

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

IN THE MATTER OF CANCELLED PERMIT)
51854 FILED TO CHANGE THE POINT)
OF DIVERSION OF PUBLIC WATERS)
PREVIOUSLY APPROPRIATED FROM AN)
UNDERGROUND SOURCE WITHIN PIUTE)
VALLEY GROUNDWATER BASIN (214),)
CLARK COUNTY, NEVADA.)

RULING

4462

GENERAL

I.

Application 51854 was filed on February 22, 1988, by Gem Enterprises to change the point of diversion of 0.25 cubic feet per second of the water previously appropriated under Permit 47654 for mining and milling purposes within the S $\frac{1}{2}$ Section 29, S $\frac{1}{2}$ Section 30, S $\frac{1}{2}$ N $\frac{1}{2}$ Section 30, and NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, T.28 S., R.63 E., M.D.B. & M.¹ Application 51854 requested permission to move the point of diversion of Well No. 2 from the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 30, to a point described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 30. The map which accompanied change Application 49651² identifies the point of diversion under Application 51854 as being located within Gem mining claim #9 located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 30.

II.

Permit 51854 was granted on October 19, 1988.³ Under the terms of the permit Proof of Completion of the Work and Proof of Beneficial Use of the waters was due to be filed in the Office of the State Engineer on or before April 27, 1989.

¹ File No. 51854, official records of the Office of the State Engineer; Exhibit No. 1, at pp. 3-4, public administrative hearing before the State Engineer, September 9, 1996. (Hereinafter "Exhibit No. 1".)

² Permit 49651 was a change application for another well within the identified place of use.

³ Exhibit No. 1 at pp. 38-39.

III.

Notice was sent by certified mail dated April 28, 1989, that the permittee had not complied with the terms of Permit 51854 in that the Proof of Completion of Work and Proof of Beneficial Use of the water had not been filed in accordance with the permit terms. The permittee was given 30 days in which to file the required documentation. On May 24, 1989, the permittee filed an Application for Extension of Time for filing said Proof of Completion and Proof of Beneficial Use under Permit 51854 stating that "due to circumstances in renegotiated [sic] lease arrangement to complete mining plant facilities, we will require additional extension of time for one full year to establish beneficial use."⁴ The State Engineer granted the requested extension of time through April 27, 1990.

On May 10, 1990, Gem Enterprises filed a subsequent Application for Extension of time for filing the Proof of Completion of Work and Proof of Beneficial Use indicating that the well was completed, the pump in, but that it was waiting for power and mill completion before the water could be put to beneficial use.⁵ The State Engineer granted the requested extension of time through April 27, 1991.

Proof of Completion of Work for Permit 51854 was filed on July 12, 1990. On May 24, 1991, Gem Enterprises filed an Application for Extension of time for filing Proof of Beneficial Use indicating that additional time of one year was needed due to a lack of funds.⁶ The State Engineer granted the requested extension of time through April 27, 1992.

⁴ Exhibit No. 1 at p. 44.

⁵ Exhibit No. 1 at p. 54.

⁶ Exhibit No. 1 at p. 64.

On May 7, 1992, Gem Enterprises filed an Application for Extension of Time for filing Proof of Beneficial Use of the waters again stating that additional time of one year was needed due to a lack of funds.⁷ The State Engineer granted the requested extension of time through April 27, 1993.

On May 6, 1993, Gem Enterprises filed an Application for Extension of Time for filing Proof of Beneficial Use of the waters again stating that additional time of one year was needed due to "beginning mining operation."⁸ The State Engineer granted the requested extension of time through April 27, 1994.

On April 6, 1994, Gem Enterprises filed another Application for Extension of Time for filing Proof of Beneficial Use of the waters again stating that additional time of one year was needed due to "working bugs out of milling process".⁹ On September 2, 1994, the State Engineer granted the requested extension of time through April 27, 1995; however, the State Engineer informed the permittee that the extension of time was granted with the condition that additional requests would be reviewed to determine progress in establishing beneficial use of the water, and unless good faith and reasonable diligence were demonstrated, further requests for extensions of time would be denied.¹⁰

IV.

