

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

IN THE MATTER OF PERMIT 4079, CERTIFICATE 919 )  
FILED TO APPROPRIATE THE WATERS OF BEAR CREEK )  
FOR MILLING AND TOWN SUPPLY PURPOSE FOR THE )  
UNINCORPORATED TOWN OF JARBIDGE, ELKO COUNTY, )  
NEVADA. )

RULING

# 4372

GENERAL

I.

Application 4079 was filed on July 27, 1916, by Winthrop W. Fisk, Trustee for the Commercial Club and the Town of Jarbidge, to appropriate 0.5 cubic feet per second (cfs) of the waters of Bear Creek within Elko County, Nevada, for domestic use and fire protection for the Town of Jarbidge. Permit 4079 was approved on November 28, 1916. Following the submittal of a deed dated August 23, 1917, from Winthrop W. Fisk, Trustee for the Commercial Club and the Town of Jarbidge, Permit 4079 was assigned to Elkoro Mines Company. Elkoro Mines Company filed the proof of beneficial use under Permit 4079 and on December 21, 1923, Certificate 919 was issued for 0.50 cfs for Milling and Town Supply Purpose. The point of diversion is located within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 17, T.46N, R.58E, MDBM.<sup>1</sup>

II.

On April 21, 1994, the agent for Nevada Oil and Mining Company, filed a chain of title from Elkoro Mines Company to Nevada Oil and Mining Company.<sup>1</sup> The Jarbidge Water Users Association (JWUA) objected to the assignment of the municipal portion and requested that the assignment to Nevada Oil and Mining Company be held in abeyance until all aspects could be investigated.<sup>2</sup> Meanwhile, Counsel for Nevada Oil and Mining Company requested that

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<sup>1</sup> File No. 4079, Official Records in the Office of the State Engineer.

<sup>2</sup> See letters to the State Engineer's Office from the Jarbidge Water User's Association dated July 15, 1994 and August 5, 1994, in File 4079, Official Records in the Office of the State Engineer.

the State Engineer complete the assignment based on the documents that were filed.<sup>3</sup>

III.

On August 23, 1994, the JWUA petitioned the State Engineer to declare abandoned the milling portion of Permit 4079, Certificate 919.<sup>4</sup>

IV.

On October 30, 1995, the Elko County Deputy District Attorney, acting on behalf of the Unincorporated Town of Jarbidge, filed a report of conveyance for Permit 4079, Certificate 919, from JWUA to the Unincorporated Town of Jarbidge and requested that an assignment be made. The document was returned with the explanation that the assignment could not be made because a complete chain of title from the owner of record, Elkoro Mines Company, was not submitted.<sup>5</sup>

V.

In an attempt to clarify the status and ownership of Permit 4079, Certificate 919, the State Engineer has reviewed all documents on file pertaining to said certificate. The State Engineer concluded that the milling portion could be assigned to Nevada Oil and Mining Company but the ownership of the municipal portion must remain with Elkoro Mines Company. Later in the summer of 1996, a hearing was to have been scheduled to consider JWUA's

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<sup>3</sup>See letters to the State Engineer's Office from Ross E. de Lipkau dated May 10, 1995, May 18, 1995, May 19, 1995, and June 7, 1996, File 4079, Official Records in the Office of the State Engineer.

<sup>4</sup>See letter to the State Engineer's Office from the Jarbidge Water User's Association dated August 23, 1994, in File 4079, Official Records in the Office of the State Engineer.

<sup>5</sup>See letter from the State Engineer's Office dated January 26, 1996, Official Records in the Office of the State Engineer.

petition to declare the milling portion abandoned.<sup>6</sup> The State Engineer has now determined that the evidence reviewed during his investigation regarding the status and ownership of Permit 4079, Certificate 919 is clear and convincing and a hearing is not necessary. Therefore, the State Engineer hereby enters the following Findings of Fact, Conclusions, and Ruling.

