus seen that the land, or at least the greater portion thereof, that Mr. Jones purchased from Mrs. Merchant and on which he has been using White's Creek water, has a vested water right for diversified pasture from the Humboldt River.

WHITE'S CREEK:

In order to fully understand this matter, a brief description of White's Creek describing the existing water rights is herewith given:

White's Creek, sometimes known as Cross Creek; as White's Stream and as Water Canyon, has its source in the Sonoma Range and flows northwesterly into the City of Winnemucca. Originally, and up to a few years after the turn of the century, the creek flowed through the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 29, T. 36 N., R. 38 E. in a northwesterly direction to a point between Bridge and Daud street and thence parallel to these streets to the Humboldt River. Mrs. Salisbury testified that the creek was in back of her home which was located at 333 Bridge Street. In subsequent years certain channel changes were made which will be delineated later in this ruling.

Certain recorded water rights exist on this stream and although such rights are above the proposed point of diversion under Application No. 12059, it is felt that a listing of such rights is germane to this ruling. These rights are as follows:

Proof of Appropriation No. 01046 filed September 2, 1911 by Humboldt County in which claim was made to a vested right sufficient to irrigate 13 $\frac{1}{2}$ acres of land. The point of diversion was shown as being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 29, T. 36 N., R. 38 E.

and the place of use in the NE NW of said Section 29. This proof made claim to a priority of 1893. In late years no use has been made under this right.

Certificate No. 432 issued under Permit No. 2062 in name of John E. Schreiner in the amount of 0.299 c.f.s. for the irrigation of 29.99 acres of land within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 28, T. 36 N., R. 38 E. The point of diversion is within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32 of said township and range.

Permit No. 4174 in name of Harry Warren to appropriate 0.02 c.f.s. for irrigation and domestic purposes. The point of diversion is in the NE SW Section 29 and the place of use in Lots 9, 10, 11, 12 and 13, Block 17 and Lots 13 and 14, Block 16, Upper Winnemucca, and being in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 29, T. 36 N., R. 38 E.

Application No. 5793 was filed October 7, 1919 by the Winnemucca Water and Light Company to appropriate 10.0 c.f.s. of water from a shaft tunnel or well developed in the bed of water (White's) Canyon. The proposed point of diversion is in the SW NW Section 12, T. 35 N., R. 38 E. No action has been taken on this application.

Permit No. 6950 in name of Winnemucca Water and Light Co. was granted February 18, 1949 to appropriate 1.0 c.f.s. for public utility purposes. The point of diversion is within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 12, T. 35 N., R. 38 E. This permit is to cover newly developed underground water in the vicinity of White's Creek Channel and such developed water to commingle with the waters of White's Creek. The Winnemucca Water and Light Company is the predecessor of the California Pacific Utilities Company.

In addition to the above rights, the California Pacific Utilities Company, through their predecessor in interest, have no doubt the first priority on this stream. Correspondence and records in the office of State Engineer indicates this and that such priority would date back to about 1881. No official record has ever been filed in this office of such right. The second priority on the stream was that of Humboldt County as set forth in Proof of Appropriation No. 01046.

CHANNEL CHANGES:

As aforesaid, the alignment of the original channel of White's Creek was northwesterly across the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 29, T. 36 N., R. 38 E. running between Bridge and Band Street to the Humboldt River. In about 1893 Mr. Joseph Germain, the predecessor of Humboldt County under Proof of Appropriation No. 01046, constructed a ditch to convey the waters of White's Creek to the 13 $\frac{1}{2}$

acres located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 29. This land was later occupied by the hospital. The point of diversion was within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 29. The terminus of the main ditch was near the NE Corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 29. At this point the ditch forked to different portions of said tract of land.

At a later date, and to eliminate the creek channel from the central part of town, the ditch which conveyed water to the Humboldt County tract was enlarged and extended. The extension was from a point near the NE Corner of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 29 northeasterly to near the NE Corner of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and thence northwesterly across the Southern Pacific tracks following generally down East and Hurst streets to the Humboldt River. The date of this change was not fixed at the Winnemucca hearing. Several of the witnesses for Protestant Jones stated it was made about at the time of the "bank robbery", and when the Western Pacific was constructing through Winnemucca.

