

IN THE MATTER OF APPLICATIONS NOS.
12670 TO 12673 INCLUSIVE AND 12770
IN NAME OF JACK G. HUBBARD TO APPRO-
PRIATE WATER FOR IRRIGATION AND STOCK-
WATERING PURPOSES, NYE COUNTY, NEVADA.

RULING

This ruling is concerned with five applications to appropriate water by Jack G. Hubbard. Three of the applications (Nos. 12670, 12671 and 12672) are for irrigation purposes and two applications (Nos. 12673 and 12770) are for stockwatering purposes. The locale of these applications is in northeastern Nye County, just south of the Eureka-Nye County line and lying in the southern portion of T. 14 N., R. 51 E. and the northerly portion of T. 13 N., R. 51 E. The description of these applications, giving the date of filing, point of diversion, place of use, purpose and the names of protestants follows:

157A
Application 12670 filed Oct. 4, 1948 to appropriate 0.50 c.f.s. of the waters of Snowball Spring for the irrigation of 15 acres. The proposed point of diversion is in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 34, T. 14 N., R. 51 E. Said application protested Feb. 28, 1949 by A. G. McBride and on Mar. 31, 1949 by Arambel & Etchaverry.

Application 12671 filed Oct. 4, 1948 to appropriate 0.333 c.f.s. of the waters of Snowball Spring No. 1 for the irrigation of 15 acres. The proposed point of diversion is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 34, T. 14 N., R. 51 E. Said application protested Feb. 28, 1949 by A. G. McBride and on Mar. 31, 1949 by Arambel & Etchaverry.

155A
Application 12672 filed Oct. 4, 1948 to appropriate 0.25 c.f.s. of the waters of Snowball Spring No. 3 for the irrigation of 10 acres. The proposed point of diversion is in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 35, T. 14 N., R. 51 E. Said application protested Feb. 28, 1949 by A. G. McBride and on Mar. 31, 1949 by Arambel & Etchaverry.

155A
Application 12673 filed Oct. 4, 1948 to appropriate 0.50 c.f.s. of the waters of Snowball Spring No. 4 for the watering of 150 head of cattle and 15 horses. The proposed point of diversion is in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 32, T. 14 N., R. 51 E. Said application protested Feb. 28, 1949 by A. G. McBride and on Mar. 31, 1949 by Arambel & Etchaverry.

155A
Application 12770 filed Dec. 18, 1948 to appropriate 0.333 c.f.s. of the waters of Silver Springs for the watering of 150 head of cattle and 15 horses. The proposed point of diversion is in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 2, T. 13 N., R. 51 E. Said application protested Feb. 28, 1949 by A. G. McBride and on Mar. 31, 1949 by Arambel and Etchaverry.

On or about June 23, 1949 a field investigation was made by Hugh A. Shamberger, Assistant State Engineer.

On September 27 and 28, 1950 a hearing was held on the above numbered applications. In addition, the hearing covered certain applications in the names of John F. & Bernice E. Kincaid and Murlyn M. Madden, the locale of which were in the same general vicinity as the Hubbard applications and were protested by the same parties who protested the Hubbard applications. Appearances were as follows:

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

For the Applicants - John Sexton, Attorney at Law,
Austin, Nevada

For the Protestants - Orville R. Wilson, Attorney at Law,
Elko, Nevada - Appearing for protestant,
A. G. McBride.

- Morley Griswold, Attorney at Law, Reno, Nev.
Appearing for protestant, Bertrand Arambel
and Pete Etchaverry.

During the hearing a number of witnesses testified, and for the purpose of the record are herewith listed:

For the Protestants

A. G. McBride
George L. Dugan
Martin Hochquet
Mrs. Emily Schaefer
Harold Schaefer
Amelia Segura
Bertrand Arambel
Isador Sara

For the Applicants

Frank Swain

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

The area in general:

As heretofore stated, the hearing held in connection with the Hubbard applications, the subject of this ruling, also covered the Kincaid applications within the Cottonwood, Indian and Willow Creek drainage and the Madden applications in the Indian and Willow Creek area. The testimony presented, in general, applied to the area as a whole; therefore brief statements as to the various ownerships and range operation are germane to this ruling.

