

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

IN THE MATTER OF CANCELLED)
PERMITS 49419, 49420, 52076, AND)
52077 FILED TO CHANGE THE POINT)
OF DIVERSION AND PLACE OF USE OF)
WATERS PREVIOUSLY APPROPRIATED)
FROM AN UNDERGROUND SOURCE WITHIN)
CARSON VALLEY GROUNDWATER BASIN)
(105), DOUGLAS COUNTY, NEVADA.)

RULING

4680

GENERAL

I.

Applications 49419 and 49420 were filed on October 2, 1985, by Thomas A. Abdoo to change the points of diversion and places of use of 0.435 cubic feet per second (cfs) of water previously appropriated under Permits 36101 and 36102, respectively, for quasi-municipal and domestic purposes from the underground waters of the Carson Valley Groundwater Basin, Douglas County, Nevada. The proposed points of diversion were the same and are described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T.13N., R.20E., M.D.B.&M. The places of use under Permits 49419 and 49420 are within the S $\frac{1}{2}$ SE $\frac{1}{4}$ of said Section 26. Permits 49419 and 49420 were approved on March 31, 1986, with Proof of Completion of Work, Proof of Beneficial Use and Cultural Map for the waters allowed under said permits to be filed in the office of the State Engineer on or before May 1, 1987. The permit terms limited these two permits and Permit 49421 to a total combined duty of water not to

exceed 283.2 acre-feet annually (afa). The current owners of record of Permits 49419 and 49420 in the office of the State Engineer are Gardnerville Town Water Company, White Rabbit Associates, and the State of Nevada.¹

II.

Applications 52076 and 52077 were filed on May 4, 1988, by Robert Easterwood and Valkyrie Easterwood to change the points of diversion and places of use of 0.1222 cfs each, not to exceed a total combined duty of 73 afa, of waters previously appropriated under Permits 49433 and 49432, respectively, for quasi-municipal and domestic purposes from the underground waters of the Carson Valley Groundwater Basin, Douglas County, Nevada. The points of diversion are the same location as described above under Permits 49419 and 49420. The places of use under Applications 52076 and 52077 are identical to that described above under Permits 49419 and 49420. Permits 52076 and 52077 were approved on March 26, 1990, with Proof of Completion of Work to be filed in the office of the State Engineer on or before May 1, 1990, and Proof of

¹ File Nos. 49419 and 49420, official records in the office of the State Engineer.

Beneficial Use and Cultural Map for the waters allowed under said permits to be filed in the office of the State Engineer on or before November 1, 1990. The permit terms limited these two permits to a total combined duty of water not to exceed 73 afa and a total combined duty of water when combined with Permits 49419, 49420, 49421, not to exceed 356.2 afa.³ The current owners of record of Permits 52076 and 52077 in the office of the State Engineer are Gardnerville Town Water Company, White Rabbit Associates, and Gardnerville Ranchos General Improvement District (GRGID).²

III.

On September 16, 1997, Chris H. Gansberg, Jr., and Faye H. Gansberg acquired title to portions of Permits 49419, 49420, and 49421. An Affidavit of Withdrawal of Water Right in Favor of Use of Water for Domestic Wells Created by Subdivision or Parceling of Land was executed by the Gansbergs on September 16, 1997, withdrawing 32.32 afa of water from Permits 49419, 49420, and 49421 for a subdivision known as Gansberg Estates.¹ Subsequently,

² File Nos. 52076 and 52077, official records in the office of the State Engineer.

the State Engineer's Subdivision Review No. 6461-F, was approved for 16 lots with an individual domestic well on each lot based on the withdrawal. Therefore, the total combined duty of water under Permits 49419, 49420 and 49421, was reduced from 283.2 afa to 250.88 afa.^{1,3}

IV.

