

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

IN THE MATTER OF PROTESTED APPLICATIONS)
55957, 56708 AND 56709 FILED BY RAY MAY)
AND GARY AND CLEMENTINE TOPE, TO CHANGE)
THE POINTS OF DIVERSION AND PLACE OF)
USE OF WATER HERETOFORE APPROPRIATED IN)
HONEY LAKE VALLEY, WASHOE COUNTY,)
NEVADA.)

RULING
3892

GENERAL

I.

Application 55957 was filed on March 12, 1991, by Gary and Clementine Tope and Ray May, requesting permission from the State Engineer to change the point of diversion and place of use of a portion of Permit 30460.¹ Permit 30460 was approved on December 1, 1976, and was abrogated by Permit 38547 on June 23, 1981.²

Application 55957 was timely protested on June 7, 1991, by Washoe County, Northwest Nevada Water Resources, a Nevada Limited Partnership, and Fish Springs Ranch, a Nevada Limited Partnership.³

Applications 56708 and 56709 were filed on August 29, 1991, by Raymond D. May and Gary L. Tope, requesting permission from the State Engineer to change the point of diversion and place of use of a portion of Permit 46124.⁴

Applications 56708 and 56709 were timely protested on December 2, 1991, by Washoe County.⁵

1 Exhibit No. 2, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

2 Files 30460 and 38547, official records in the office of the State Engineer.

3 Exhibit No. 5, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

4 Exhibit No's 3 and 4, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

5 Exhibit No's 6 and 7, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

II.

After proper notice,⁶ a hearing was held before the Hearing Officer of the State Engineer on February 25, 26, and 27, 1992, to consider protested Applications 55957, 56708 and 56709.

FINDINGS OF FACT

I.

The place of use of Permits 30457 through 30461 encompasses an area of 1,097 acres located in portions of Sections 25, 27, 35 and 36 in T.27N., R.18E.⁷ The sum of the diversion rates allowed in Permits 30457 through 30461 is 24.1 cubic feet per second (cfs).⁸

On July 3, 1979, Walter Ford and Sylvia Ford purchased Permit 30461, which allowed the buyers a diversion rate of 4.0 cfs and water sufficient to irrigate 236 acres of land. The selling price was \$14,160.00 or \$60.00 per acre of irrigated land.⁹ On July 3, 1979, Ray May, Gary L. Tope and Clementine Tope purchased Permits 30457, 30458, 30459 and 30460. Under these permits, the buyers were allowed to drill four wells for a total flow of 20.1 cfs to irrigate 861 acres of land. The price was \$51,660.00 or \$60.00 per acre of irrigated land.¹⁰

⁶ Exhibit No. 1, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

⁷ Maps supporting Permits 30457 through 30461, official records in the office of the State Engineer and Exhibit 27, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

⁸ File No's 30457 through 30461, official records in the office of the State Engineer.

⁹ Exhibit No. 11, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

¹⁰ Exhibit No. 10, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

The agent for both the Fords and for May and Tope, testified that there was a total of 1097 acres of water righted land available under Permits 30457 through 30461.¹¹ The agent further testified that May and Tope could not have received water rights to irrigate 1371 acres of land out of the four permits, Permits 30457 through 30460.¹¹ On July 11, 1979, the same agent, acting on behalf of the Fords, and May and Tope, simultaneously filed Applications 38543 through 38547 to change Permits 30457 through 30461.¹² Applications 38543 through 38547 were filed for a total of 24.1 cfs of water to irrigate 1097 acres of land. These quantities of water exactly match the diversion rate and irrigated acreage originally permitted under Permits 30457 through 30461. The State Engineer approved Applications 38543 through 38547 for the above mentioned quantities of water, thereby fully abrogating Permits 30457 through 30461.¹²

May and Tope claim that there is additional water right left under Permit 30460.¹³ They argue that the water righted acreages allowed under Permits 30457 through 30461 are additive, that sum being 1,607 acres. They further argue that only 1,097 acres had been changed and there must be water rights remaining.¹⁴ The State Engineer finds that the described place of use of Permits 30457 through 30461 only encompassed 1,097 acres. Examination of the maps supporting Permits 30457 through 30461 and summarized in Exhibit 27, clearly shows 1097 acres with water rights. The

¹¹ Transcript pp. 423-424, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

¹² File No's. 38543 through 38547, official records in the office of the State Engineer.

¹³ Stated on Line 15 of Application 55957 (Exhibit 2) is "This application is for the remaining water right under Permit 30460 that was omitted under previous changes."

¹⁴ Transcript p. 458, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992. Mr. May stated that he thought he purchased 1371 acres of water right. This is equal to 1,607 minus 236, the amount purchased by Walt Ford.

State Engineer finds that the land described as the place of use of Permit 30460, encompassing 510 acres, is not only covered by Permit 30460, but is also covered by portions of Permits 30458, 30459 and 30461.⁷ The State Engineer further finds that the practice of covering the same piece of land with two different permits can not be construed to mean that the permittee holds the water rights equivalent to the arithmetic sum of the acreages allowed in the two supplemental permits.

