

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

IN THE MATTER OF CANCELLED PERMITS )  
51110, 53200 THROUGH 53204, INCLUSIVE, )  
53834, 54749 THROUGH 54754, INCLUSIVE, )  
54756 AND 55306 FILED TO CHANGE WATERS )  
PREVIOUSLY APPROPRIATED FROM THE )  
UNDERGROUND WATERS WITHIN THE )  
THOUSAND SPRINGS VALLEY GROUNDWATER )  
BASIN (189), ELKO COUNTY, NEVADA )

RULING

# 4717

GENERAL

I.

Application 51110 was filed on July 14, 1987, by Lands of Sierra, Inc., to change the point of diversion, manner and place of use of 3.0 cubic feet per second (cfs), a portion of the waters previously appropriated under Permit 36361, from the underground waters of the Thousand Springs Valley-Toano Rock Springs Area, Elko County, Nevada. Permit 51110 was approved on January 25, 1988, for 3.0 cfs, not to exceed 960 acre-feet annually (afa) for irrigation purposes within the S $\frac{1}{2}$  Section 25, SE $\frac{1}{4}$  SE $\frac{1}{4}$  Section 26, NE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 35, N $\frac{1}{2}$  Section 36, T.43N., R.66E., M.D.B.&M.; SW $\frac{1}{4}$  Section 30, and the NW $\frac{1}{4}$  Section 31, T.43N., R.67E., M.D.B.&M., totaling 320 acres. The point of diversion is described as being located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 35, T.43N., R.66E., M.D.B.&M. The permit terms limit this appropriation to a duty of 3.0 acre-feet annually per acre from any and all sources.<sup>1</sup>

II.

Applications 53200 through 53204, inclusive, were filed on April 28, 1989, by Lands of Sierra, Inc., to change the points of

<sup>1</sup> File No. 51110, official records in the office of the State Engineer.

diversion, and places of use of waters previously appropriated under the following Permits:

Application	Base Permit	Diversion Rate (cfs)	Duty (afa)
53200	36373	6.0	2,560.00
53201	36371	6.0	2,560.00
53202	portion of 36378	1.0	426.67
53203	portion of 36378	2.0	853.33
53204	49554	3.0	1,840.00

from the underground waters of the Thousand Springs Valley-Montello-Crittenden Creek Area, Elko County, Nevada. Permits 53200 through 53204, inclusive, were approved on March 19, 1990, for irrigation purposes within portions of Sections 13, 14, 15, 16, 21, 22, 23, 24, 26, 27, 28, the E½ of Sections 17, 20, and 29, T.40N., R.69E., M.D.B.&M., totaling 2,600 acres. The points of diversion are described as being located as follows: Permit 53200 is within the SE¼ SE¼ of Section 15; Permits 53201 and 53202 are for the same well within the SE¼ SW¼ of Section 14; Permit 53203 is within the NW¼ SW¼ of Section 22; Permit 53204 is within the NE¼ NW¼ of Section 27, all of which are within T.40N., R.69E., M.D.B.&M. The permit terms limit this appropriation to a duty of 4.0 acre-feet annually per acre from any and all sources.<sup>2</sup>

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<sup>2</sup> File Nos. 53200, 53201, 53202, 53203, and 53204, official records in the office of the State Engineer.

### III.

Application 55306 was filed on September 20, 1990, by Lands of Sierra, Inc., to change the point of diversion and place of use of 6.0 cfs, of the waters previously appropriated under Permit 36374, from the underground waters of the Thousand Springs Valley-Montello-Crittenden Creek Area, Elko County, Nevada. Permit 55306 was approved on November 3, 1995, for 6.0 cfs, not to exceed 2,560 acre-feet annually (afa) for irrigation purposes within portions of the E $\frac{1}{2}$  E $\frac{1}{2}$  of Section 29, E $\frac{1}{2}$ , E $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 32, T.41N., R.69E., M.D.B.&M., W $\frac{1}{2}$ , W $\frac{1}{2}$  E $\frac{1}{2}$  of Section 4, S $\frac{1}{2}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 8, W $\frac{1}{2}$  of Section 9, W $\frac{1}{2}$  of Section 16, T.40N., R.69E., M.D.B.&M., totaling 640 acres. The permit terms limit this appropriation to a duty of 4.0 acre-feet annually per acre from any and all sources.<sup>3</sup>