On May 18, 1995, Gem Enterprises filed another Application for Extension of Time for filing Proof of Beneficial Use of the water stating that it needed an additional one year to install power and line to the mill site from the well.¹¹ By letter dated October 5,

⁷ Exhibit No. 1 at p. 71.

⁸ Exhibit No. 1 at p. 79.

⁹ Exhibit No. 1 at p. 83.

¹⁰ Exhibit No. 1 at p. 85.

¹¹ Exhibit No. 1 at p. 89.

1995, the State Engineer informed the permittee that the record lacked evidence that beneficial use of the water would be established within a reasonable time or that the permittee had determined the extent of the project.¹² The record demonstrated that no significant additional expenditures had been incurred toward development of the water source since April 1994. The State Engineer found that retaining a water right permit for an indefinite period of time was contrary to Nevada Water Law in that water cannot be retained without a reasonable effort to establish beneficial use or a reasonable expectation to do so within a reasonable period of time as beneficial use is the basis, the measure and the limit of a water right under Nevada law.¹³

The State Engineer found that the record lacked evidence that there had been reasonable progress to comply with the beneficial use requirements under Permit 51854, (or that the owner may be expected to comply with the beneficial use requirement in a reasonable period of time). The State Engineer further found that the permittee had not shown good cause to grant the requested extension of time nor was the owner proceeding in good faith and with reasonable diligence as provided under NRS 533.395(1). Therefore, the State Engineer cancelled Permit 51854.

V.

As provided pursuant to NRS 533.395, on November 27, 1995, the State Engineer received a written petition from Gem Enterprises requesting review of the cancellation at a public hearing before the State Engineer¹⁴ stating that actions of the State of Nevada and the United States Government had prevented Gem Enterprises from proving beneficial use of the waters under Permit 51854. The permittee indicated that changing policies of the Federal

¹² Exhibit No. 1 at pp. 92-95.

¹³ Exhibit No. 1 at p. 93.

¹⁴ Exhibit No. 1 at p. 99-100.

Government, specifically the Bureau of Land Management ("BLM"), had delayed the project; that the permittee had filed an appeal of the BLM interpretations in 1994 and had yet to have a hearing or final judgment rendered. The permittee further indicated that it has had similar roadblocks with the Nevada Department of Transportation.

VI.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held before representatives of the Office of the State Engineer on September 9, 1996, at Las Vegas, Nevada.¹⁵

FINDINGS OF FACT

I.

After hearing the testimony at the public administrative hearing the hearing officer determined there appeared to exist many other documents which would aid the State Engineer in his determination regarding the cancellation of Permit 51854. Therefore, the hearing officer left the hearing record open for a period of 30 days from the date of the hearing and instructed the permittee/petitioner to file any additional documentation supporting the permittee's case, including documentation supporting the permittee's claim that the policies of the Federal Government and the BLM have delayed the project, that the permittee has an active appeal of the BLM interpretations, and that active discussions were taking place with regard to financing of the permittee's project.¹⁶ The State Engineer finds that Gem Enterprises submitted additional documentation within the 30-day time frame; however, none of the additional documentation addressed the issue of financing the project.

¹⁵ Transcript, public administrative hearing before the State Engineer, September 9, 1996. (Hereinafter "Transcript".)

¹⁶ Transcript, pp. 10-14, 50-54.

II.

Testimony provided at the public hearing indicated that about 1985 Gem Enterprises became aware that the Nevada Department of Transportation ("NDOT") claimed to have a pre-existing gravel mining claim on several of the Gem Enterprises mining claims, including that claim identified as Gem #9 in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 30.¹⁷ Gem Enterprises disputes the validity of this pre-existing claim. The State Engineer finds he has no jurisdiction over the land issues and will not address the specifics of the dispute between Gem Enterprises, the NDOT and the BLM regarding who has a valid claim to use of the land for mining.

III.

