

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

IN THE MATTER OF CANCELLED)
PERMITS 30244, 30245, 30246, 30247)
AND 39983 FILED TO APPROPRIATE)
THE UNDERGROUND WATERS WITHIN THE)
PANACA VALLEY GROUNDWATER BASIN)
(203), LINCOLN COUNTY, NEVADA.)

RULING

4627

GENERAL

I.

Applications 30244, 30245, 30246 and 30247 were filed on May 11, 1976, by Wayne M. and Janice A. Turner, to appropriate the underground waters of the Panaca Valley Groundwater Basin, Lincoln County, Nevada. Permits 30244, 30245, 30246 and 30247 were each approved on November 10, 1976, for 3.34 cubic feet per second (cfs) for irrigation purposes. The points of diversion are described as being located within: SE¼ NW¼ of Section 24 (Permit 30244); NW¼ NW¼ of Section 24 (Permit 30245); SW¼ SW¼ of Section 13 (Permit 30246); NE¼ SE¼ of Section 14 (Permit 30247) all within T.2S., R.67E., M.D.B.&M. The places of use under Permits 30244, 30245, 30246 and 30247 are within the W¼ SW¼, SE¼ SW¼ of Section 13; the N¼ NW¼, NE¼, E¼ SE¼ of Section 14; the SE¼ NE¼ of Section 23; and the NW¼ of Section 24, all in T.2S., R.64E., M.D.B.&M. totalling 640 acres. The permit terms limit these permits to a duty of 5.0 acre-feet per acre from any and all sources for a total combined duty not to exceed 3,200 acre feet annually (afa).¹

II.

By Quitclaim Deed executed June 2, 1983, Wayne M. Turner and Janice A. Turner relinquished to the State of Nevada 424.8 afa of water appurtenant to 84.96 acres of land, delineated on Attachment 'A'² to the deed, under Permits 30244, 30245, 30246 and 30247 for

¹ File Nos. 30244, 30245, 30246 and 30247, official records in the office of the State Engineer.

² Exhibit No. 9, public administrative hearing before the State Engineer, November 5, 1997.

the Natures Haven Subdivision. Subsequently, the State Engineer's subdivision review No. 2611C-F, was approved for 354 lots with an individual domestic well on each lot based on the relinquishment of the 424.8 afa. Therefore, the total combined duty under Permits 30244 through 30247, inclusive, was reduced from 3,200 afa to 2,775.2 afa.¹

III.

Application 39983 was filed on December 17, 1979, by Wayne M. and Janice A. Turner to appropriate the underground waters of the Panaca Valley Groundwater Basin, Lincoln County, Nevada. Permit 39983 was approved on January 23, 1984, for irrigation purposes. The point of diversion is described as being located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, T.2S., R.67E., M.D.B. & M. The place of use under Permit 39983 is located within the W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13; the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 14; the NW $\frac{1}{4}$ of Section 24, all within T.2S., R.67E., M.D.B. & M. for 360 acres, less those lands relinquished under Permits 30244 through 30247, inclusive, at a duty of 5.0 acre-feet per acre from any and all sources. The place of use under Permit 39983 is entirely within the place of use of Permits 30244, 30245, 30246 and 30247. Therefore, Permits 30244, 30245, 30246, 30247 and 39983 are supplemental to each other for a total combined duty not to exceed 2,775.2 afa. The current owners of record in the office of the State Engineer of Permits 30244, 30245, 30246, 30247 and 39983 are Wayne M. and Janice A. Turner.³

IV.

Proof of Beneficial Use and cultural map were first due to be filed in the office of the State Engineer on or before June 10, 1981, under Permits 30244, 30245, 30246 and 30247. Twelve extensions of time have been granted to establish beneficial use of the water and to file the Proof of Beneficial Use and cultural map under each permit. Under Permit 39983, the Proof of Completion

³ File Nos. 30244, 30245, 30246, 30247 and 39983, official records in the office of the State Engineer.

of Work was first due to be filed in the office of the State Engineer on or before February 23, 1985. Eight extensions of time have been granted to complete the water well and associated diversion works under Permit 39983. The Proof of Beneficial Use and cultural map under Permit 39983 were first due to be filed in the office of the State Engineer on or before February 23, 1988. Five extensions of time have been granted under Permit 39983 to establish beneficial use of the water and to file the Proof of Beneficial Use and cultural map. On September 26, 1994, Permits 30244, 30245, 30246, 30247 and 39983 were cancelled. The permittees and the Farmers Home Administration (now known as the Farm Service Agency⁴) both timely petitioned the State Engineer for an administrative hearing to review the cancellation pursuant to NRS § 533.395(2).³

V.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on November 5, 1997, in Las Vegas, Nevada, before representatives of the office of the State Engineer regarding the petition for review of the cancellation of Permits 30244, 30245, 30246, 30247 and 39983.