### IV.

Application 53834 was filed on September 8, 1989, by Lands of Sierra, Inc., to change the point of diversion and manner and place of use of 3.0 cfs being a portion of waters previously appropriated under Permit 36361 from the underground waters of the Thousand Springs Valley-Toano Rock Springs Area Groundwater Basin, Elko County, Nevada. Permit 53834 was approved on July 2, 1990, for 3.0 cfs, but not to exceed 312.8 million gallons annually (mga) for industrial purposes within Sections 16, 17, 18, 19, 20, 21, 28, 29, and 30, T.42N., R.66E., M.D.B.&M.. The point of

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<sup>3</sup> File No. 55306, official records in the office of the State Engineer.

diversion is described as being located within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 5, T.39N., R.66E. M.D.B.&M.<sup>4</sup>

V.

Applications 54749, 54750, 54753, 54754, and 54756 were filed on May 14, 1990, by Lands of Sierra, Inc., to change the points of diversion, manners and places of use of 6.0 cfs each, of waters previously appropriated under Permits 36360, 36364, 36370, 36372, and 36376, respectively, from the underground waters of the Thousand Springs Valley-Toano Rock Spring Area Groundwater Basin, Elko County, Nevada. Permits 54749, 54750, 54753, 54754, and 54756 were approved on September 30, 1994, for 6.0 cfs each, but not to exceed 1,920 afa each, for industrial purposes within the same place of use described above for Permit 53834. The points of diversion are described as being located in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 15, T.41N., R.65E., M.D.B.&M., for Permit 54749; SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 7, T.39N., R.66E., M.D.B.&M., for Permit 54750; SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 35, T.41N., R.65E., M.D.B.&M., for Permit 54753; SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 13, T.39N., R.65E., M.D.B.&M., for Permit 54754; and the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 27, T.41N., R.65E., M.D.B.&M., for Permit 54756. The permit terms express that the total combined duty of Permits 53834, 54749, 54750, 54753, 54754, and 54756 shall not exceed 14,400 afa.<sup>5</sup>

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<sup>4</sup> File No. 53834, official records in the office of the State Engineer.

<sup>5</sup> File Nos. 54749, 54750, 54753, 54754, and 54756, official records in the office of the State Engineer.

VI.

Applications 54751 and 54752 were filed on May 14, 1990, by Lands of Sierra, Inc., to change the manners and places of use of 6.0 cfs each, of waters previously appropriated under Permits 36365 and 36366, respectively, from the underground waters of the Thousand Springs Valley (Herrill-Siding Brush Creek Area) Groundwater Basin, Elko County, Nevada. Permits 54751, and 54752 were approved on September 30, 1994, for 6.0 cfs each, but not to exceed 1,920 afa each for industrial purposes within the same place of use as described above for Permit 53834. The permit terms express that the total combined duty of Permits 53834, 54749, 54750, 54751, 54752, 54753, 54754, and 54756 shall not exceed 14,400 afa.<sup>6</sup> The current owner of record for Permits 51110, 53200 through 53204, inclusive, 53834, 54749 through 54754 inclusive, 54756, and 55306 is Walker-Winecup-Gamble, Inc.<sup>1,2,3,4,5,6</sup>

VII.

The subject water rights for irrigation purposes are under Permits 51110, 53200 through 53204, inclusive, and 55306. The table below describes the number of extensions of time granted to file the Proofs of Completion of Work and the Proof of Beneficial Use for each of the subject irrigation permits and the underlying appropriation from which they came:

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<sup>6</sup> File Nos. 54751 and 54752, official records in the office of the State Engineer.