II.

On November 6, 1979, the document which assigned ownership of Permits 30457, 30458, 30459 and 30460 to May and Tope was filed in the State Engineer's Office.¹⁵ The document is not specific regarding the quantity of water assigned to May and Tope. However, additional title information was requested at the conclusion of the hearing and upon a review of all of the evidence, including the Assignment and Sales Agreement, the State Engineer finds that the portion of Permits 30457, 30458, 30459 and 30460 assigned to the applicant was limited to 20.1 cfs to be used to irrigate 861 acres.¹⁶

¹⁵ Exhibit No. 12, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

¹⁶ One of the items the Hearing Officer asked the parties to include in their post-hearing briefs is the use of the Sales Agreement in resolving any ambiguity in the Assignment (Transcript p. 512, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992). In his brief, the applicant asked the State Engineer to compare the operative language of both the Assignment and the Sales Agreement (Applicants' Post Hearing Brief pp. 4-5, May 8, 1992). Each of these documents transfers "all right, title, and interest" in the named permits. The Sales Agreement goes on to clarify what is meant by "all right, title, and interest" by stating exactly the quantity of water being transferred, namely: "Seller is the assignee of Well Permits No. 30460, 30458, 30457, and 30459, issued by the State Engineer of Nevada wherein Seller is permitted to drill four (4) wells for a total flow of 20.1 cubic feet per second to irrigate 861 acres located in northern Washoe County and described in said permits." These two documents, the Assignment and the Sales Agreement, when read together, clearly describe exactly the quantity of water that was obtained by May and Tope.

III.

The State Engineer further finds that the Fords were assigned the balance of the aggregate water rights and received 4.0 cfs to be used for the irrigation of 236 acres.¹⁷

IV.

Application 55957 seeks to change the point of diversion and place of use of 2.7 cfs of water heretofore appropriated under Permit 30460.¹ Permit 30460 was approved for 6.0 cfs.² Permit 38547 was filed by May and Tope to change the point of diversion and place of use of 6.0 cfs of water appropriated under Permit 30460. Permit 38547 was approved for 6.0 cfs on June 23, 1981.² Therefore, Permit 30460 was fully abrogated by Permit 38547 and the State Engineer finds that no water is now available to be changed by Application 55957.

V.

The State Engineer finds that May and Tope purchased and changed the points of diversion and places of use of 20.1 cfs of water to irrigate 861 acres of land and that the Fords purchased and changed 4.0 cfs of water to irrigate 236 acres of land. The State Engineer further finds that Permits 30457 through 30461 were fully abrogated by Permits 38543 through 38547 and that no additional water is available for change by Application 55957.

VI.

The protestant to Applications 56708 and 56709 claims that there is a potential conflict with existing, superior rights, in that the proposed points of diversion are located too close to the existing wells owned by Northwest Nevada Water Resources (NNWR).¹⁸ The nearest NNWR well is approximately one mile away

¹⁷ Likewise Ford's Assignment (Exhibit No. 13, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992) and Sales Agreement, when read together, clearly describe exactly the quantity of water that was obtained by the Fords, namely a total flow of 4 cubic feet per second to irrigate 236 acres.

¹⁸ Exhibit No's 6 and 7, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

from the May-Tope wells proposed to be pumped under 56708 and 56709.¹⁹ The NNWR wells are planned to supply water for the Truckee Meadows Project (TMP), a comprehensive water importation plan designed to provide additional water for municipal use in the Truckee Meadows. The protestant asserts that approval of Applications 56708 and 56709 could result in negative impacts to water quantity and quality at the NNWR wells. The protestant's expert estimated that the drawdown at the NNWR wells would increase by about 45% if the change applications were approved.²⁰ However, the protestant's expert did not state what the absolute effect would be in terms of the depth, in feet, of the additional drawdown caused by pumping the May-Tope wells. The applicants' expert, after examining the available well logs and types of soils existing in the area, stated he would not expect measurable NNWR well interference, if the May-Tope wells were pumped.²¹

The State Engineer finds that the protestant has failed to demonstrate that approval of Applications 56708 and 56709 will result in an interference to NNWR's existing rights.

VII.

No specific evidence or testimony was presented by the protestant to support the claim that pumping the May-Tope wells under Applications 56708 and 56709 would result in poor water quality at the NNWR wells. The protestant's expert stated that the water quality near the May-Tope property was very poor, the total dissolved solids (TDS) being approximately 20,000 parts per million (ppm)²² compared to the groundwater quality from the NNWR

¹⁹ Transcript p. 605, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²⁰ Transcript p. 607, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²¹ Transcript pp. 611-612, 620, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²² Transcript p. 583, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

wells in which the TDS averages approximately 200 ppm.²³ The applicants' expert testified that pumping the May-Tope wells may restrict the tendency of the poor quality water to migrate toward the NNWR wells. He opined that the quantity of water contemplated to be pumped from the May-Tope wells may not be enough to make much difference.²⁴

The State Engineer finds that the protestant has failed to demonstrate that approval of Applications 56708 and 56709 will negatively affect the water quality in NNWR's wells.