It appears from the testimony presented and from the records in the office of State Engineer, a man by the name of John Williams owned both the Snowball and Willow Creek ranches for a number of years prior to the 1908-1914 period. Testimony was given to the effect that in 1908 John Williams owned the property and in 1914 the properties were owned by Leandro Oroz.

Between the years 1908 and 1914 Williams sold to Toni Henriques; Henriques sold to Ora Lovell and Lovell sold to Leandro Oroz. Whether or not these transactions applied to both the Snowball and Willow Creek ranches is uncertain, although our records indicate such transactions on the Snowball ranch. In any event, the records show Leandro Oroz owned both the Snowball and Willow Creek ranches in 1914.

On October 15, 1917 Leandro Oroz (Willow Creek Livestock Co.) sold all of his interest in Willow Creek ranch and Snowball ranch, together with all water rights located thereon and used in connection with the said ranches, to Martin Hachquet, John Ardans and Julian Juanche. Our records indicate the following water rights were transferred:

| | | | |
|------------|------|------|--------------------------|
| Permit No. | 3075 | - | Twin Spring |
| " | " | 3076 | - Sheep Spring |
| " | " | 3077 | - Pine Spring |
| " | " | 3078 | - Double Spring |
| " | " | 3079 | - Rock Spring |
| " | " | 3080 | - Mahogany Spring |
| " | " | 3081 | - Waste Water Willow Cr. |

Also, Proof of Appropriation No. 01444 on Snowball Spring and Proof of Appropriation No. 01326 on Willow Creek.

On October 3, 1918 Julian Juanche assigned his interest to Martin Hachquet.

On January 14, 1921 Martin Hachquet and John Ardans, doing business as the Willow Creek Livestock Company, assigned a one-half interest in the Willow Creek and Snowball ranches and water rights originally obtained from Leandro Oroz to Nazareth Hachquet, Jean B. Hachquet, Peter Hachquet and John Hachquet. In addition, the deed transferred a one-half interest in the following water rights obtained by the Willow Creek Livestock Company in 1918:

| | | | |
|------------|------|------|---------------------|
| Permit No. | 5035 | - | Martin Spring |
| " | " | 5036 | - Rock Spring |
| " | " | 5037 | - Buck Spring |
| " | " | 5038 | - Dry Lake Well |
| " | " | 5039 | - White Rock Spring |
| " | " | 5040 | - Couge Spring |
| " | " | 5041 | - Horse Spring |

We have little information as to subsequent transfers but according to the testimony, it appears that in 1923 the properties were divided, with John Ardans taking the Willow Creek ranch and range appurtenant thereto to the north, and the Hachquet Brothers taking the Snowball ranch and southerly range. In 1925 Martin Hachquet sold out to his brothers. It appears that when the property was divided John Ardans took the following six spring:

Permit 3075 - Twin Spring
" 3076 - Sheep Spring
" 3077 - Pine Spring
" 3081 - Waste Water Willow Cr.
" 5039 - White Rock Spring
" 5041 - Horse Spring

and the Hachquet brothers kept the following:

Permit 3078 - Double Spring
" 3079 - Rock Spring
" 3080 - Mahogany Spring
" 5036 - Rock Spring
" 5037 - Buck Spring
" 5038 - Dry Lake Well
" 5040 - Couge Spring

In 1932 Martin Hachquet acquired full interest in the Snowball ranch and the water rights that went with that ranch.

On January 20, 1944 Martin Hachquet and wife assigned the Snowball ranch (NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 35, T. 14 N., R. 51 E.) and the seven water rights together with range rights to William H. and Gailon A. Bell. This transfer also included certain property in Elko County (See McBride Exhibit A).

In January of 1945 William H. Bell and wife assigned their interests to Gailon A. Bell (See McBride Exhibit C).

On September 26, 1945 Gailon A. Bell and wife assigned to A. O. McBride. This assignment included the Snowball ranch, water permits Nos. 3078, 3079, 3080, 5036, 5037, 5038, and 5040, together with range rights (See McBride Exhibit B).

Shortly after the division between John Ardans and the Hachquet Brothers in about 1923, John Ardans sold the Willow Creek ranch, water rights and range rights to four parties listed in the transcript as being Hiram and Pete Cameno, Mike Indiano and another. In 1928 Emma Schaefer became the owner of this property and lived there with her son, Harold, until 1943 when said property was sold to Pete Carreca who sold in about the same year to Bertrand Arambel.