EXTENSIONS GRANTED TO PERMIT				EXTENSIONS GRANTED TO UNDERLYING WATER RIGHT PERMIT					
PERMIT	PCW	PBU	MAP	PERMIT	PCW	PBU	PERMIT	PCW	PBU
51110	8	4	4	36361	2	6			
53200	F	6	6	36373	9	6			
53201	F	6	6	36371	9	6			
53202	F	6	6	36378	9	6			
53203	F	6	6	36378	9	6			
53204	F	6	6	49554	3	1	36369	5	2
55306	1	0	0	36374	15	12			

F means filed; PCW means Proof of Completion of Work;  
PBU means Proof of Beneficial Use; MAP means supporting map

The subject water rights for industrial purposes are under Permits 53834, 54749 through 54754, inclusive, and 54756. The table below describes the number of extensions of time granted to file the Proofs of Completion of Work and the Proof of Beneficial Use for each of the subject industrial permits and the underlying appropriation from which they came:

EXTENSIONS GRANTED TO PERMIT			EXTENSIONS GRANTED TO UNDERLYING WATER RIGHT PERMIT		
PERMIT	PCW	PBU	PERMIT	PCW	PBU
53834	5	3	36361	2	0
54749	1	0	36360	7	2
54750	1	0	36364	7	2
54751	1	0	36365	9	6
54752	1	0	36366	9	6
54753	1	0	36370	7	2
54754	1	0	36372	7	2
54756	1	0	36376	9	6

On January 5, 1998, Permits 51110, 53200 through 53204, inclusive, 53834, 54749 through 54754, inclusive, 54756, and 55306 were cancelled for failure to comply with beneficial use requirements under each permit and that the owner of the right has

not shown good cause to continue to grant extensions of time. The permittee timely petitioned the State Engineer for a public administrative hearing to review the cancellations pursuant to NRS § 533.395(2).<sup>1,2,3,4,5,6</sup>

#### VIII.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on October 21, 1998, in Carson City, Nevada, before representatives of the office of the State Engineer regarding the petition for review of the cancellation of Permits 51110, 53200 through 53204, inclusive, 53834, 54749 through 54754, inclusive, 54756, and 55306.

#### FINDINGS OF FACT

##### I.

At the administrative hearing, the testimony and evidence for the subject cancelled water rights were presented by the manner of use, one being the irrigation water rights and the other being the industrial water rights.

Mr. Bill Nisbet testified on behalf of the permittee as an expert in the field of water rights administration.<sup>7</sup> Mr. Nisbet is familiar with the history surrounding the subject cancelled water rights, due to being involved in the water rights concerning the Walker-Winecup-Gamble Ranches through his employer since about 1978.<sup>8</sup> The irrigation and industrial permits are changes of

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<sup>7</sup> Transcript, p. 10, public administrative hearing before the State Engineer, October 21, 1998. Hereinafter, 'Transcript'.

<sup>8</sup> Transcript, p. 11.

appropriative water rights issued in the 1980's. The base right permits were granted numerous extensions of time to file in the office of the State Engineer the Proofs of Completion and Beneficial Use.<sup>9</sup>

Mr. Nisbet testified that he knew it was incumbent upon the current owners to set out an endpoint to the irrigation project to allow for the Proofs of Beneficial Use to be filed.<sup>10</sup> The eight requests for extensions of time to submit the Proof of Completion of Work and the four requests for extensions of time for the Proof of Beneficial Use and cultural map filed for Permit 51110 indicate that a well has been drilled, but is not equipped for production. The well was drilled and completed on January 24, 1988,<sup>11</sup> and has not been equipped since the predicted production yield of the well is below a point of beneficial yield and requires further hydrologic analysis and possibly a change in location to meet the quantity of water deemed necessary or determine the best course of action for these water rights.<sup>11</sup> A portion of the place of use under Permit 51110 is supplemental to decreed surface waters from Thousand Springs Creek under Proof V-01862 and not any other groundwater rights. The State Engineer finds that there is a well drilled under Permit 51110 and that no permitted underground water

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<sup>9</sup> Exhibit No. 2, public administrative hearing before the State Engineer, October 21, 1998. Hereinafter, 'Exhibit'.

<sup>10</sup> Transcript, p. 13.

<sup>11</sup> Transcript, p. 15.

has been beneficially used for irrigation purposes within the permitted place of use for 10 years since it was granted.

II.