VIII.

The protestant intends to spend much time, effort and money on the TMP monitoring plan in order to determine the exact quantity of water available for use from Honey Lake Basin and to determine the quality of this water.²⁵ The protestant contends that pumping the May-Tope wells may negatively impact the TMP monitoring plan.²⁶ However, no specific evidence was offered to support this contention. The applicants' expert testified that additional data from monitoring the May-Tope wells may be beneficial to the monitoring plan.²⁷ The State Engineer finds that the protestant has not demonstrated that approval of Applications 56708 and 56709 will be detrimental to the public interest by injuring the TMP monitoring plan.

²³ Transcript p. 576, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²⁴ Transcript pp. 614-615, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²⁵ Transcript pp. 577-579, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²⁶ Transcript pp. 579-581, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

²⁷ Transcript p. 613, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

IX.

Applications 56708 and 56709 were filed to change the point of diversion and place of use of portions of Permit 46124.⁴ Permit 46124 was one of several related permits issued to the Permittees for the same general area. Permit 46124 was approved on March 21, 1985, for 6.0 cfs of water to irrigate 374 acres.²⁸ The proof of completion of work was originally due on April 21, 1987 and the proof of beneficial use was originally due on April 21, 1990. Extensions of time were granted to February 22, 1991, with notices that no further extensions of time would be issued.²⁸ On March 1, 1991, the permittee filed requests for extension of time for Permit 46124 and for several related permits. On May 2, 1991, a hearing was held to consider these requests for extensions of time. In Ruling No. 3799, made at the May 2, 1991 hearing, the State Engineer cancelled Permits 46007 through 46009, 46122, 46123 and 46126 because of the lack of due diligence and good faith in completing the work, shown by the Permittees. In the same ruling, because some effort was expended to drill the well under Permit 46124, the State Engineer granted the request for extension of time for Permit 46124 for filing the proof of completion of work to November 2, 1991 and for filing the proof of beneficial use to November 2, 1992.²⁸

May and Tope purchased Permit 46124 on August 23, 1991, which was after the May 2, 1992 ruling.²⁸ When they acquired Permit 46124, they also became responsible for any conditions that accompanied the permit, namely the requirements for filing the proof of completion of work and the proof of beneficial use. The protestant claims that filing Applications 56708 and 56709 is an unjustified attempt to extend the proof filing dates of Permit 46124, given the repeated warnings from the office of the State Engineer that no further extensions would be granted.^{5,28} Mr. Tope testified that the wells at the proposed points of diversion are already constructed and Mr. Tope felt that it would be more

²⁸ File No. 46124, official records in the office of the State Engineer.

cost-effective to utilize these existing wells on his property rather than to drill new wells at the existing point of diversion of Permit 46124.²⁹ The State Engineer finds that Applications 56708 and 56709 were filed prior to the final date for filing the proof of completion of work and that filing these applications is not an unjustified attempt to extend the time of Permit 46124.

CONCLUSIONS

I.

The State Engineer has jurisdiction in the subject matter.³⁰

II.

The State Engineer is prohibited from approving an application to change the point of diversion and place of use if the application:

1. Conflicts with existing rights on the source, or
2. Threatens to prove detrimental to the public interest.³¹

III.

Permits 38543 through 38547 fully abrogated water right Permits 30457 through 30461 and no water right exists to support an additional change. Therefore, Application 55957, which attempts to change the point of diversion and place of use of a portion of Permit 30460, cannot be approved because no water remains under Permit 30460.

IV.

The protestants have failed to demonstrate that approval of Applications 56708 and 56709 would conflict with their existing rights.

²⁹ Transcript pp. 639-640, Public Administrative Hearing before the State Engineer, February 25, 26 and 27, 1992.

³⁰ NRS Chapter 533.365.

³¹ NRS Chapter 533.370(3).

V.

The protestants have failed to demonstrate that approval of Applications 56708 and 56709 would be detrimental to the public interest.

VI.

Filing Applications 56708 and 56709 is not an unjustified attempt to extend Permit 46124. However, there was a lack of good faith and due diligence shown by the permittees under Permit 46124.

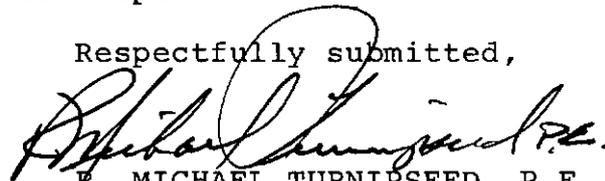
RULING

The protest to Application 55957 is upheld and Application 55957 is hereby denied.

The protest to Applications 56708 and 56709 is hereby overruled and applications 56708 and 56709 are approved, subject to but not limited to the following conditions:

1. Payment of statutory fees.
2. The proof of completion of work shall be due on November 2, 1992, and the proof of beneficial use shall be due on November 2, 1993. No further extensions of time will be granted.
3. A substantial measuring device must be installed and measurements of water use kept.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 26th day of
June, 1992.