The map accompanying this ruling shows the location of the stream, water rights and range area.

Manner of Range Use:

John Williams was the owner of the Willow Creek and Snowball Creek ranches prior to 1908. He operated the stage line from Eureka to Hot Creek. Witness Dugan testified that Williams ran horses on the meadows around Willow Creek and Snowball Creek ranches and that there were, at one time, three or four hundred head of horses on the range. In addition, Williams ran cattle; the witness stating that when Williams sold out he very probably had about 200 head. Witness Swain testified that Williams had a few cattle - fifteen or twenty. Witness Hachquet stated that Williams had a few livestock - horses and cows.

In 1914 Leandro Oroz purchased both the Willow Creek and Snowball ranches and placed sheep on the range. Witness Hachquet testified that when he purchased from Oroz in 1917 he bought 4700 sheep from him and that Oroz sold some 2000 sheep to a Greek. It was his opinion that Oroz was running about 6000 sheep just prior to selling the property. The witness stated that between 1917 and 1923 they had between 6000 and 9000 head of sheep and from 30 to 50 cows. He described his range operations about as follows: He lambled along the foothills as far north as Deep Well, sometimes going into Eureka County. After lambing, the sheep ranged in the Willow Creek mountains (shown on the map as the Antelope Range). Their ranging operations apparently covered the whole mountainous area including the drainage area to Cottonwood, Indian, Willow and Snowball Creeks and extending westward from the summit of Antelope range. In the fall the sheep would be brought down to the Willow Creek and Snowball Creek ranches and were kept there as long as the feed lasted. When snow came the sheep moved southward towards Stone Valley and in the spring trailed northward to the lambing grounds as the snow receded.

In 1923 the range was divided with John Ardans taking the northerly portions and the Hachquet Brothers taking the south. Apparently the dividing line was along Willow Creek. The range operation was about the same as before with the exception that the Ardans and Hachquet Brother's sheep were handled separately. During this period the Hachquet Brothers were running about 3500 sheep out of Snowball.

Shortly after the division of the Willow Creek and Snowball Creek ranch properties, John Ardans sold the Willow Creek ranch to Hiram and Pete Cameno, Mike Indiano and another, and in 1928 Emma Schaefer purchased the Willow Creek properties. We fail to find any information as to the range operation between the 1924-28 period; however, there is testimony to the effect that the range was fully used. In 1928, following purchase by Emma Schaefer, some 2000 head of sheep were operated from the Willow Creek ranch. In the fall and winter it appears the sheep were run out in the flats, towards Deep Well and Moody Mountain. In the spring the sheep were

run close to the mountains, lambing below the Willow Creek ranch and as soon as weather permitted were taken to the hills and ranged on Cottonwood Creek, the head of Indian Creek, and on the Willow Creek drainage. In 1943 the properties were sold to Pete Carreca who ran about 2400 head of sheep and who shortly thereafter sold to Bertrand Arambel.

Following the division of the properties in 1923, the Hachquet Brothers and Martin Hachquet operated in about the same manner as before. The sheep were taken south in the fall of the year, when snow conditions allowed, and followed the snow back in the spring. They lambed at Snowball and when weather conditions permitted, were taken to the higher range in the Antelope mountains.

On the Snowball Creek range it appears that there was a period prior to when Martin Hachquet sold to Bell that this range was leased to Pete Carreca. When Bell acquired the property he leased to Arambel. After purchase by McBride, the range has been leased to Arambel on a year to year basis. The use of the range area by Arambel was somewhat different than formerly, as Arambel brought sheep in from the north and utilized this range in the late spring, summer and fall. The sheep were taken southward with the snow through Dry Lake, Sand Springs area, and sometimes towards Stone Cabin area.

It appears to us from the testimony offered that the range area on the watersheds of Cottonwood, Indian, Willow and Snowball Creeks has been continuously utilized from sometime prior to 1914 to the present. Due to the many changes in ownership and operation, such range use may not have utilized the range to its fullest capacity at all times. It also appears that stockwatering conditions are generally good and there is ordinarily more than enough water available. During dry years installation of troughs at several sources is necessary. It is our opinion that customary range use has been established, sufficiently to utilize the range.