The 1996 filing of the request for extension of time to submit the Proof of Completion of Work for Permit 55306 indicates that a well has been drilled, but is not equipped for production.<sup>12</sup> The well was drilled and completed on June 21, 1980,<sup>12</sup> and has been equipped and pumped underground water for irrigation purposes.<sup>13</sup> A portion of the place of use under Permit 55306 is supplemental to surface waters from Thousand Springs Creek under Proof V-01864, which is decreed and Permit 2964. This permit is not supplemental to any groundwater rights. The amount of water pumped and number of acres irrigated from this groundwater source is not determinable, since the place of use under Permit 55306 has also been irrigated by surface waters.<sup>14</sup>

The base right for Permit 55306 was issued in 1980, under Permit 36374. Permit 36374 had fourteen extensions of time granted for filing the Proof of Completion of Work and twelve extensions of time granted for filing the Proof of Beneficial Use. The State Engineer finds that there is a well drilled under Permit 55306 and that sufficient time has elapsed to allow for the permittee to file the Proof of Completion of Work for this permit.

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<sup>12</sup> File No. 55306, official records in the office of the State Engineer.

<sup>13</sup> Transcript, p. 34.

<sup>14</sup> Transcript, p. 37.

The State Engineer further finds that underground water has been diverted and beneficially used for irrigation purposes within the permitted place of use.

### III.

The predecessor to the current permittee expanded the irrigated lands that include certificated acreage of 1,196 acres and acreage outside of the certificated area up to approximately the 1,710 acres that are currently irrigated by the permittee.<sup>15</sup> These lands are within the places of use of Permits 53200 through 53204, inclusive. The certificated water rights are a portion of the numerous water rights acquired by Walker-Winecup-Gamble in March of 1993. The acquisition included decreed and certificated surface water rights as well as permitted and certificated groundwater rights. Some of these acquired water rights include other existing permitted underground water rights appurtenant to the same places of use as Permits 53200 through 53204, inclusive.

The 1,710 acres of irrigated land was determined by the permittee's agent from aerial photographs taken in 1995.<sup>16</sup> All of these lands that have been irrigated are within the places of use under Permits 53200 through 53204, inclusive. Wells have been drilled and equipped and the Proofs of Completion of Work for each of these permits has been timely filed in the office of the State Engineer. These wells have recently delivered underground water

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<sup>15</sup> Exhibit No. 16, Transcript, p. 18.

<sup>16</sup> Transcript, p. 20.

to the 1,710 acres, which are a portion of the permitted place of use of 2,600 acres within 8,000 acres.<sup>17</sup>

A portion of the places of use under Permits 53200 through 53204, inclusive, are supplemental to surface water under the Thousand Springs Creek Decree. These surface waters have been used for irrigation in the past, however, ditches to divert these surface waters around the 1,710 acres of current irrigation have been constructed to prevent flooding of the laser-leveled fields, which had occurred in the past.<sup>18</sup> The surface water rights are available for irrigation as per decree, but are currently excluded in the operation for delivering water for irrigation purposes.<sup>19</sup> The State Engineer finds that portions of the places of use under Permits 53200 through 53204 inclusive, in the amount of 1,710 acres have been irrigated by groundwater from the wells completed under said permits.

#### IV.

The requests for extensions of time to file the Proof of Beneficial Use and cultural map under Permits 53200 through 53204 inclusive, filed in 1991 and 1992 indicate that the permittee was attempting to complete the irrigation project in phases as finances allowed. After the acquisition by Walker-Winecup-Gamble the requests for extensions of time filed in 1993 through 1996 indicated that more time was necessary to complete the irrigation

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<sup>17</sup> Transcript, p. 25.

<sup>18</sup> Transcript, p. 29.

<sup>19</sup> Transcript, p. 29.

plan and expansion of the irrigation project would be suspended due to the concerns of a hydrological response from a proposed industrial project of which the permittee is also the owner of record of those permits.