FINDINGS OF FACT

I.

At the administrative hearing, Mr. Turner presented evidence and testimony in support of the fact that he was unable to perfect the waters of the subject permits due to his pecuniary inadequacy arising from the litigation concerning the control of loans for the development of the lands to which the water rights are appurtenant. The requests for extension of time under Permits 30244, 30245, 30246 and 30247 to submit the Proof of Beneficial Use and cultural

⁴ By telephone conference on August 27, 1997, the Office of the General Counsel, U.S. Department of Agriculture informed the State Engineer that the U.S. Department of Agriculture held a forced deed of trust and was foreclosing on the property the subject of referenced permits.

map filed from 1981 through 1985 indicate that due to factors beyond the permittees control the progression from completion of the works of diversion to putting in fields ready for the application of irrigation waters was not feasible at the time. The amount of lands irrigated were far less than permitted. The requests for extension of time to file the Proof of Completion of Work under Permit 39983 and the Proof of Beneficial Use and cultural map under Permits 32044, 32045, 32046, 32047 and 39983 filed from 1986 through 1992 indicate that the permittees were in litigation with the then Farmers Home Administration.

This inability by the permittees to put the water to beneficial use is directly related to the litigation regarding the subject property. The Farm Service Agency is the successor in interest to the Farmers Home Administration and is the current holder of a mortgage on the lands covered under the subject permits. The Farm Service Agency testified that the litigation between the Turners and their agency has prevented the permittees from perfecting the waters of the subject permits.⁵

Cost considerations, such as expenditures for seed, fertilizer and land improvements, including the irrigation of cultivated lands as testified to by Mr. Turner has demonstrated that the permittees have attempted to put a portion of the subject waters to beneficial use.⁶ The State Engineer finds that approximately 480 acres of land within the described place of use has been irrigated and/or prepared for irrigation at this juncture. The State Engineer further finds that the litigation or negotiation between the permittees and a government agency or other party has had an

⁵ Transcript p. 66, public administrative hearing before the State Engineer, November 5, 1997.

⁶ Exhibit No. 7, public administrative hearing before the State Engineer, November 5, 1997.

adverse impact in the permittees ability to perfect the subject waters.

II.

On June 2, 1983, a Quitclaim Deed was executed between Wayne M. and Janice A. Turner as grantor and the State of Nevada as grantee. The Quitclaim Deed was for the relinquishment of a portion of Permits 30244, 30245, 30246 and 30247 in exchange for a proposed subdivision. The relinquishment of a portion of Permits 30244, 30245, 30246 and 30247 reduced the place of use to 555.04 acres with a total combined duty of 2,775.2 afa at a diversion rate of 2.9 cfs for each of the referenced permits. The place of use of Permit 39983 is for 360 acres within the 555.04 acres. A portion of the place of use has not been irrigated fully since the issuance of the subject permits as testified to by Mr. Turner.⁷ The State Engineer finds that portions of the places of use in the amount of 80 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, T.2S., R.67E., M.D.B.&M. have not been irrigated.

III.

The relinquishment of a portion of the water rights under Permits 30244, 30245, 30246 and 30247 appurtenant to 84.96 acres and in the amount of 424.8 afa at a diversion rate of 0.4 cfs under State Engineer's subdivision Review No. 2611C-F is still in effect. Mr. Turner testified that the proposed subdivision fell through in approximately 1983.⁸ Mr. Turner further testified that a subdivision map had been filed and recorded as required.⁹ The State Engineer finds that a land reversion map has not been filed

⁷ Transcript p.57; public administrative hearing before the State Engineer, November 5, 1997.

⁸ Transcript p. 9, public administrative hearing before the State Engineer, November 5, 1997.

⁹ Transcript p. 23, public administrative hearing before the State Engineer, November 5, 1997.

and that the water rights quitclaimed to the State of Nevada remain as such.

IV.