Water Rights:

The recorded water rights in this area in the order of their priority are as follows: The following seven applications, which were perfected, were filed by Leandro Oroz on August 14, 1914:

Application No. 3075 to appropriate the waters of Twin Spring in about the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 28, T. 15 N., R. 51 E. Certificate No. 489 was issued Dec. 11, 1919 in sufficient amount to water 2000 sheep between April 1 and November 1 of each year.

Application No. 3076 to appropriate the waters of Sheep Spring in about the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 21, T. 15 N., R. 51 E. Certificate No. 488 was issued December 11, 1919 in sufficient amount to water 2000 sheep between April 1 and November 1 of each year.

Application No. 3077 to appropriate the waters of Pine Spring in about the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 28, T. 15 N., R. 51 E. Certificate No. 487 was issued December 11, 1919 in sufficient amount to water 2000 sheep between April 1 and November 1 of each year.

Application No. 3078 to appropriate the waters of Double Springs in about the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 33, T. 15 N., R. 51 E. Certificate No. 486 was issued December 11, 1919 in an amount sufficient to water 2000 sheep between April 1 and November 1 of each year.

Application No. 3079 to appropriate the waters of Rock Spring in about the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 33, T. 15 N., R. 51 E. Certificate No. 485 was issued December 11, 1919 in an amount sufficient to water 2000 sheep between April 1 and November 1 of each year.

Application No. 3080 to appropriate the waters of Mahogany Springs in about the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29, T. 14 N., R. 51 E. Certificate No. 484 was issued December 11, 1919 in an amount sufficient to water 2000 sheep between April 1 and November 1 of each year.

Application No. 3081 to appropriate the waters of Willow Creek (waste water) in about the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 32, T. 15 N., R. 53 E. Certificate No. 483 was issued December 11, 1919 in an amount sufficient to water 7000 sheep between January 1st and December 31st of each year.

At the time of the above filings, T. 15 N., R. 53 E. was unsurveyed; therefore, the location may not conform exactly to the legal subdivisions since the township has been surveyed. It appears from our records that A. G. McBride is the present owner of the water rights as evidenced by Certificates Nos. 486 (Double Spring); No. 485 (Rock Spring); and No. 484 (Mahogany Spring). The balance of the seven water rights mentioned above are apparently owned by Bertrand Arambel.

Proof of Appropriation No. 01326 was filed August 8, 1914 by Leandro Oroz wherein a vested right is claimed for sufficient water of Willow Creek for the irrigation of 20 acres of land with a priority of 1884. Also, claim of vested right is made for water for stockwatering and domestic purposes. The point of diversion is given as being within approximately the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 24, T. 14 N., R. 51 E. Our records indicate this proof is now owned by Bertrand Arambel.

Proof of Appropriation No. 01444 was filed December 31, 1915 by Leandro Oroz wherein a vested right is claimed on the waters of Snowball Springs for the irrigation of about 15 acres of land with a priority of prior to 1905. Claim of vested right is also made for stockwatering purposes. The point of diversion is placed in T. 14 N., R. 51 E. Our records indicate this claim of vested right is now owned by A. G. McBride.

Application No. 4128 was filed August 25, 1916 by Chas. W. Williams to appropriate the waters of Cockalorum Spring for irrigation and stockwatering purposes. The point of diversion was given as about the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 23, T. 15 N., R. 51 E. Said application was approved for 0.06 c.f.s. for the irrigation of 6 acres of land. All proofs were subsequently filed, but due to the failure of permittee to file a cultural map, no certificate has ever been issued. Said permit was assigned July 7, 1925 to Ross Parker and on March 27, 1930 by Ross Parker and wife to Emma Schaefer and her son, Harold Schaefer. With this transfer, the Parkers also assigned all their range rights as claimed under a range map submitted by them which covered most of Townships 14, 15 and 16 North, Ranges 51 and 52 East and the eastern tier of sections in Townships 14, 15, and 16 North, Range 50 East. We have no record as to whether this water right and claimed range were transferred to Carreca and by Carreca to Arambel.