The owner has leased the property to a ranch manager, who together with the owners are endeavoring to maximize the production of the ranching operations. The leasing is necessary since the owners and managing general partner, Mr. Walker, live a great distance from the location of the ranch, in addition to Mr. Walker's health problems that have not allowed him the opportunity to oversee the management of the subject ranch properties.<sup>20</sup> Economic factors, such as expenditures for land leveling, center pivot irrigation equipment, and other improvements, including the irrigation of cultivated lands as testified to by Mr. Nisbet demonstrates that the permittee has attempted to put a substantial portion of the agricultural water rights to beneficial use.<sup>21</sup> The State Engineer finds that since the acquisition of the subject water rights and the factors that contribute to the extenuating circumstances surrounding these water rights, the permittee has put to beneficial use a portion of the water rights with reasonable due diligence.

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<sup>20</sup> Transcript, p. 41.

<sup>21</sup> Exhibit No. 7, public administrative hearing before the State Engineer, November 5, 1997.

v.

Mr. Walker, the managing partner of Walker-Winecup-Gamble, presented testimony in support of the fact that he was unable to perfect the waters of all the subject permits at this time, but is prepared to invest substantial sums of money for the irrigation wells in a short period of time. Permittee Walker-Winecup-Gamble has a proposal to contract with an environmental hydrologic consulting firm for the purposes of well inventory, evaluation, rehabilitation, siting, and construction in a phased approach for the irrigation wells. The permittee has established a trust account to provide for the payment of the services, which is conditionally based upon the cancellations being rescinded.<sup>22</sup>

The places of use of Permits 53200 through 53204, inclusive, are described as being 2,600 acres within 8,000 acres. The beneficial use of these agricultural water rights prior to their cancellation is for only a portion of the described places of use in the amount of 1,710 acres.<sup>23</sup> Of the remaining 890 acres of land where no progress has been made to put the water to beneficial use, Mr. Walker testified that he intends to irrigate an additional 400 acres, leaving 490 acres without a plan. The State Engineer finds that the 1,710 acres irrigated does not include the places of use described under Permit 51110 and 55306. The State Engineer further finds that a portion of the places of

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<sup>22</sup> Exhibit No. 10, Transcript, p. 14, public administrative hearing before the State Engineer, November 5, 1997.

<sup>23</sup> Exhibit No. 16, public administrative hearing before the State Engineer, November 5, 1997.

use for Permits 53200 through 53204, inclusive, are lands that do not have a viable plan to become irrigated.

VI.

The industrial water rights are under Permits 53834, 54749 through 54754, inclusive, and 54756. The industrial water rights and the circumstances surrounding these water rights as to why the permittee has not complied with the terms of the permits for the permitted uses was testified to by Mr. Dennis Peseau. Mr. Peseau was qualified as expert in the field of utility regulation.

The concept of due diligence as testified to by Mr. Peseau is assessing all aspects of a particular project, in this instance a power generation project. The attributes of a project of this type include determining the type of plant, the fuel supply, a power contract and other physical characteristics to allow a project to come to fruition.<sup>24</sup> The Thousand Springs Power project was to be a coal-fired generating facility at the time it was first conceived. The economics for large coal-fired power plants was being changed prior to the time the project was initiated due to the increased technology for natural gas-fired power plants and the deregulation of the natural gas industry that lowered the prices for natural gas during the 1980's. This combination led to coal-fired power plants not being economically feasible.<sup>25</sup>

In 1994, the concept of wholesale wheeling of power that allowed competition between utilities for the first time came

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<sup>24</sup> Transcript, p. 49.

<sup>25</sup> Transcript, p. 51.

about due to the changes made in the energy laws that are overseen by the Federal Energy Regulation Commission (FERC).<sup>26</sup> The costs for a coal-fired power is about 1.2 million dollars per megawatt. The most economical type of power plant today is a combined cycle for natural gas at a cost of 400 thousand to 500 thousand dollars per megawatt. The minimum size of a power plant considering economic factors would be about 250 megawatts, with a total cost of 100 to 125 million dollars. These costs do not include the need for an enhanced natural gas line that would cost approximately 100 million dollars for this proposed project and location.<sup>27</sup> Mr. Peseau further testified that it would not have been prudent to build a power plant between 1993 and 1998 on the Thousand Springs site for reasons such as; no market for the power, the ability to finance was nearly impossible and that the capital invested would have resulted in great losses. These reasons left the permittee with no other course of action since the acquisition of the subject water rights.<sup>28</sup> The State Engineer finds that the construction of a coal-fired power plant on the site is not feasible and the permittee has not proceeded with due diligence to build the power plant envisioned under the permits. However, it does appear possible that a natural gas power plant is feasible at this site.

