

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

IN THE MATTER OF CANCELLED PERMITS)
53700 AND 53701 FILED TO CHANGE THE)
POINT OF DIVERSION AND PLACE OF USE)
OF WATERS PREVIOUSLY APPROPRIATED)
FROM AN UNDERGROUND SOURCE WITHIN)
THE PLEASANT VALLEY GROUNDWATER)
BASIN (88), WASHOE COUNTY, NEVADA.)

RULING

4442

GENERAL

I.

Application 53700 was filed on July 20, 1989 by George Poore and Merle B. Winburn to change the point of diversion and place of use of a 0.781 cubic foot per second (cfs), not to exceed 63.0 acre-feet annually, portion of the water previously appropriated under Permit 49324 for quasi-municipal purposes for use within the S $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, T.18 N., R.19 E., M.D.B. & M.¹ The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 34. Permit 49324 was approved by the State Engineer on May 8, 1989.

Application 53701 was filed on July 20, 1989 by Merle B. Winburn to change the point of diversion and place of use of 0.02 cfs, not to exceed 11.0 acre-feet annually, of the water previously appropriated under Permit 46958 for quasi-municipal purposes for use within the S $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, T.18 N., R.19 E., M.D.B. & M.² The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 34. Permit 46958 was approved on September 4, 1981, to change the place of use of Permit 42760.

¹File No. 53700, official records of the Office of the State Engineer.

²File No. 53701, official records of the Office of the State Engineer.

Applications 53700 and 53701 proposed to combine 74 acre-feet of water at the new point of diversion to serve 66 lots within the place of use. The owner of record, Nell J. Redfield Trust, acquired Applications 53700 and 53701 on or about July 28, 1989.

Permits 53700 and 53701 were granted by the State Engineer on December 30, 1991. Under both Permits 53700 and 53701 proof of completion of work was first due to be filed in the Office of the State Engineer on or before October 4, 1992. Proof of beneficial use of the waters under Permit 53700 was first due to be filed in the Office of the State Engineer on or before October 4, 1996, and under Permit 53701 on or before October 4, 1993.

II.

On October 5, 1995, the State Engineer sent notice to the permittee that it had not complied with the permit terms in that it had not timely filed proof of completion of work as required under both Permits 53700 and 53701, and had not timely filed proof of beneficial use as required under Permit 53701.¹⁻²

III.

On October 16, 1995, the permittee filed applications for extension of time for filing proof of completion of work and proof of beneficial use under Permits 53700 and 53701 and explained in part the following reasons for needing the extension of time:

That "(p)ermittee has been actively and aggressively marketing the real property to which this permit is appurtenant";

That "(t)he Charter of the corporation precludes the Trust from actually developing the real property"; "(a)ccordingly, the Trust must sell the property, the subject of this water right, to a 'developer', who will obtain the necessary local and state approvals"; "(t)he Trust, therefore, is not a builder or developer";

That "(t)he national economy, the local economy, and the fact that large blocks of land are readily available within the Truckee Meadows and surrounding areas, has, to some degree, hindered the sales"; "(a)ccordingly, the Trust must retain the property and maintain its highest value,";

That "(s)ales of real property in the area are pending"; "the State of Nevada, Department of Transportation, has condemned, by eminent domain, certain real property owned by permittee"; "(a)lthough not included within the place of the subject water rights, such action reduces the ability of permittee to successfully market its real property";

That "(p)ermittee was one of the owners of Galena Resort, which entity owned a large portion of Mt. Rose"; "(o)n August 12, 1994, escrow closed, wherein the United States Government acquired the property owned by Galena Resort"; "(d)uring the pendency of the long escrow, permittee was unaware of whether the escrow would close or not"; "(t)hat decision had a large part in determining how the waters depicted in this permit should best be put to a beneficial use"; and

That "(p)ermittee has, in addition to the above, suffered delays pending conclusion of the recent Nevada legislature"; "(i)t was unknown exactly what entity, meaning Westpac Utilities or Washoe County, would actually serve water to the real property covered by this permit"; "(s)ince that issue has now been resolved, permittee is working closely with Washoe County, attempting to integrate these water rights into Washoe County's existing systems"; "(u)ntil such resolutions are complete, permittee is unable to place the water to a beneficial use."¹⁻²

IV.

By letter dated May 15, 1996, the State Engineer found that three extensions of time had been granted to complete the diversion works and file the proof of completion of the work under Permit 53700. One extension of time had been granted to file the proof of completion of work under Permit 49324 before Permit 53700 was approved. A total of four extensions of time had already been granted to file proof of completion of work under Permits 49324 and 53700.

Three extensions of time had been granted to complete the diversion works and file the proof of completion of the work, and two extensions of time had been granted to establish beneficial use and file proof of beneficial use under Permit 53701. Five extensions of time had been granted to file the proof of beneficial

use under Permit 46958 before Permit 53701 was approved. A total of seven extensions of time had already been granted to file proof of beneficial use under Permits 46958 and 53701.