On April 29, 1918 the Willow Creek Livestock Company (Martin Hachquet and John Ardans) filed seven applications to appropriate water for stockwatering purposes. Permits were granted in 1918 and later certificates of appropriation were issued. The locale of some of these water rights are several miles eastward and others are a number of miles southward from the area being considered here. However, since they were mentioned at the hearing, a brief description is herewith given. The certificates were all in sufficient amounts to water 5500 sheep between May 1st and December 1st.

| <u>App. No.</u> | <u>Cert. No.</u> | <u>Name</u> | <u>Pt. of Diversion</u> |
|-----------------|------------------|-----------------|--|
| 5035 | 533 | Martin Spring | SW NW Sec. 23, T. 10 N., R. 54 E. Uns. |
| 5036 | 534 | Rock Spring | NW NE Sec. 17, T. 12 N., R. 53 E. " |
| 5037 | 535 | Buck Spring | SE SE Sec. 26, T. 14 N., R. 53 E. " |
| 5038 | 536 | Dry Lake Well | NW SE Sec. 17, T. 11 N., R. 53 E. " |
| 5039 | 537 | White Rock Spr. | NW SW Sec. 13, T. 11 N., R. 53 E. " |
| 5040 | 538 | Couge Spr. | NW NE Sec. 2, T. 13 N., R. 53 E. " |
| 5041 | 539 | Horse Spr. | NE NW Sec. 11, T. 13 N., R. 53 E. " |

As near as we can ascertain, Certificate No. 533 issued under Permit No. 5035 on Martin Spring was transferred to J. P. Jacobsen who later sold to Fermeri Espinol.

It appears from McBride Exhibits A-B-C, that he is the owner of Certificates 534 (Rock Spring); 535 (Buck Spring); 536 (Dry Lake Well) and 538 (Couge Spring). It also appears that Bertrand Arambel owns Certificates Nos. 537 (White Rock Spring) and 539 (Horse Spring).

A. G. McBride is also the owner of the following water applications for watering 1200 sheep at each source:

| <u>App. No.</u> | <u>Source</u> | <u>Location</u> |
|-----------------|--------------------|-----------------------------------|
| 7795 | Snowball Spring #4 | NE NE Sec. 32, T. 14 N., R. 51 E. |
| 7796 | Snowball Spring #5 | SE SW Sec. 33, T. 14 N., R. 51 E. |
| 7797 | Snowball Spring #6 | NW SE Sec. 9, T. 13 N., R. 51 E. |
| 7798 | Snowball Spring #7 | NW NW Sec. 16, T. 13 N., R. 51 E. |
| 7799 | Snowball Spring #8 | SW SW Sec. 31, T. 14 N., R. 51 E. |
| 7800 | Snowball Spring #9 | SW NE Sec. 30, T. 14 N., R. 51 E. |

These applications were filed June 30, 1926 by E. P. Carville and informally protested by Geo. A. and Wm. J. Potts. No action was ever taken and on June 29, 1949 said applications were transferred to A. G. McBride. At the time of filing the applications, Mr. Carville was, we understand, attorney for the Nachquet Brothers.

From our investigations and knowledge of the area, it appears that the applications, with the exception of Nos. 7799 and 7800, are located within the range use area of the Snowball ranch operations. Applications Nos. 7799 and 7800 are, according to our map, located westerly of the Antelope range summit and may be in conflict with existing rights.

Patented Land:

The only patented land in the area being considered here lies within T. 14 N., R. 51 E. These lands are as follows:

In 1930 a patent was issued to Nettie M. Parker on a 160 acre homestead covering the following land: N $\frac{1}{2}$ NE $\frac{1}{4}$ Section 10 and N $\frac{1}{2}$ NW $\frac{1}{4}$ Section 11, T. 14 N., R. 51 E. This land is located on Indian Creek and apparently now owned by the Kincaids. According to the testimony, in about 1932 or 1933 a man by the name of Cobb owned this property. Subsequently he sold to Dick Walker who later sold to the Kincaids. No evidence was submitted to the effect that at any time the owner of this Indian Creek property ever ran any range stock nor ever claimed any range rights.

In 1932 a homestead patent was issued to Harold Schaefer covering the S $\frac{1}{2}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$ Section 23, T. 14 N., R. 51 E. This land was supposedly intended to cover the irrigated and meadow pasture lands on Willow Creek. As heretofore stated, in 1914 Leandro Oroz, predecessor of Harold Schaefer, filed Proof of Appropriation No. 01326 wherein claim of vested right was made on the waters of Willow Creek for irrigation, stockwatering and domestic purposes. It appears that the land was not described properly and should have been located in Section 24 rather than Section 23. Just recently Arambel filed under the "Color of Title Act" in an attempt to gain title to lands in Section 24 within which the meadows, buildings, ponds, etc. lay.

