

IN THE MATTER OF APPLICATIONS)
TO CHANGE 34444, 34445 AND 34446)
FILED BY J. CHESTER YOUNG FOR THE)
WATERS OF KINGSTON CREEK, LANDER)
COUNTY, NEVADA)

SUPPLEMENTAL RULING

GENERAL

This supplemental ruling is respectfully submitted in compliance with the remand order of the Third Judicial District Court of the State of Nevada dated September 15, 1982, Honorable Richard J. Legarza, District Judge, presiding.

A history of the sequence of events will not be stated since the court's order amply provided a chronological summary of all matters pertinent to the J. Chester Young's applications hereinafter referred to as the Young Applications.

The Court's Remand Order of September 15, 1982, specifically directed the State Engineer to submit additional findings on the following:

1. An express finding that no threat to the detriment of public interest exists and that the finding is based on substantial evidence.
2. Supplement to the previous finding that the granting of Applications 34444, 34445 and 34446 would not conflict with the existing rights, specifically that the finding be supported by substantial evidence.
3. Conclusion III of the amended ruling of January 27, 1982, conflicted with Conclusion IV of the ruling of August 27, 1979. Therefore, this supplemental ruling must expressly modify or reverse Conclusion IV of the ruling of August 27, 1979.

FINDINGS OF FACT

I

The Public Interest and Conservation of the Resource

The water law does not specifically define what criteria the State Engineer must follow in determining whether the act of appropriating or changing the point of diversion of existing water rights is "detrimental to the public interest or welfare". The State Engineer therefore must exercise discretion in his interpretation under the express authority granted in the law. The State Engineer must, to the extent possible, make a factual determination of all interests involved in any particular appropriation or change of existing rights. It is not unusual that more than one public interest is determined or defined. Some interests may ultimately outweigh others. In the situation at hand the public interest was served by the adjudication and determination of the relative rights of Kingston Creek. The public interest is further served by the economical and beneficial use of lawfully established water rights. The public

interest would not be served by recognition of uses that are not supported by established water rights. The Nevada Supreme Court has expressly held 1/ that:

"The conservation of the waters in this state is the order of the day and will increase the population and wealth and is for the public good."

The Court went on to find that while this goal should be encouraged by all legitimate means, it must not be pushed to the extent of depriving an appropriation of water already acquired by prior appropriation to a beneficial use.

The Young Applications were represented as necessary in the best interests of conserving water 2/ and to reduce seepage and evaporation losses of 60 to 70 percent 3/ in the creek channels lower reaches. The record further set forth the substantial cost 4/ involved in the new diversion works and delivery system to the place of use. The public interest identified here is the protection of private property rights as represented by decreed water rights and the conservation of the resource and efficient use of the limited resource in the best interests of these rights and the resource. This interest was weighed against the interest of property owners who purchased subdivided lots within the Kingston development in reliance on the stream flow being maintained 5/ without the benefit of water rights. The testimony of the protestants was further inconsistent as to the effect of the Young Applications on Kingston property values 6/. Further testimony by the protestants witnesses supported the conservation of the resource represented by the method of diversion and delivery of water in the Young Applications 7/. In addition, evidence of stream flow and hydrologic characteristics of Kingston Creek is clearly set forth in records 8/ available to the State Engineer. This data depicts clearly that Kingston Creek is a stream system which generally has its maximum flow at the mountain front or in the area where it exits the mountain drainage and enters the alluvium 9/. The evidence is uncontroverted that losses are substantial through seepage and evaporation and that those losses may reach as much as 1.0 cubic feet per second per mile in flow rates and 1500 acre-feet per year in volume 10/. Although these losses for the most part enter the ground water system as recharge, they clearly affect the decreed waters available to the Young Applications. The Conclusion IV of the ruling of August 27, 1979, clearly was flawed in view of the substantial evidence to the contrary and the recognition during the administrative hearing that stream flow and hydrologic records 11/ were available to the State Engineer.

The question of a viable fishery in the channel reaches below the Young Applications proposed point of diversion is addressed on the basis of a public interest and the Shelley et al protest. The Nevada Department of Wildlife resolved its protest with the Youngs and in accordance with the Court's previous order, the State Engineer considered that agreement in the amended ruling of January 27, 1982. This discussion is for the purpose of providing the court full consideration of the evidence, data and records that the State Engineer reviewed. There is no record of the establishment of a water right for the maintenance of instream flows for

fishery purposes on Kingston Creek. The stream flow records on Kingston Creek 12/ establish that during periods of low flow and precipitation in the drainage area, coupled with evaporation and seepage losses, the lower reaches of the Kingston Creek Channel will not support a viable fishery under natural conditions. The Department of Wildlife testimony 13/ at the administrative hearing confirms this finding. Additionally, the stream flow records 14/ clearly reflect that during dry periods the flow of Kingston Creek is reduced to a point that the diversion under the earliest priority right (Town of Kingston right) may not be fully satisfied. The conservation of the resource, based on the record, simply overwhelmed any consideration of a detrimental effect on a questionable fishery that was not supported by established water rights.

The public interest does not extend to, nor does it sanction, allowing water to run free in a stream channel when the water must be put to beneficial use in an economic manner to serve established water rights. A finding that water be required to flow in the natural channel of Kingston Creek for the purpose of supporting vegetation along the channel banks could create a riparian water right. The unsuitability of the riparian doctrine to conditions prevailing in the State of Nevada has been upheld by the courts on several occasions 15/. The court held 16/ on one occasion that:

"It is now the settled doctrine of this State that a person can acquire the right to use the waters flowing in a stream for the purpose of irrigation by appropriation as against riparian proprietors or other persons, the priority of rights of various claimants to the use thereof to be determined by the priority of time in making the various appropriations."