The State Engineer found from the request for extension of time that as the water right owner is precluded from actually developing the property and is unable to complete the project within a reasonable period of time, good cause had not been demonstrated to grant the requested extensions of time. Since the owner is precluded from developing the property, any uncertainty, delay or adverse effect resulting from the pendency of the long escrow regarding Galena Resort, or from the Nevada legislature's resolution of water service jurisdiction, or from economic or market conditions was irrelevant concerning the ability of the owner to establish beneficial use in compliance with the permit requirements.

The State Engineer further found that retaining a water right permit for an indefinite period of time for the proposed, prospective, or pending sale of land to which the permit is appurtenant, or pending negotiations to integrate the permit into the Washoe County water system, without reasonable progress to establish beneficial use, was contrary to the intent of Nevada Water Law.

V.

Pursuant to NRS 533.395, the permittee timely filed a written petition requesting review of the cancellation. After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on July 11, 1996, at Carson City, Nevada, before representatives of the Office of the State Engineer.³

³Transcript, public administrative hearing before the State Engineer, July 11, 1996. (Hereinafter "Transcript".)

FINDINGS OF FACT

I.

Testimony was provided at the public administrative hearing that Washoe County operates two water systems, the Mount Rose water system and the Timberline water system, in the local area identified as the place of use under Permits 53700 and 53701.⁴ At the present time the two water systems are not connected; however, Washoe County has plans to connect the systems in the future.⁵

Testimony was further provided that before Washoe County would approve any development at the place of use identified under Permits 53700 and 53701 Washoe County would require a sewer system be in place, as opposed to septic tank systems of waste disposal. As a sewer system is not available to serve this property at the present time Washoe County would not likely approve a project for development at this time on the land covered by the permits.⁶ Even if the permittee were to complete the works without the sewer in place building permits would not be granted at the place of use.⁷

The State Engineer finds that the issue of inability to proceed due to the fact that sewer service is unavailable is new information not previously presented to the State Engineer in the request for extension of time, and in effect precludes anyone from proceeding to perfect the water rights at the place of use identified under Permit 53700 and 53701 for the immediate future.

II.

Testimony also indicated that a sewer system should be under construction by the end of 1996, to be completed by 1997, which would put a sewer main interceptor $\frac{1}{2}$ mile from the place of use,

⁴Transcript, pp. 20 -21.

⁵Transcript, p. 20.

⁶Transcript, pp. 26 - 27.

⁷Transcript, p. 27.

and that the Timberline subdivision, which is located between the main interceptor and the place of use is already sewerred. Therefore, by the end of 1997 a sewer connection should be only a few hundred feet from the place of use identified in the permits.⁸ The State Engineer finds that any development of the place of use appears to be precluded until at least the end of 1997, the timeframe anticipated for having a sewer connection available to service the property identified as the place of use.

III.

Testimony was provided at the public administrative hearing that when the permittee purchased Permits 53700 and 53701 the seller agreed to have infrastructure in place that would supply water to the lots identified under the permits.⁹ However, the seller did not have the infrastructure in place or the well capacity to complete the seller's obligation under the agreement with the permittee.¹⁰ Further, the seller passed away before fulfilling his contractual obligation with regard to infrastructure. However, Washoe County is working with the permittee to resolve the problems left from the seller's failure to complete the contractual obligations.¹¹ The State Engineer finds that the infrastructure problems and resulting demise of the person contractually responsible for the infrastructure has hindered the permittee from proceeding with development of the water source; however, the State Engineer further finds that the permittee has been working with Washoe County in attempting to find a resolution to the infrastructure problem.

⁸ Transcript, pp. 33 - 34.

⁹ Transcript, pp. 29 - 31.

¹⁰ Transcript, pp. 45 - 46.

¹¹ Transcript, p. 32.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹²

II.

NRS 533.390(2) provides that if a person holding a water right permit fails to timely file the proof of completion of work the State Engineer shall notify the person that the permit is being held for cancellation, and should the holder within 30 days fail to file the required documentation, the State Engineer shall cancel the permit. However, NRS 533.390(2) provides that the State Engineer may in his discretion for good cause shown, upon application made prior to the expiration of the 30-day period, grant an extension of time in which to file the proof of completion of work.

NRS 533.410, applicable to the filing of proof of beneficial use, provides that the State Engineer may for good cause shown, upon application made prior to the expiration of the 30-day period, grant an extension of time for filing proof of beneficial use of the waters.