On October 2, 1995, GRGID acquired title to a portion of Permits 52076 and 52077 and subsequently filed Applications 62005 and 62006 to change the points of diversion and places of use. The change applications filed by GRGID were approved by the State Engineer on September 9, 1996. This approval reduced the total combined duty of Permits 49419, 49420, 49421, 52076, and 52077 to 254.88 afa.

V.

Ten extensions of time have been granted by the State Engineer to file the Proof of Beneficial Use and Cultural Map under Permits 49419 and 49420. Additionally, three extensions of

³ File No. 49421, official records in the office of the State Engineer.

time were granted for filing the Proof of Beneficial Use and Cultural Map under Permits 36101 and 36102, which are the base water rights for the changes allowed under Permits 49419 and 49420, respectively.

Seven extensions of time have been granted by the State Engineer to file the Proof of Beneficial Use and Cultural Map under Permit 52077. Additionally, four extensions of time were granted for filing the Proof of Beneficial Use and Cultural Map under Permit 49433, which is the base water right for the change allowed under Permit 52076. In addition, three extensions of time were granted by the State Engineer for filing the Proof of Beneficial Use and Cultural Map under Permit 36103, which is the base water right for the change allowed under Permit 49433.

Seven extensions of time have been granted by the State Engineer to file the Proof of Beneficial Use and Cultural Map under Permit 52076. Additionally, four extensions of time were granted for filing the Proof of Beneficial Use and Cultural Map under Permit 49432, which is the base water right for the change allowed under Permit 52077. In addition, three extensions of time were granted for filing the Proof of Beneficial Use and Cultural

Map under Permit 36103, which is the base water right for the change allowed under Permit 49432.

In summary, a total of thirteen extensions of time have been granted by the State Engineer to file the Proof of Beneficial Use and Cultural Map for Permits 49419 and 49420 and their respective base water rights, and a total of fourteen extensions of time have been granted by the State Engineer to file the Proof of Beneficial Use and Cultural Map for Permits 52076 and 52077, and their respective base water rights.

VI.

By notice dated April 30, 1998, Permits 49419 and 49420 were cancelled, and by notice dated May 8, 1998, Permits 52076 and 52077 were cancelled for failure to demonstrate good faith and due diligence toward perfecting the water rights under the subject permits, and on the grounds that the record lacked evidence that substantial progress had been made or that significant mitigating circumstances exist that would justify another extension of time.^{1,3} The permittees timely petitioned the State Engineer for an administrative hearing to review the cancellation of the permits pursuant to NRS § 533.395(2).

VII.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on August 26, 1998, at Carson City, Nevada, before representatives of the office of the State Engineer regarding the petition for review of the cancellation of Permits 49419, 49420, 52076, and 52077.

FINDINGS OF FACT

I.

The original appropriation of water occurred under the base rights for Permits 49419, 49420, 52076, and 52077 in 1979. White Rabbit Associates acquired title to Permits 49419 and 49420 on November 6, 1985, and title to Permits 52076 and 52077 on June 15, 1988. The Proof of Completion of Work was filed in the office of the State Engineer on April 13, 1989, for Permits 49419 and 49420.¹ The Proof of Completion of Work was filed in the office of the State Engineer on April 9, 1990, for Permits 52076 and 52077.² The completion of one water well and its associated works occurred prior to November 22, 1988, which is less than three years after White Rabbit Associates acquired ownership of the

subject water rights.⁴ Expenditures for the completion of the water well and associated works demonstrates that the permittees have complied with a portion of the permit terms of the subject water rights. The State Engineer finds that a water well exists at the described point of diversion for the subject permits. The office of the State Engineer conducts an annual pumpage inventory of the permitted and certificated groundwater rights in the Carson Valley. A review of the pumpage inventories on file in the office of the State Engineer for the years 1990 through 1997 indicate that no water has been beneficially used for the purposes allowed within the described place of use from said water well. The State Engineer further finds that since the granting of the subject permits no beneficial use of the waters has occurred.

II.