The testimony, supplemental documentation and records of the Office of the State Engineer indicate that about 1985 Frehner Construction Company, which had been hired by the NDOT to do repairs on the nearby highway, came into the area identified as the place of use, had a well drilled, and mined gravel for nearby highway construction.¹⁸ Evidence was provided that Gem Enterprises later acquired ownership of this well.¹⁹ Testimony was provided which indicates that the BLM would not, without the NDOT's approval, grant Gem Enterprises a right-of-way from the Frehner well through the NDOT claim.²⁰

As the permittee had not brought any documentation to the hearing regarding this issue, the hearing officer also left the record open for 30 days in order for the permittee to supplement the record with evidence regarding the dispute with the NDOT and the BLM as to whether Gem Enterprises has a valid mining claim on

¹⁷ Transcript, pp. 14-21, 25-30, 42-44.

¹⁸ Transcript, pp. 14-21, 25-30.

¹⁹ Supplemental documentation at Tab 10 and Tab 13, Exhibit F.

²⁰ Transcript, pp. 14-15, 19-20, 25-30, 39-44; supplemental documentation at Tab 1, Tab 2, Tab 13 at Exhibit A & B.

the areas claimed by the NDOT and as to the issue of right-of-way. In the supplemental documentation supplied, it is indicated that in February 1986 the BLM declared Gem #1 and Gem #9 to be null and void,²¹ and in August 1987 the Interior Board of Land Appeals ("IBLA") affirmed the BLM decision declaring Gem #1 and Gem #9 as null and void.²² The State Engineer finds that no documentation or evidence was supplied by the permittee indicating that the IBLA decision was ever appealed to the courts or reversed.

IV.

In the supplemental documentation it is indicated that in September 1993 the BLM instituted a trespass proceeding against Gem Enterprises and ordered Gem Enterprises to remove the water line on the NDOT materials site and to plug the well.²³ From the testimony and documentation it appears that the BLM had not granted Gem Enterprises a right-of-way permit across the site claimed by the NDOT, and the NDOT would not agree to grant a right-of-way to Gem Enterprises.²⁴ The State Engineer finds it is unclear from the record whether the trespass proceeding goes to the Frehner well or another well, but based on a statement by Mr. Noland at the hearing²⁵, the State Engineer believes the trespass decision is

²¹ Supplemental documentation at Tab 13 Brief at p. 3, and Tab 13 Exhibit L.

²² Supplemental documentation at Tab 13, p. 4.

²³ Supplemental documentation at Tab 13, Exhibits A & B. Note - the letter indicates September 1994, but it is clear from the date of the letter 1994 is a typographical error and should be 1993.

²⁴ Supplemental documentation at Tab 13 Exhibits L & M.

²⁵ Transcript, p. 36.

addressing the Frehner well which is not the permit at issue in this proceeding. However, the permittee testified that the project, including both wells, should be viewed as one operation.²⁶

In the supplemental documentation it was indicated that in February 1994 Gem Enterprises filed an amended notice of claim location in which Gem #1 was redesignated and included a portion of the former Gem #9.²⁷ The brief filed with the IBLA indicates that the new Gem #1 was filed to cover those areas already mined by the NDOT and to exclude those areas that could be mined by the NDOT in the future.²⁸

In a letter dated March 24, 1994, the NDOT indicated that it would not agree to issuance by the BLM of a right-of-way grant to Gem Enterprises,²⁹ and around May 31, 1994, the BLM found Gem Enterprises to be in trespass.³⁰ Gem Enterprises filed an appeal to the IBLA of that decision in June or July 1994. Testimony indicates that the permittee is still waiting for an answer to the appeal.³¹ The State Engineer finds that public information provided by the IBLA indicates that the matter is still pending, that the order to remove water lines and plug the wells was stayed until the IBLA could reach the case on the merits, and that no action has been taken with regard to the appeal; however, the IBLA is getting close to dealing with the fiscal 1994 cases in a backlog of 1,400 cases.

²⁶ Transcript, p. 37.

²⁷ Supplemental documentation at Tab 13 Exhibits I & J.