**FINDINGS OF FACTS**

I.

The manner of use as stated on Certificate 919 is "Milling and Town Supply Purpose" and the amount of the appropriation is 0.5 cfs. However the quantity of water appropriated for the milling portion and that appropriated for the town supply portion are not specified. There is some evidence that indicates the quantity of water that should be allowed for the municipal portion. In 1916, Flaxie Mines Company, the predecessor to Elgoro Mines Company, agreed to construct a water works system for the Town of Jarbidge that was capable of delivering 30,000 gallons per day (gpd).<sup>7</sup> This is equivalent to 0.046 cfs. In addition to the 1916 Agreement, the proof of completion of work, filed under Permit 4079 on May 15, 1920, indicates that 32 residences were connected to the water system. Allowing 1,000 gpd for each connection, the total quantity of water right necessary to serve the 32 residences would be 32,000 gpd or about 0.05 cfs. The State Engineer finds that the municipal portion of Permit 4079, Certificate 919 should be taken as 0.05 cfs. Because the total appropriation under this certificate is 0.50 cfs, the milling portion can be calculated to be 0.45 cfs.

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<sup>6</sup>See letter from the State Engineer's Office dated July 3, 1996, File 4079, Official Records in the Office of the State Engineer.

<sup>7</sup>Agreement dated October 7, 1916, between W.W. Fisk as trustee for the Jarbidge Commercial Club and the Citizens of the Town of Jarbidge and Flaxie Mines Company, File 4079, Official Records in the Office of the State Engineer.

II.

A series of certified documents which form the chain of title from Elgoro Mines Company to Nevada Oil and Mining Company has been filed under Permit 4079, Certificate 919.<sup>1</sup> The first document is a water rights quitclaim deed dated August 30, 1934, from Elgoro Mines Company, the party of the first part, to Eastern Iron and Metal Company, Inc., the party of the second part. Water rights were conveyed in the deed by the following:

"WITNESSETH that the party of the first part... does hereby remise, release and quitclaim unto the party of the second part, its successors and assigns forever, its water and water rights connected with or appurtenant to the lode mining claims (emphasis added) formerly owned by the party of the first part in the Jarbidge Mining District, Elko County, Nevada, and heretofore conveyed to the party of the second part, together with the appurtenances and all the estate and rights of the party of the first part in and to said water and water rights."

It appears that any reference to the municipal portion of Permit 4079, Certificate 919 was specifically omitted. The State Engineer finds that Elgoro Mines Company conveyed to Eastern Iron and Metal Company, Inc. only that water right appurtenant to the mining properties, which is the milling portion of Permit 4079, Certificate 919. The State Engineer further finds that the municipal portion of Permit 4079, Certificate 919, omitted from this water rights quitclaim deed, was not conveyed to Eastern Iron and Metal Company, Inc.

The next document in the chain of title is a water rights quitclaim deed dated September 14, 1934, from Eastern Iron and Metal Company, Inc. to Elgoro Mines Operating Company. This deed contains the same language. The State Engineer finds that Elgoro Mines Operating Company obtained ownership of the milling portion, but not the municipal portion, of Permit 4079, Certificate 919.

The next document is a grant, bargain and sale deed dated October 12, 1937, from Elkoro Mines Operating Company to Gray Rock Mining Company. By this deed, Gray Rock Mining Company obtained ownership to the mining property and "...all appurtenant buildings, rights, water rights, right of ways, machinery, tools and equipment situate thereon or used in connection therewith. Together with all other property real or personal, owned by Elkoro Mines Operating Company situate within a radius of five miles of any of the claims above described." This clearly includes the milling portion of Permit 4079, Certificate 919 but not the municipal portion, since Elkoro Mines Operating Company did not own the municipal portion.

