

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

IN THE MATTER OF CANCELLED PERMITS)
49412, 49427 AND A PORTION OF 51328)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND SOURCE)
WITHIN THE TRACY SEGMENT GROUNDWATER)
BASIN (083), WASHOE COUNTY, NEVADA.)

RULING

4762

GENERAL

I.

Application 49412 was filed on September 24, 1985, by Sun River Mining Co. to change the point of diversion, manner and place of use of a portion of the water previously appropriated under Permit 35966 from the underground waters of the Tracy Segment Groundwater Basin, Washoe County, Nevada. Permit 49412 was approved on June 20, 1986, for 0.1 cubic feet per second (cfs), not to exceed 23.59 million gallons annually (mga), equivalent to 72.4 acre-feet annually (afa), for mining, milling and domestic purposes. The point of diversion is described as being located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, T.20N., R.23E., M.D.B.&M. The place of use is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, and a portion of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ lying north of the northerly right-of-way line of Interstate 80, of Section 13, T.20N., R.23E., M.D.B.&M.¹

II.

Application 49427 was filed October 2, 1985, by Sun River Mining Co. to change the point of diversion, place and manner of use of a portion of the water previously appropriated under Permit 35966 from the underground waters of the Tracy Segment Groundwater

¹ File No. 49412, official records in the office of the State Engineer.

Basin, Washoe County, Nevada. Permit 49427 was approved on June 20, 1986, for 0.15 cfs, not to exceed 35.39 mga, equivalent to 108.6 afa, for mining, milling and domestic purposes. The point of diversion is described as being located in the NW¼ NE¼ of Section 13, T.20N., R.23E., M.D.B.&M. The place of use described is the same as that described above under Application 49412.² Permits 49412 and 49427 were issued for a total combined duty not to exceed 58.98 mga annually.^{1,2}

III.

Application 51328 was filed September 23, 1987, by Sun River Mining Company, Inc., to change the point of diversion and manner of use of a portion of the water previously appropriated under Permit 35966 from the underground waters of the Tracy Segment Groundwater Basin, Washoe County, Nevada. Permit 51328 was approved on October 19, 1988, for 0.25 cfs, not to exceed 58.98 mga, equivalent to 181 afa, for mining, milling and domestic purposes. The Bowmans own a portion of this water right in the amount of 31 afa. The point of diversion is described as being located in the NE¼ NE¼ of Section 13, T.20N., R.23E., M.D.B.&M. The place of use described is all of Section 13, T.20N., R.23E., M.D.B.&M., lying northerly of U.S. Interstate 80. The total combined duty of water under Permits 49412, 49427, and 51328 shall not exceed 117.96 mga, equivalent to 362 afa. Permit 51328 has been partially abrogated prior to the cancellation in the amount of 150 afa. The remaining 31 afa portion of Permit 51328 is in the name of Buster and Judith Nancy Bowman. Therefore, the total

² File No. 49427, official records in the office of the State Engineer.

combined duty of water under Permits 49412, 49427, and 51328 shall not exceed 212 afa.³

IV.

Proofs of Beneficial Use were first due to be filed in the office of the State Engineer on or before October 27, 1987, under Permits 49412 and 49427. Ten extensions of time have been granted to establish beneficial use of water and file the Proof of Beneficial Use under these two permits. Proof of Completion of Work was first due to be filed in the office of the State Engineer on or before April 19, 1989, and the Proof of Beneficial Use was first due on or before October 27, 1989, under Permit 51328. Nine extensions of time have been granted for filing the Proof of Completion of Work and eight extensions of time have been granted for filing the Proof of Beneficial Use under Permit 51328. On February 18, 1998, the State Engineer cancelled Permits 49412, 49427, and the Bowmans' portion of Permit 51328. The permittees timely petitioned the State Engineer for a public administrative hearing to review the cancellations pursuant to NRS § 533.395(2).⁴

V.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on April 20, 1999, in Carson City, Nevada, before representatives of the office of the State Engineer regarding the petition for review of the cancellation of Permits 49412, 49427, and 51328.

³ File No. 51328, official records in the office of the State Engineer.

⁴ File Nos. 49412, 49427, and 51328, official records in the office of the State Engineer and Exhibit No. 7, public administrative hearing before the State Engineer, April 20, 1999. (Hereinafter "transcript")

FINDINGS OF FACT

I.

At the hearing, Judith Nancy Bowman and Buster Bowman, the permittees presented evidence and testimony in support of the fact that they were unable to perfect the waters of the subject permits due to ongoing litigation surrounding the lands to which the subject water rights are appurtenant and personal issues such as an automobile accident. This inability by the permittees to put the water to beneficial use is in relation to transactions concerning the occupancy and access to the subject place of use, wherein the occupant, Arthur J. Beach, is a party to current ongoing litigation with the permittees.⁵ The litigation is under Case No. CV99-01637 in the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

The Bowmans acquired title to the land and subject water rights by a deed which was filed in the office of the State Engineer on September 19, 1997. The document was executed August 22, 1996, between SEF Ventures, Inc., and David Edelman and Hannah Edelman as Trustees of the David Edelman CPA Profit Sharing Trust (grantors) to Buster and Judith Nancy Bowman husband and wife as joint tenants (grantees).⁶ The permittees have entered into litigation with the occupant of the property to which the subject water rights are appurtenant. One issue of the litigation would allow the permittees to gain control of the land so they may put the subject water rights to beneficial use. Permits 49412, 49427, and a portion of Permit 51328 are currently in the name of Buster

⁵ Transcript, p. 7.