In about 1945 or 1946 another channel change was made in order to make way for development of "Upper Winnemucca". A new ditch was constructed which takes the flow of the creek out just below the power house and runs northeasterly and being parallel to the railroad tracks to the northerly line of said Section 29; thence west to the intersection of the existing channel. It was understood that provisions would be made to satisfy the existing rights below the new take-out. It is from this new channel that Applicants Ballard and Persson desire to divert water.

THE ISSUES:

The question of whether or not a permit should be issued under Application No. 12059 depends on whether there are any existing rights below the proposed point of diversion. Protestant Jones testified that he has been using the waters of White's Creek subsequent to 1933. As he is the only user below this point, we must determine if he, through his predecessors in interest, has an established vested right from White's Creek, i.e. a right initiated prior to March 1, 1905.

It would appear that if the first channel change which conveyed the water easterly of the Humboldt County property was made prior to March 1, 1905, there might be a possibility of the Jones' property having a vested right of some of the early spring flow, provided there was a method of conveying the water across an outer slough shown on the 1913 map filed in support of the Marr proof and which was the basis of the decreed right from the Humboldt River heretofore mentioned. No testimony was presented and no record found of any such method of conveying the water across this slough.

We find in examining Proof of Appropriation No. 01040 of Humboldt County this language:

"It was the intention to appropriate all water flowing down White's Stream and to irrigate as much land as the same would water, but until the last few years there was only enough water to irrigate eight acres. In 1909, 1910 all of said 13 1/2 acres were irrigated for feed; however the sagebrush was not cleared off the extra 5 1/2 acres".

This proof was filed in 1911. It would appear that there was little, if any, water passing the Humboldt County point of diversion except possibly the early spring flow.

As heretofore stated, witnesses for Protestant Jones testified that the first channel change was made about the time of the "bank robbery" in Winnemucca and during the construction of the Western Pacific Railroad. In order to ascertain whether this change was made prior to March 1, 1905 we looked through the issues of the newspaper that was being published in Winnemucca during this period. We found in the September 19, 1900 issue of the "Silver State" an account of the robbery of the First National Bank at Winnemucca. We extended our research to the files of the Humboldt County Clerk (Winnemucca then being an unincorporated town) and found in Book H Page 146 under date of July 6, 1908 the following statement:

"The Petition of Residents and Tax-payers of the town of Winnemucca, Nevada, praying that Cross Creek in its course through the town of Winnemucca, be declared a public nuisance by the Board, was read and considered by the Board, whereupon, M. S. Bonnefield appeared before the Board and duly made objection to the granting of said petition, and thereafter, said matter was laid over for further consideration."

It would thus appear that the actual change in the course of the channel was made subsequent to July 1908. In a letter dated Nov. 19, 1943 from Henry P. Bork, Superintendent of Streets, he stated as follows:

"This creek (meaning water canyon) originally flowed through the main part of the city and about 1910 a ditch was dug to carry this water around the outskirts of the city - - - -".

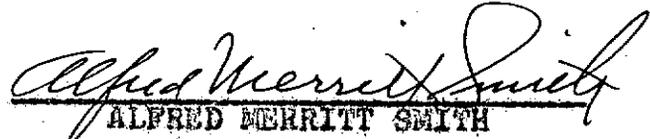
It therefore appears obvious to us that the channel change was made sometime between 1908 and 1910.

From the reasons above, it appears obvious to us that the property now owned by Mr. Jones does not have a water right out of White's Creek.

The protest against the granting of a permit under Application No. 12059 is herewith overruled and a permit subject to existing

rights will be granted applicants upon payment of the statutory fee for issuance of same.

Respectfully submitted,


ALFRED MERRITT SMITH
State Engineer

Dated this 4th day of August, 1949.

Note: A plat showing the various physical features discussed in the above ruling is herewith attached.

Humboldt River and sloughs
are as shown on 1913 map
filed in support of claim of
vested right from Humboldt
River by Marr.

Figures represent acreage
given decreed right

Scale 1" = 600'

T. 36 N., R. 38 E