²⁸ Supplemental documentation Tab 13 Brief at pp. 4-5.

²⁹ Supplemental documentation Tab 13 Exhibit M.

³⁰ Transcript, pp. 38-40; Supplemental documentation at Tab 13 Exhibit A.

³¹ Transcript, pp. 36-37.

V.

At the public administrative hearing the permittee testified to a belief that the Las Vegas Valley Water District has also thwarted its efforts at developing the mining claims and putting the water to beneficial use.³² In the supplemental documentation the permittee provided a letter dated June 29, 1990, from the NDOT to the Las Vegas Valley Water District³³ regarding the placement of a district water line and power line through the NDOT material site. The letter summarizes information the NDOT had with regard to the Gem Enterprises' wells within the NDOT material site and indicates that the BLM records do not reflect Gem Enterprises ever made any application to secure a right-of way across the NDOT materials site and that any attempt to place water lines from the well sites to the place of use without the proper right-of-way grants would be regarded as a violation of federal regulations and considered a trespass. The State Engineer finds that while the Las Vegas Valley Water District was also trying to put a water line and power line through the area there is no evidence to support the permittee's claim that the Las Vegas Valley Water District in any way has thwarted its efforts in developing its project.

VI.

At the public administrative hearing the permittee indicated that issues have arisen regarding the mining claim area being designated as threatened tortoise habitat.³⁴ In the supplemental documentation supplied by the permittee there is a letter dated March 9, 1995, from the BLM to Douglas Noland, one of the owners of Gem Enterprises.³⁵ The BLM letter indicates that a plan of

³² Transcript, pp. 14-17, 23-27, 34.

³³ Supplemental documentation at Tab 13 Exhibit L.

³⁴ Transcript, pp. 41-46.

³⁵ Supplemental documentation at Exhibit 14.

operations was filed with regard to Gem claims #5, #15 and #16, and the Mr. Noland was mistakenly led to believe that the mining claims were outside of the area closed pursuant to an Interim Closure of Public Lands in the Piute Valley, Stateline Resource Area, Clark County, Nevada, published in the Federal Register, as opposed to inside the closure area.

Attached to the BLM letter was a draft biological evaluation dated March 6, 1995. The draft biological evaluation indicated measures which could be taken to avoid or mitigate adverse affects to the desert tortoise habitat which included having a qualified tortoise biologist on site during all phases of mineral exploration from March through October, or a tortoise fence could be built with a biologist on site during the fence building, and further required several thousand dollars be paid in mitigation fees. The draft biological evaluation indicates that "no proposed species and or proposed critical habitat are on the site of the action,"³⁶ and indicates that perhaps the area could be deleted from the Piute-Eldorado Desert Wildlife Management Area after the completion of the Clark County Desert Conservation Plan and the BLM's Resource Management Plan.

The State Engineer finds that in 1995 at least a portion of the area identified as the place of use under Permit 51854 was considered threatened desert tortoise habitat and until the required mitigation and expenditures for mitigation were undertaken no development could take place. The State Engineer finds that the documentation provided did not address what has transpired since 1995 to the hearing date in September 1996 with regard to resolution of the desert tortoise issues and proceeding with the biological evaluation and mitigation. The State Engineer further

³⁶ Supplemental documentation at Exhibit 14.

finds that it appears if the permittee will undertake the required mitigation, (it could go forward with its project but for the issue of lack of right-of-ways from the wells and the NDOT's superior claim).

VII.

The State Engineer finds that the permittee did supply evidence which indicates problems it has had in developing its mining claims, problems with the NDOT and Gem Enterprises claiming the same area as a mining claim, problems with obtaining a right-of-way for use of the wells, and problems with threatened species habitat designations being put on the area of the mining claims. However, the permittee provided very little evidence of its activities with regard to attempts at resolution of the issues.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.³⁷

II.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise³⁸ and beneficial use is the basis, the measure and the limit of the right to the use of water.

III.