The next document is a Decree of Quiet Title dated February 21, 1978, in which Envirotech Corporation was declared the owner of the mining property formerly held by Gray Rock Mining Company and others, and all appurtenances to that property. By implication, this includes the milling portion of Permit 4079, Certificate 919. The Decree contains no language regarding water rights or specifically, the municipal portion of Permit 4079, Certificate 919. Therefore, the State Engineer finds that Envirotech Corporation did not obtain ownership of the municipal portion of Permit 4079, Certificate 919.

The next document is a quitclaim deed dated November 23, 1982, from Envirotech Corporation to Utah-Wyoming Consolidated Oil Company which conveyed the mining property and all water rights appurtenant to said property. Again, this includes the milling portion of Permit 4079, Certificate 919, but not the municipal portion, since Envirotech Corporation did not own the municipal portion.

The final document in the chain of title is a quitclaim deed dated July 18, 1984, from Utah-Wyoming Consolidated Oil Company to Nevada Oil and Mining Company which conveyed the mining property and all water rights appurtenant to said property. This includes

the milling portion of Permit 4079, Certificate 919, but not the municipal portion.

The State Engineer finds that a complete chain of title has been filed to show that Nevada Oil and Mining Company is the owner of the milling portion of Permit 4079, Certificate 919, amounting to 0.45 cfs. The State Engineer further finds that the owner of the municipal portion, amounting to 0.05 cfs, is still Elkoro Mines Company.

### III.

On August 23, 1994, the JWUA petitioned the State Engineer to declare abandoned the milling portion of Permit 4079, Certificate 919.<sup>8</sup> The petition was accompanied by an affidavit by longtime Jarbidge resident, John S. Williams, who has lived most of his 72 years in Jarbidge and has been the Justice of the Peace of the Jarbidge Township since 1972. He stated in his affidavit that Elkoro Mines Company ceased all mining and milling activities in 1932 and any use of water by Elkoro Mines Company ended at that time. According to the affidavit, Elkoro Mines Company sold to Eastern Iron and Metal Company, Inc. in December, 1933,<sup>9</sup> which formed Elkoro Mines Operating Company and transferred the property to Elkoro Mines Operating Company in September, 1934.<sup>10</sup> This company worked the original company's tailings but ceased operation in 1935. Mr. Williams does not know if any water under Permit 4079, Certificate 919 was used during this time, but states in his affidavit that no water has been put to beneficial use on the mining and milling property, by the appropriator or any successors

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<sup>8</sup>See letter to the State Engineer's Office from the Jarbidge Water User's Association dated August 23, 1994, in File 4079, Official Records in the Office of the State Engineer.

<sup>9</sup>The Water Rights Quitclaim Deed was dated August 30, 1934 and the instrument conveying the property was not filed with the office of the State Engineer.

<sup>10</sup>The Water Rights Quitclaim Deed was dated September 14, 1934.

since 1935. Mr. Williams' affidavit is corroborated in part by a letter dated April 18, 1934, sent to the State Engineer by R.E. Baty, Secretary of the Jarbidge Commercial Club.<sup>1</sup> Mr. Baty stated, "...The Elgoro Mines Company seems to be closing out every thing here, all their representatives are gone from here, they have sold their mill and I have been told they have sold all their mining claims, and I know they have sold town property even to the office building." There is evidence that Elgoro Mines Operating Company milled ore in 1936<sup>11</sup> and possibly used the water but, in 1937, conveyed the property to Gray Rock Mining Company. No evidence of any mining or milling production and associated water use by Gray Rock Mining Company exists.<sup>12</sup> When Envirotech Corporation obtained title to the mining property, it had to do so through a quiet title action in which Gray Rock Mining Company failed to appear. After considering all the evidence, the State Engineer finds that water for milling use under Permit 4078, Certificate 919 has not occurred from 1937 to the present time.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction over the subject matter of this action.<sup>13</sup>

##### II.

If the owner of a surface water right fails to use the water for beneficial purposes for which the right of use exists during any five successive years, the right to so use shall be deemed as

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<sup>11</sup>Beeson, J.J., Report on the Property of the Elgoro Mines Operating Company at Jarbidge, Nevada, Nevada Bureau of Mines, Mining District File No. 63, Item 24, September 10, 1936.