The lands to which the subject permits are appurtenant contain a number of wells that may have been drilled prior to its acquisition by the permittees. The well under Permit 39983 was drilled prior to Permit 39983 being issued.¹⁰ The State Engineer finds that there is a well existing at the point of diversion under Permit 39983.

V.

The concept of due diligence and the related concept of the doctrine of relation back are common law doctrines applicable to appropriative water rights in Nevada. The concept of due diligence is defined to be the steady application to business of any kind of a constant effort to accomplish any undertaking. The law does not require any unusual or extraordinary efforts, but only that which is usual or ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose of labor which is usual with men engaged in like enterprises and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the work a bona fide intention to complete it within a reasonable time¹¹. Nevada Revised Statute § 533.380(1)(b) requires that the application of the water to its intended beneficial use must be made within ten years after the date of approval of the permit. The statute provides that for good cause shown the State Engineer may extend the time in which the diversion works must be completed

¹⁰ Transcript p. 35, public administrative hearing before the State Engineer, November 5, 1997.

¹¹ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

or the water applied to its intended beneficial use¹². Mr. Turner testified that his estimate for putting all the waters to beneficial use was two years if he had adequate funding.¹³ The State Engineer finds that the permittee has irrigated a portion of the place of use under the subject permits with reasonable diligence under the circumstances surrounding these water rights.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁴

II.

NRS § 533.380(3) provides that the State Engineer may for good cause shown, extend the time within which construction of the work must be completed, or water must be applied to a beneficial use under any permit issued by him. Any application for an extension of time for filing Proof of Completion of Work and Proof of Beneficial Use must be accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application.¹⁵ For the purposes of NRS § 533.380, 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 State Engineer concludes that a portion of the places of use under Permits 30244, 30245, 30246, 30247 and 39983 has been irrigated since the inception of the project and the permittees are proceeding in good faith to those sections of land

¹² NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

¹³ Transcript, p. 52, public administrative hearing before the State Engineer, November 5, 1997.

¹⁴ NRS Chapters 533 and 534.

¹⁵ NRS § 533.380(3)(b).

¹⁶ NRS § 533.380(6).

when not hindered by the litigation and is sufficient cause for rescinding the cancellation of a portion of the permits.

III.

The permittees have not submitted a request for reversion to acreage since the water rights were relinquished by the Quitclaim Deed. Therefore, the State Engineer concludes that the water rights in the amount of 428.4 acre-feet at a diversion rate of 0.4 cfs that are appurtenant to 84.96 acres within the place of use under Permits 30244 through 30247, inclusive, are not available for reversion to the permittees. The State Engineer further concludes that there has been no irrigation of a portion of the place of use in the amount of 80 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, T.2S., R.67E., M.D.B. & M.

IV.

The State Engineer concludes that under Permit 39983 there exists a drilled and cased water well located at the point of diversion under said permit, and further concludes that the Proof of Completion of Work could and should be filed in the office of the State Engineer under said permit.

RULING

The permittees, Wayne M. and Janice A. Turner, have 30 days from the date of this ruling to file in the office of the State Engineer applications requesting extensions of time to file the Proof of Completion of Work under Permit 39983 and the Proofs of Beneficial Use and cultural map under Permits 32044, 32045, 32046, 32047 and 39983, and accompanied by the statutory filing fees. If the applications for extension of time and statutory filing fees are timely filed in the office of the State Engineer, the cancellation of 2,375.2 afa under Permits 32044, 32045, 32046, 32047 and 39983 will be rescinded and the 2,375.2 afa reinstated with a new priority date of October 13, 1994. The water rights in the amount of 400 afa appurtenant to 80 acres located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13 and the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 14, T.2 S., R.67E.,

M.D.B. & M., the cancellation is affirmed. The relinquishment of 428.4 acre-feet at a diversion rate of 0.4 cfs that are appurtenant to 84.96 acres within the places of use under Permits 30244 through 30247, inclusive, remains with the State of Nevada. Failure to timely file the applications for extension of time and statutory filing fees will result in the affirmation of the cancellation. The use of the waters under Permits 30244, 30245, 30246, 30247 and 39983 is restricted to the original points of diversion and for 475.04 acres within the places of use as set forth in Permits 30244, 30245, 30246, 30247 and 39983. Each application requesting an extension of time must include a full description of the irrigation plan and the progress made at the time.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/cl

Dated this 30th day of
April, 1998.