A permit to appropriate water grants to the permittee the right to develop a certain amount of water from a particular source for a certain purpose to be used at a definite location.³⁹ In the perfection of a water right, a permittee is generally allowed, under the law, sufficient time after the date of approval of the

³⁷ NRS Chapters 533 and 534.

³⁸ NRS 533.030 and 533.035.

³⁹ NRS 533.330 and 533.335.

application to complete application of the water to beneficial use.⁴⁰ In the case of Permit 51854, which was a change in point of diversion of Permit 47654, the permittee has had since 1985 to put the water to beneficial use.

However, Nevada water law provides that the State Engineer may for good cause shown extend the time within which the water is to be placed to beneficial use. 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.⁴¹ 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.⁴² When a project or integrated system is comprised of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.⁴³

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 must 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.

⁴⁰ NRS 533.380.

⁴¹ NRS 533.380.

⁴² NRS 533.380(6).

⁴³ NRS 533.380(6).

IV.

When Application 47654 was filed in 1984 it was estimated that three years would be needed to complete the diversion works and five years to prove beneficial use of the waters under the permit. When change Application 51854 was filed in 1988 it was estimated that 30 days were needed to construct the works, and one year was needed to prove beneficial use of the water. More than 11 years have passed since a permit was originally granted for the permittee's project.

The State Engineer concludes that Gem Enterprises has encountered what could be considered either temporary or permanent obstacles to placing the water to beneficial use. The issue of the NDOT's overriding and superior claims to Gem #1 and #9 and the subsequent appeal of the trespass decision from BLM, if resolved in Gem Enterprises' favor, can be considered a temporary obstacle. However, if the issue is resolved against Gem Enterprises it may be a permanent obstacle.

The State Engineer concludes that no evidence was supplied indicating any judicial appeal of the IBLA decision in 1987 declaring Gem #1 and #9 null and void. Therefore, the 1987 decision of the IBLA with regard to Gem #1 and Gem #9 is final as far as the evidence in this case. The State Engineer concludes that the appeal to the IBLA of the BLM decision of May 1994 whereby Gem Enterprises was found to be in trespass is still pending, and until the trespass decision is heard on the merits it is a temporary adverse condition which prevented compliance with the proof of beneficial use requirements as the evidence indicates the well is within an area claimed by the NDOT.

The State Engineer concludes he has no jurisdiction over the issue of the dispute between Gem Enterprises, the NDOT and the BLM regarding NDOT's overlapping claims to the areas claimed by Gem as Gem #1 and #9, or amended Gem #1, or over the issue of a right-of-way.

V.

The State Engineer concludes that the designation of the mining claim area as threatened desert tortoise habitat, and the possibility that the designation may be removed after studies, could be viewed as a temporary adverse condition which prevented the permittee from placing the water to beneficial use. However, the State Engineer also concludes that the evidence indicates that Gem Enterprises could proceed even in light of the designation if it is willing to pay the cost for mitigation but for the resolution of the trespass decision and the NDOT claim. The State Engineer further concludes that the evidence indicates that the permittee has not taken much action in an attempt to try to obtain final resolution of these issues, and that the desert tortoise designation does not appear to be a permanent obstacle to placing the water to beneficial use.

RULING

The cancellation of Permit 51854 is hereby rescinded with the following conditions. The due date for filing Proof of Beneficial Use of the waters is now established as September 9, 1996. The priority date of Permit 51854 is now November 27, 1995.

Applications for extension of time will be granted, if requested, at least until the resolution of the IBLA appeal. If an application for extension of time is filed in lieu of Proof of Beneficial Use the permittee must provide more detail than has previously been supplied in the applications for extension of time and should specifically address the permittee's efforts at good faith and reasonable diligence in placing the water to beneficial use, including, but not limited to, efforts which have been undertaken to move along Gem Enterprises' appeal of the trespass decision before the Interior Board of Land Appeals, efforts towards resolution of the desert tortoise habitat designation and

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mitigation, efforts towards resolution of the NDOT competing claims, and efforts towards financing for the overall project. If the required specific efforts are not demonstrated no further extensions of time will be granted.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 11th day of
December, 1996.