In about 1940 a 40 acre soldiers additional homestead was patented to Martin Hachquet covering the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 35, T. 14 N., R. 51 E. Apparently a mistake in description occurred here insofar as the described lands apparently do not cover the buildings and some of the meadow lands on Snowball Creek now owned by McBride. Within the past year Mr. McBride filed under the "Color of Title Act" on the N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 34; the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 35, T. 14 N., R. 51 E. In 1915 Leandro Oros, predecessor of McBride, filed Proof of Appropriation No. 01444 wherein claim of vested right is made on the waters of Snowball Springs for irrigation and stockwatering purposes.

Just recently a 160 acre homestead application was granted to Leland C. Easley consisting of the N $\frac{1}{2}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ NE $\frac{1}{4}$ Section 34, T. 14 N., R. 51 E. Mr. Easley has filed Application No. 12416 to appropriate 0.2 c.f.s. of the waters of Main Cottonwood Creek for the irrigation of 20 acres of land.

In addition to the above patented lands there are now three homestead and desert land entries pending before the Bureau of Land Management. These are as follows:

In about 1949 a desert land entry was filed by the Kincaids covering the SW $\frac{1}{4}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ Section 24, T. 14 N., R. 51 E. and the N $\frac{1}{2}$ S $\frac{1}{2}$ Section 19, T. 14 N., R. 52 E. Some of this land applied for includes the meadow hay and pasture lands, the buildings, etc. on Willow Creek now claimed by Arambel. Bernice Elaine Kincaid filed Application No. 13274 to appropriate 1.0 c.f.s. of the waters of Willow Creek for irrigation of 80 acres within the land applied for.

In about 1948 Marilyn M. Madden filed for a 160 acre homestead covering the NE SW, N $\frac{1}{2}$ SE and SE NE Section 22, T. 14 N., R. 51 E. This land lies on Willow Creek about 1 $\frac{1}{2}$ miles westerly of the Willow Creek ranch. Mr. Madden filed Application No. 12614 to appropriate 0.2 c.f.s. of the waters of Pine Springs (a tributary of Willow Creek) for the irrigation of 20 acres.

In about 1948 Jack C. Hubbard filed a land application covering the N $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 34; S $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 35, T. 14 N., R. 51 E. This land is located on Snowball Creek. Mr. Hubbard filed Applications Nos. 12670, 12671 and 12672 for irrigation purposes. The McBride meadow hay and pasture lands and buildings are apparently located on the lands applied for by Hubbard.

The Issues:

Section 63, Chap. 140, Statutes of 1913 (Sec. 7946 NCL 29) provides in part as follows:

"It shall be the duty of the State Engineer to approve all applications made in proper form where all fees, as in this act provided, have been paid, which contemplate the application of water to beneficial use, and where the proposed use or change does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. - - - - -

But where there is no unappropriated water in the proposed source of supply, or where its proposed use or change conflicts with existing rights, or threatens to prove detrimental to the public interests, it shall be the duty of the state engineer to reject said application and refuse to issue the permit asked for."

Section 2, Chapter 201, Statutes of 1925 (1925 Stockwatering Act) provides as follows:

"Whenever one or more persons shall have a subsisting right to water range live stock at a particular place, and in sufficient numbers to utilize substantially all that portion of the public range readily available to livestock watering at that place, no appropriation of water from either the same or a different source shall subsequently be made by another for the purpose of watering range livestock in such numbers and in such proximity to the watering place first mentioned, as to enable the proposed appropriator to deprive the owner or owners of the existing water right of this grazing use of said portion of the public range, or to substantially interfere with or impair the value of such grazing use and of such water right."

Section 3 of the same act contains the following language:

"Before approving any application for the right to use water for watering livestock, the state engineer shall determine, by examination on the ground or otherwise, that the right and use applied for will not contravene the policy of Section 2 of this act. If he shall determine that the right applied for will contravene such policy, he must reject the application. If the water applied for shall be along the course of or in the immediate vicinity of an established or customary driving route for moving livestock from one range to another, the state engineer may reject the application even if no previous right shall exist for any portion of such water, if he shall determine that such water will best subserve the public interests by being reserved for the watering of livestock while so being driven along such customary driving route."