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<sup>26</sup> Transcript, p. 53.

<sup>27</sup> Transcript, p. 66.

<sup>28</sup> Transcript, pp. 67-72.

VII.

The Thousand Springs Power Plant is described as a viable power plant site since it is remote, has water available, is within the right-of-way of a proposed Southwest Inter Tie Project for a natural gas pipeline and the demand for power is uniformly upward.<sup>29</sup> The lead time or planning process for a coal-fired power plant is 6 to 10 years, whereas the time for planning a combined cycle for natural gas is considerably less at about two years to construct and another one or two years to be fully operational.<sup>30</sup> The permittee, Walker-Winecup-Gamble, was a protestant in an administrative hearing held by the office of the State Engineer on February 3, 1997. The hearing concerned protested applications filed to appropriate underground waters for a proposed electrical power generating facility. At this administrative hearing, Walker-Winecup-Gamble put on the record their proposal for a natural gas power plant in 221 megawatt increments that was separate from the Applicant's proposal. The type of facility proposed by Walker-Winecup-Gamble then is similar to the type now described by Mr. Peseau.<sup>31</sup>

The power project now proposed that is the subject of the cancelled permits would be a natural gas plant which would require a quantity of water far less than that required for a coal-fired

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<sup>29</sup> Transcript, p. 78, Exhibit No. 15.

<sup>30</sup> Transcript, p. 85.

<sup>31</sup> Exhibit 31, public administrative hearing before the State Engineer, February 3, 1997.

power plant. The amount of water required for a natural gas power plant was estimated to be 2,000 afa per unit at the February 3, 1997, public administrative hearing and were to be phased in over time.<sup>32</sup> The estimated amount of 5,000 afa for a 500 megawatt plant is considerably less than the amount necessary for a coal-fired power plant of the same size.<sup>33</sup> Mr. Walker testified that he is aware that the total quantity of the subject cancelled permits is for a quantity greater than what is needed for the proposed power plant.<sup>34</sup> The State Engineer finds that the proposed power generating facilities as now contemplated would be fueled by natural gas and not coal as originally conceived. The State Engineer further finds that the amount of water necessary for a natural gas power plant is less than the needs of a coal-fired power plant and that amount is approximately 5,000 afa for a 500 megawatt power plant.

#### VIII.

There is a possibility of building a power plant at the Thousand Springs site in the near future with some certainty.<sup>35</sup> The permittee has hired consultants and experts in the energy field to assist him since the acquisition of the subject water rights and has continued to pay them for their endeavors to find a

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<sup>32</sup> Transcript, p. 188, public administrative hearing before the State Engineer, February 3, 1994.

<sup>33</sup> Transcript, p. 88.

<sup>34</sup> Transcript, p. 113.

<sup>35</sup> Transcript, p. 95.

viable means of moving forward with the power project. Mr. Walker testified that the acquisition of the lands and subject water rights was entered into with the intent to put the industrial permitted water rights to beneficial use to their full extent.

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 permit without reasonable progress to establish beneficial use, or without the expectation to establish beneficial use within a reasonable period of time. The water under the industrial permits were first issued in 1985 and no water has yet been placed to beneficial use under the original irrigation rights nor under the permits changed to industrial use. The permittee was requested to provide additional information on the progress of work on the power project by letter dated September 19, 1994. No information in reference to this request was received by the office of the State Engineer. The intent of the extension of time provision is to provide the opportunity for the permittee to resolve temporary adverse conditions, which prevent compliance with the terms of the permit. The State Engineer finds that the permittee has not secured a definite completion date for any water held under the industrial water rights. The State Engineer further finds that the permittee has not complied with the request of providing additional information to show progress as to when perfection of the subject industrial water rights will occur.

IX.