It would not be in the public interest to recognize or establish a use of water that does not exist under statutory sanction.

In summary there is no express right, established in accordance with Nevada law, to use the waters of Kingston Creek as proposed by protestants herein. Additionally, to allow water to continue down the channel where the facts, as set out hereinabove, show it to be lost so that no viable fishery can exist, to the detriment of lawfully established water rights is, simply, not within the law of this state as set forth in the statutes and case law appertaining thereto.

Therefore, it is expressly concluded that there is no detrimental effect on the public interest and welfare by the granting of the Young Applications and further that the granting of the applications will provide a substantial conservation and efficient use of the limited resource which is in the public interest.

II

Affect of the Granting of the Young Applications on Existing Rights

The right to make changes in the exercise of a decreed or appropriative

right is provided by statutory procedure subject to the condition that the change does not adversely effect or work injury to other rights. The responsibility of the orderly distribution of waters on adjudicated stream systems in Nevada rests with the State Engineer 17/ as an officer of the court. The administration and regulation of stream systems where junior rights and points of diversion are upstream from those of senior appropriators are commonplace. The State Engineer has determined, by experience and knowledge, that through the placement of adequate diversion control structures and measuring devices, distribution and regulation can be accomplished in accordance with the lawful interests of the appropriators. There was no evidence or testimony provided in the administrative hearing that supported the speculation that distribution could not be accomplished in accordance with the priority of the rights. In view of the physical facts existing on Kingston Creek with relation to the points of diversion of the various appropriators, the authority of the State Engineer; and the control works that will be required before actual diversion can begin, proper distribution can be and will be accomplished. It is therefore concluded that the Young Applications will not adversely effect existing rights or the orderly distribution of the waters of Kingston Creek.

CONCLUSIONS

1. The granting of Applications 34444, 34445 and 34446 will not be detrimental to the public interest and welfare.
2. Conclusion IV of the State Engineer's ruling dated August 27, 1979, is hereby reversed on the grounds that there is substantial evidence as set forth under Findings Of Fact I, that a savings and conservation of water can be accomplished by the approval of Applications 34444, 34445 and 34446.
3. The granting of Applications 34444, 34445 and 34446, subject to the conditions set forth in the ruling of January 27, 1982, will not adversely effect existing rights or the orderly distribution of the waters of Kingston Creek.

RULING

The protests to the granting of Applications To Change 34444, 34445 and 34446 are herewith overruled on the grounds that the proposed changes will not adversely effect existing rights, will not be detrimental to the public interest and welfare and, the granting thereof, will be in the best interests of the conservation of the resource.

Respectfully submitted,



Peter G. Morros
State Engineer

PGM/bc

Dated this 28th day of
September, 1982.

FOOTNOTES

1. Tonkin v. Winzell, 27 Nev. 88, 99, 100 73 Pac. 593.
2. Administrative Hearing Transcript, page 79.
3. Administrative Hearing Transcript, pages 80, 83, 84.
4. Administrative Hearing Transcript, page 81.
5. Administrative Hearing Transcript, pages 37, 59, 60.
6. Administrative Hearing Transcript, pages 37, 49, 59, 60.
7. Administrative Hearing Transcript, pages 57-59, 61, 69, 72.
8. Administrative Hearing Transcript, pages 102, 148. Water Resources Bulletin No. 41 - Water Resources of Big Smoky Valley, Lander, Nye and Esmeralda Counties, Nevada, U.S. Geological Survey/State of Nevada Division of Water Resources. Water Resources Data for Nevada 1968 thru 1980, Part 1. Surface Water Records, U.S. Geological Survey/State of Nevada Division of Water Resources Nevada Streamflow Characteristics/Water Resources - Information Series Report #28, cooperatively prepared by Department of Conservation and Natural Resources, Division of Water Resources/U.S. Geological Survey, U.S. Department of the Interior. Exhibits 1, 2 and 3 are attached as part of the ruling and record as set forth in the hearing transcript, page 102, lines 1 thru 7; page 148, lines 12 thru 15.
9. Water Resources Bulletin No. 41 (see 8).
10. Water Resources Bulletin No. 41 (see 8).
11. Administrative Hearing Transcript, pages 102, 148.
12. Water Resource Data for Nevada, 1968 thru 1980, Part 1. Surface Water Records (see 8).
13. Administrative Hearing Transcript, page 26.
14. Water Resource Data for Nevada, 1968 thru 1980, Part 1. Surface Water Records (see 8).
15. Jones v. Adams, 19 Nev. 78, 84-88, 97 Pac. 442
Walsh v. Wallace, 26 Nev. 299, 327, 67 Pac. 914
In re Humboldt River, 49 Nev. 357, 361-362, 246 Pac. 692
In re Manse Spring and Trib., 60 Nev. 280, 286, 108 Pac. 311
Reno Smelting v. Stevenson, 20 Nev. 269, 21 Pac. 317
Bliss vs. Grayson, 24 Nev. 422, 456, 56 Pac. 231
Ronnow v. Delmue, 23 Nev. 29, 34, 41 Pac. 1074
Steptoe Livestock Co. v. Gulley, 53 Nev. 163, 171-172, 295 Pac. 772.
16. Bliss vs. Grayson, 24 Nev. 422, 456, 56 Pac. 231.
17. NRS 533.305.