In acting on the applications herein under consideration, the State Engineer must determine whether or not the granting of each

application would, in his opinion, contravene the policies set forth in the above quoted acts and his rulings must be in accord with such findings.

The State Engineer is of the opinion that in acting on applications to appropriate water for stockwatering purposes, he must take into consideration the provisions of the 1931 Range Law. This has long been the practice in similar situations. In describing the methods of establishing customary use, it is our interpretation of the Act that such use can be acquired by the open, notorious, peaceable and public use of the range seasonally for a period of five consecutive years subsequent to 1926. The act was approved on March 30, 1931. The language of the act is silent as to the necessity of having a valid water right. It therefore is our opinion that such customary use may be acquired without a water right. While such an interpretation does not give such customary user the right to water at a watering place of another, it renders him immune from trespass action as provided for in Section 4 of the 1925 Stockwater Act.

In acting on Applications Nos. 12670, 12671 and 12672 to appropriate the waters of Snowball Spring, Snowball Spring No. 1 and Snowball Spring No. 3 for irrigation purposes, we must proceed according to Section 63, Chapter 140, Statutes of 1913 (Sec. 7948 NCL 29) heretofore quoted:

Application No. 12673 to appropriate the waters of Snowball Spring No. 4 for stockwatering purposes is the same source filed for under Application No. 7795 now in name of A. G. McBride and on which a permit has been issued. Also, Mr. McBride is the owner of Certificate No. 484 on Mahogany Spring located about one mile northwesterly and Permit No. 7796 on Snowball Spring No. 5 located about one-half mile southeasterly from Snowball Spring No. 4. Application No. 12770 to appropriate the waters of Silver Springs for stockwatering purposes is located about one mile southerly from the meadow pasture and buildings on Snowball Creek and less than two miles northeasterly of Snowball Spring No. 6, the subject of Permit No. 7797 in name of A. G. McBride.

Applicant stressed the point that some of the watering troughs had been removed from the springs covered by existing water rights in this area, indicating presumably that there had been a forfeiture. It must be kept in mind that in normal years there is, according to the testimony, an abundance of stock water. Usually water is available at the head of Snowball Creek and from such sources the range can be covered. We fail to find any evidence that would indicate that there had been a forfeiture; neither do we find any indication of an intention to abandon the use of such water for stockwatering purposes by protestants. It was indicated in the evidence presented at the hearing that when draught conditions existed, troughs were installed in sufficient number to take care of the range stock. It was also indicated that even in draught periods there was usually water at the head of Snowball, Indian,

Cottonwood and Willow Creeks, and the range could still be utilized by watering at these sources.

Even if consideration is not given to the water rights of protestants, the range has been used by said protestants and their predecessors in such a manner that a customary range right has no doubt been acquired pursuant to the 1931 Nevada Range Act (Section 5581 NCL Supp. 1931-41).

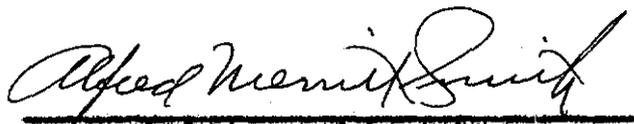
In considering Applications Nos. 12670, 12671 and 12672 to appropriate water for irrigation purposes from Snowball Spring, Snowball Spring No. 1 and Snowball Spring No. 3, respectively, we are of the opinion that there is no unappropriated water for irrigation purposes from these sources. Protestant McBride claims a vested right to such waters as evidenced by Proof of Appropriation No. 01444. From the testimony presented at the hearing, we are of the opinion that such waters have been used continuously by protestant and their predecessors from prior to 1905 to the present time.

RULING

The protests to the granting of permits under Applications Nos. 12673 and 12770 are herewith sustained and said applications are denied on the grounds that the granting thereof would contravene the provisions of the Stockwatering Act of Nevada, Section (7948 NCL 1929) and also the provisions of the Nevada Range Law (Section 5581 NCL Supp. 1931-41).

The protests to the granting of permits under Applications Nos. 12670, 12671 and 12672 to appropriate water for irrigation purposes are herewith sustained and such applications are denied on the grounds that the granting thereof would impair the value of existing rights and be detrimental to the public welfare.

Respectfully submitted,


ALFRED MERRITT SMITH
State Engineer

January 26, 1951,