At the administrative hearing, Mr. Robert Anderson presented evidence and testimony on behalf of one of the permittees, White Rabbit Associates, that their inability to perfect the waters of the subject permits was due to the circumstances surrounding the planning and zoning process in Douglas County. Gardnerville Town

⁴ Transcript, p. 16, public administrative hearing before the State Engineer, August 26, 1998. (Hereinafter "Transcript".)

Water Company, the other permittee, was not represented at the hearing nor did they take an active role in the review of the cancellation of the subject permits.⁵

A review of the requests for extensions of time to submit the Proof of Beneficial Use and Cultural Map filed in the office of the State Engineer for Permits 49419 and 49420 indicate that a request for a zone change was granted for a proposed 14 unit individual domestic well subdivision within the place of use of the subject permits by November 8, 1991. This approval occurred during the master plan adoption process. The State Engineer reviewed the subdivision map and issued a tentative approval under Subdivision Review No. 4134-T on November 19, 1991. The records in the office of the State Engineer do not reflect the submittal of a final map for this project.

On September 24, 1997, a different and separate project for a 16 unit subdivision to be served by individual domestic wells was approved by the State Engineer as to water quantity under Subdivision Review 6461-F. The subdivision approval required that a portion of the waters under Permits 49419, 49420, and all of

⁵ Exhibit No. 11, public administrative hearing before the State Engineer, August 26, 1998.

Permit 49421, totaling 32.32 afa to be withdrawn in favor of this subdivision. The project under Subdivision Review No. 6461-F is not within the place of use of the subject permits and the withdrawal of the water rights in the amount of 32.32 afa occurred on October 1, 1997. The State Engineer finds that the approval of the 16 unit subdivision occurred after the adoption of the adoption of the master plan.

In addition to the above described withdrawal, a title transfer to GRGID occurred on October 2, 1995. GRGID filed change applications to change the points of diversion and the places of use portions of the water rights under Permits 52076 and 52077 in the amount of 69.0 afa. The State Engineer granted Permits 62005 and 62006 further reducing the total amount of permitted water rights available under the subject permits. The State Engineer finds that 101.32 afa of the total combined duty of 356.2 afa has been transferred or withdrawn from the original permits.

III.

The Douglas County Master Planning process began in 1989 for the Wastewater Plan and Land-Use Plan.⁶ To date, the Wastewater

⁶ Transcript, p. 12.

Master Plan has not come to fruition and the Land-Use Plan was finalized in April of 1996.⁷ The permittee claims the implementation of these plans is beyond his control and the progression from completion of the works of diversion to putting the waters to beneficial use has been hindered by this process.⁸ The permittee further claims that his inability to put the water to beneficial use is in relation to the master plan adoption process in Douglas County wherein the subject property is physically located.⁹ Mr. Anderson testified that the Land-Use process in Douglas County and in Nevada is a lengthy endeavor and this process would take approximately 36 months from initiation to approval.¹⁰

The approval of the initial appropriations or base rights of the subject permits occurred in 1979 and is at least six years before commencement of the new Master Plan, and the approval of the extensions of time to submit Proof of Beneficial Use from May

⁷ Transcript, p. 15.

⁸ Transcript, p. 13.

⁹ Transcript, p. 17.

¹⁰ Transcript, p. 20.

1988, to November of 1995, for an additional six years for a total period greater than 12 years. The State Engineer recognizes that the adoption process caused a hindrance and granted the requests for extensions of time to submit the Proof of Beneficial Use and Cultural Map during the master planning process. The State Engineer finds that since April of 1996 there has been a Master Plan in place which allows White Rabbit Associates to go forward with a project and that during the period of time from its adoption to the cancellation of the subject permits in April of 1998, there is no evidence indicating that the permittee had or has a project in which to put these waters to beneficial use. The State Engineer finds that the permittees had plenty of time to formulate a project to beneficially use the subject waters. Mr. Anderson testified that at this time White Rabbit Associates still does not have a project in the works.¹¹ The State Engineer finds that the permittees do not have a project in which to put the subject water rights to beneficial use in a reasonable time, and have not shown good faith and reasonable diligence in placing the water to beneficial use.