<sup>12</sup>From an examination of the records with the Nevada Bureau of Mines, there were no precious metal production reports filed after 1936.

<sup>13</sup> NRS 533.

having been abandoned, and any such owner thereupon forfeits all water rights.<sup>14</sup>

### III.

The quantity of water appropriated under Permit 4079, Certificate 919 is 0.50 cfs, of which a portion is for municipal use for the Town of Jarbidge and the remainder is for milling use. Based on the estimates of water right necessary to serve the Town of Jarbidge at the time the water was appropriated, the State Engineer concludes that the quantity of water for the municipal portion is 0.05 cfs and the remainder, 0.45 cfs, is for the milling portion.

### IV.

As shown above, in the analysis of the chain of title submitted by Nevada Oil and Mining Company, only the milling portion of Permit 4079, Certificate 919 was conveyed. In the first two deeds in the chain of title, the municipal water rights were clearly omitted and were not conveyed. Therefore, the State Engineer concludes that Nevada Oil and Mining Company only obtained ownership of the milling portion, 0.45 cfs, and an assignment to that effect will be made. The State Engineer further concludes that the municipal portion of Permit 4079, Certificate 919, 0.05 cfs, was not conveyed in the chain of title and is still held by the current owner of record, Elkoro Mines Company. The Report of Conveyance submitted by Elko County does not track back to the owner of record, Elkoro Mines Company, and was rightfully returned to Elko County.

### V.

The use of water under the milling portion of Permit 4079, Certificate 919 ceased in 1936 and has not resumed, resulting in a

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<sup>14</sup>NRS 533.060(2). Although the statute employs both abandonment and forfeiture, the element of intent, a prerequisite to abandonment, is not a necessary element in the case of a forfeiture. Nevada's Supreme Court, in In re Manse Spring

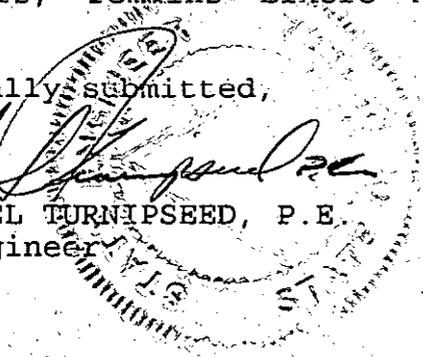
period of non-use of about 60 years, much greater than five years. The several aspects in this case, i.e., the selling off of all of the property, buildings and equipment held by Elkoro Mines Company, the absence of any mining activity after 1936, the fact that Envirotech Corporation was required to file a quiet title action because it could not obtain ownership of the mining property from Gray Rock Mining Company, and the length of time of the period of non-use, combine to obligate the State Engineer to conclude that there was an intent to abandon all mining activity and any water use associated therewith. Additionally, the State Engineer concludes that the right to use the milling portion of Permit 4079, Certificate 919 is deemed to have been abandoned. The owner of this portion of Permit 4079, Certificate 919, Nevada Oil and Mining Company forfeits the right to use the waters of Bear Creek for milling purposes.

**RULING**

The owner of the milling portion of Permit 4079, Certificate 919, 0.45 cfs, is hereby determined to be Nevada Oil and Mining Company, based on the submitted documents. The right to use the waters of Bear Creek for milling purposes is hereby deemed to have been abandoned on the grounds that a period of non-use, exceeding five successive years has occurred. Nevada Oil and Mining Company thereby forfeits its right to use the water under Permit 4079, Certificate 919. The owner of record of the municipal portion of Permit 4079, Certificate 919, 0.05cfs, remains Elkoro Mines Company.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer



RMT/JCP/bk

Dated this 12th day of  
JULY, 1996.