NRS 533.395 provides that if, at any time in the judgment of the State Engineer, the holder of any permit is not proceeding with good faith and reasonable diligence to perfect the appropriation, the state engineer shall require the submission of such proof and evidence as may be necessary to show a compliance with the law. The permittee argued that the State Engineer did not comply with NRS 533.395(1) in that the State Engineer did not first require the submission of such proof and evidence as may be necessary to show compliance with the law before cancellation of the permits.¹³

¹²NRS Chapters 533 and 534.

¹³Transcript, pp. 9 - 12.

The State Engineer concludes that NRS 533.395(1) provides the State Engineer with an additional avenue for requiring information as to good faith and due diligence other than that provided for under the provisions of NRS 533.390 and NRS 533.410 which allow for applications for extension of time for filing proof of completion and proof of beneficial use, and that a separate request by the State Engineer for the submission of proof and evidence is not required outside the process of the application requesting an extension of time. The extension of time form requests detailed information as to the reasons for the water right not being perfected and additional pages may be attached if required for a full explanation.

On January 13, 1995, the permittee was informed by letter from the State Engineer that unless substantial progress was made or significant mitigating circumstances existed future applications for extensions of time would be denied. The permittee had the opportunity in its applications for extension of time to provide the State Engineer with any additional proof or evidence of its good faith and reasonable diligence in perfecting the appropriation. The State Engineer concludes that the permittee is mistaken in its interpretation of NRS 533.395(1).

The applications for extension of time were filed pursuant to NRS 533.390 and NRS 533.410. NRS 533.395(2) provides that if a permit is cancelled under the provisions of NRS 533.390, 533.395 or 533.410, the holder of the permit has the right to timely file a petition for review of the cancellation at a public hearing. If the decision of the State Engineer modifies or rescinds the cancellation the effective date of the appropriation under the permit is vacated and replaced by the date of the filing of the written petition for review. NRS 533.395(4) provides that a cancellation of a permit may not be the subject of a judicial proceeding unless a petition for review is filed and the cancellation affirmed, modified or rescinded by the State Engineer.

The State Engineer concludes that the petition for review of the cancellation was properly before him pursuant to NRS 533.395(2).

III.

In the perfection of a water right a permittee is allowed under the law sufficient time after the date of approval of the application to complete application of the water to beneficial use.¹⁴ The State Engineer shall not grant an extension of time unless proof and evidence is submitted that shows the permittee is proceeding in good faith and with reasonable diligence to perfect the application.¹⁵ The measure of reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances.¹⁶

The intent of the extension of time provision under Nevada law is to provide the opportunity for the permittee to resolve temporary adverse conditions, which prevent compliance with the proof of completion of works and proof of beneficial use requirements set forth on the permit. To ensure and maintain the integrity and equity of the appropriation process, it is essential that the process not be improperly applied to reserve the water resource without beneficial use of the water or to retain a water right without reasonable progress to comply with the beneficial use requirements.

However, NRS 533.380(3) provides that the State Engineer may for good cause shown extend the time in which the construction work must be completed or water applied to beneficial use under any permit. NRS 533.380(4) provides that when the holder of a permit for any use which may be served by a county, city, town, public water district or public water company, requests an extension of

¹⁴NRS 533.380.

¹⁵NRS 533.380.

¹⁶NRS 533.380(6).

time to apply the water to beneficial use, the State Engineer shall, in determining whether to grant or deny the extension, consider whether the holder has shown good cause for not having made complete application of the water to a beneficial use.

The State Engineer concludes that nothing has changed regarding Redfield Trust's ability to develop this water source and apply the water to beneficial use.¹⁷ However, the State Engineer concludes that due to Washoe County's prohibition of any development at the place of use until the issue of sewer lines is resolved, prevents any person from completing the application of this water to beneficial use at least until 1997.

RULING

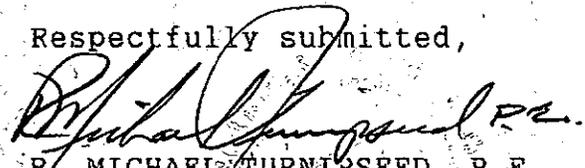
The cancellation of Permits 53700 and 53701 is hereby rescinded based upon the new information provided at the administrative hearing that precludes anyone from developing the property and water right until the sewer problem is resolved. The new priority date for Permits 53700 and 53701 is May 21, 1996. The permittee has 30 days from the date of this ruling to file the required requests for extension of time, and upon filing they are hereby granted to May 21, 1997. If the property has not been successfully marketed and escrow closed by May 21, 1998, and evidence of such filed in the Office of the State Engineer, no further extensions of time will be granted. While the law allows for speculation in land, the water law does not allow the same latitude. Either a permittee is pursuing perfection of a water right or the water right will be cancelled, and attempts at selling

¹⁷Transcript, pp. 40 - 43.

Ruling
Page 11

property to which a water right is attached does not demonstrate good faith and reasonable diligence in the pursuit of perfection of a water right.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 27th day of

September, 1996.