¹¹ Transcript, pp. 19-20.

IV.

The petition for review of cancellation of the subject permits contains an agreement with Gardnerville Town Water Company indicating that White Rabbit Associates is selling these water rights until they find someone to buy them.³ The application for requesting additional time to submit the Proof of Beneficial Use and Cultural Map filed in the office of the State Engineer on December 3, 1996, states that in the future there is a possibility of connecting to Gardnerville Town Water Company's water system as it expands along East Valley as well as other areas in the north end of Carson Valley dependent upon factors such as the growth rate and the need to use the well for Gardnerville Town Water Company's water system.^{1,3} These future needs were not given a time frame and the costs have not been determined in which the subject water rights might be necessary or that the Town of Gardnerville requires the subject water rights to meet the needs of future growth. The State Engineer finds that White Rabbit Associates deeded the permits to the Gardnerville Town Water Company in order to hide behind the law that gives municipalities greater flexibility in amassing water rights for future growth, a law not

applicable to private individuals. The State Engineer further finds that the holding of water rights with the intent of speculation and not for the beneficial use intended in the permit does not demonstrate reasonable diligence in actually placing these waters to beneficial use.

v.

When change Applications 36101 and 36102 were filed the applicant estimated seven years to put the water to beneficial use. When change Applications 49419, 49420, 52076, and 52077 were filed the applicant estimated 10 years to put the water to beneficial use. These permits have been sold and traded many times, yet no water has ever been beneficially used. Nineteen years have passed since the original permits were granted and White Rabbit Associates has owned a portion of them for thirteen years, and the other portion for ten years, yet no water has ever been beneficially used. 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 or the water applied to its intended beneficial use¹². The State Engineer finds that under the circumstances surrounding these water rights the permittees have had sufficient time in which to place the subject water rights to beneficial use and no evidence or testimony was provided at the administrative hearing which demonstrated that perfecting the water rights would occur in a reasonable amount of time.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹³

II.

The State Engineer concludes that when a new owner accepts assignment of a water right permit that permit comes with all the conditions and extensions previously granted by the State Engineer as a part of the history of the water right. Just because a new person accepts ownership of the water right does not mean that person starts anew in the extension of time process.

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

¹³ NRS Chapters 533 and 534.

III.

Nevada Revised Statute § 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. Proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application must accompany any application for an extension of time for filing proof of completion of work and proof of beneficial use.¹⁴ 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.¹⁵ The State Engineer concludes that there has been no beneficial use of the waters for the manner and within the place of use granted under Permits 49419, 49420, 52076, and 52077 since the inception of the water rights and the permittees are not

¹⁴ NRS § 533.380(3)(b).

¹⁵ NRS § 533.380(6).

proceeding in good faith and with reasonable diligence to perfect the permit.¹⁶

IV.

The State Engineer concludes that the water rights in the amount of 101.32 afa, being a portion of Permits 49419, 49420, 52076, and 52077, are not part of the cancellation since this portion of the subjects water rights was transferred by the approval of change applications or by withdrawal prior to the cancellation. The State Engineer further concludes that by never applying to beneficial use the waters appurtenant the places of use demonstrates a lack of due diligence.

V.

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. The State Engineer concludes the permittees were given ample time to make progress towards proving beneficial use

¹⁶ NRS § 533.380.

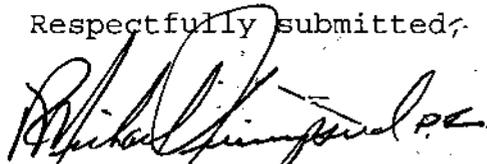
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of the waters under the terms of Permits 49419, 49420, 52076, and
52077.

RULING

The cancellation of 254.88 acre-feet annually under Permits
49419, 49020, 52076, and 52077 is hereby affirmed.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/cl

Dated this 16th day of
November, 1998.