The concept of due diligence is a common law doctrine applicable to statutory 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 time<sup>36</sup>. 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 use<sup>37</sup>. Mr. Walker testified that his estimate for putting the all the waters to beneficial use for irrigation purposes was in the next several years if the study by Converse Consultants indicates that it is possible.<sup>38</sup> The law requires

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<sup>36</sup> Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

<sup>37</sup> NRS § 533.380(3); NRS § 533.390(2); NRS § 533.395(1).

<sup>38</sup> Transcript, p. 106.

that the permittee have the financial resources to apply the water to the intended beneficial use with reasonable diligence.<sup>39</sup> The State Engineer finds that under the circumstances surrounding the agricultural water rights, the permittee has irrigated a portion of the place of use under the subject permits and has provided for funding of a study to determine the best course of action for the irrigation wells. The State Engineer further finds that the permittee has not proceeded with due diligence for the industrial permits as originally envisioned. However, considering the change of plans wherein a natural gas fired plant is now contemplated and the various change within the energy industry, the State Engineer finds the permittee should be afforded an opportunity to proceed with the revised power plant plans as long as steady progress is made from this time forward.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>40</sup>

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

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<sup>39</sup> NRS § 533.370(1)(c).

<sup>40</sup> NRS Chapters 533 and 534.

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<sup>41</sup>. 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.<sup>42</sup> The State Engineer concludes that the a portion of the places of use under Permits 51110, 53200 through 53204, inclusive, and 53206 has been irrigated since the inception of the project.

### III.

The power project and the irrigation plan as now contemplated do not require the entire amount of water appropriated under the relative permits. The State Engineer concludes that the permittee is proceeding in good faith for the relative portions of these water rights and determines that this is good case for rescinding the cancellation of a portion of the subject permits.

### IV.

The State Engineer further concludes that the permittee has no intention of applying to beneficial use the waters appurtenant to a portion of the places of use in the amount of 490 acres located within the place of use of Permits 53200 through 53204, inclusive, and that this demonstrates a lack of due diligence.

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<sup>41</sup> NRS § 533.380 (3) (b) .

<sup>42</sup> NRS § 533.380 (6) .

RULING

The permittee, Walker-Winecup-Gamble, Inc., has 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 Permits 51110, 53834, 54749 through 54754, inclusive, 54756, and 55306 and the Proof of Beneficial Use and cultural map under Permits 51110, 53200 through 53204, inclusive, 53834, 54749 through 54754, inclusive, 54756, and 55306 and accompanied by the statutory filing fee. If the applications for extension of time and statutory filing fees are timely filed in the office of the State Engineer, the cancellation of a total combined duty of 8,440 afa for the irrigation of 2,110 acres within the 2,600 acres described as the places of use under Permits 53200 through 53204, inclusive, and the water rights under Permit 51110 in the amount of 960 afa for irrigation of 320 acres, and under Permit 55306 in the amount of 2,560 afa for the irrigation of 640 acres will be rescinded. If the permits for irrigation purposes are reinstated they will have a new priority date of January 29, 1998. The cancellation of 490 acres or 1,960 acre-feet under Permits 53200 through 53204, inclusive, is hereby affirmed.

If the applications for extension of time and statutory filing fees are timely filed in the office of the State Engineer, the cancellation of the total combined duty of 5,000 afa for industrial and domestic purposes under Permits 53834, 54749 through 54754 inclusive, and 54756 will be rescinded and the total

combined duty of 5,000 afa will be reinstated with a new priority date of January 29, 1998.

The cancelled water rights in the amount 9,400 acre-feet being a portion of the total combined duty of Permits 53834, 54749 through 54754, inclusive, and 54756 appurtenant to the industrial permits place of use in T.40N., R.66E., M.D.B.&M., is hereby affirmed.

Failure to timely file the applications for extension of time and statutory filing fees will result in the full affirmation of the cancellations. Each application requesting an extension of time for irrigation purposes must include a full description of the irrigation plan and the progress made at the time. The applications for extension of time for industrial and domestic purposes must include a plan and time frame for completion of the now contemplated power project.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/RKM/cl

Dated this 29th day of  
March, 1999.