⁶ Deed filed in the office of the State Engineer September 19, 1997, under Permit 51238.

and Judith Nancy Bowman in the records of the office of the State Engineer.^{1,2,3} The State Engineer finds that the inability to access the place of use and the on-going litigation has prevented the permittees in part from placing these waters to beneficial use.

II.

In February of 1996, the current owners of record gained control of the land and water under a contract of sale. The deed did not describe any of the water rights under Permits 49412, 49427 and 51328, but described lands within the place of use of said permits. The Bowmans have had difficulties in meeting their obligations of putting the subject waters to beneficial use through a milling and ore processing operation under the subject permits in conjunction with another property in California that has been hampered by access and personal health issues.⁷ Several options have been described by the permittees which include other prospective investors or possibly selling the land and water rights, but none have come to fruition.⁸

Over a period of time, the sale of a portion of the subject water rights that are appurtenant to the subject place of use has occurred for purposes outside of the original permitted place of use. The water rights sold are approximately 150 acre-feet and occurred prior to the cancellation of the subject water rights. The State Engineer finds that Buster and Judith Nancy Bowman made efforts to develop various plans to use a portion of the permitted water rights as testified to during the hearing. The State Engineer further finds that proceeding with the litigation so that

⁷ Transcript, p. 7.

⁸ Transcript, pp. 21-23.

they may apply the subject water rights to the allowed beneficial use in a reasonable time period is evidence of proceeding in good faith and due diligence.

III.

The concept of due diligence is a common law doctrine applicable to appropriative water rights in Nevada. The concept of due diligence is defined to be the steady application to business of any kind, 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 time⁹. Nevada Revised Statute § 533.380(1)(b) requires that the application of the water to its intended beneficial use must be made within a maximum of 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 use¹⁰.

There was no evidence presented that a sale of the subject property and water rights is pending. The permittees testified that they have the means to put forth an investment for the expenditures as outlined in the initial proposal, but are not sure

⁹ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

¹⁰ NRS § 533.380(3); NRS § 533.390 (2); NRS § 533.395 (1).

when beneficial use will occur. The State Engineer finds that only a portion of the original full-scale mining and milling operation ever occurred. The State Engineer further finds that at the administrative hearing the permittees provided evidence of having control of the land and appurtenant water rights and would need water rights in the amount of 160 acre-feet sufficient to complete the proposed mining and milling project¹¹.

CONCLUSIONS

I.

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

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.

III.

NRS § 533.380(3) provides that the State Engineer may for good cause shown extend the time within which construction of diversion 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

¹¹ Transcript, p. 16, Exhibit No. 11.

¹² NRS Chapters 533 and 534.

and proof of beneficial use¹³. 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.¹⁴ The State Engineer concludes that the litigation suit filed by the permittees demonstrates an effort of due diligence and good faith to perfect the subject water rights.

RULING

The permittees Buster Bowman and Judith Nancy Bowman have 30 days from the date of this ruling to file Applications for Extension of Time under Permits 49412, 49427, 51328, and the associated filing fees. If the Applications for Extension of Time and fees are timely filed, the cancellation of 72.4 acre-feet annually under Permit 49412 and 108.6 acre-feet annually under Permit 49427, and the 31 acre-foot portion owned by the Bowmans under Permit 51328 for a total combined duty of 212 acre-feet annually will be rescinded and the 212 acre-feet portion of the total combined duty of the permits will be reinstated with a new priority date of April 17, 1998. Failure to timely file the Applications for Extension of Time and the statutory filing fees will result in the affirmation of the cancellation. The use of the waters under Permits 49412, 49427, and 51328 is restricted to the original points of diversion and place of use as set forth in Permits 49412, 49427, and 51328. The filing of the Proof of Completion of Work under Permit 51328 and the Proof of Beneficial Use under Permits 49412, 49427 and 51328 is to occur within one year after a ruling from the District Court. Each application

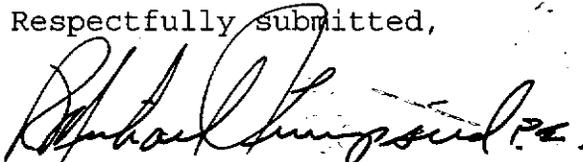
¹³ NRS § 533.380(3)(b).

¹⁴ NRS § 533.380(6).

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requesting an extension of time must include a full description of the mining and milling plan and the progress made at the time. One additional extension of time for filing the proofs of beneficial use may be granted upon receipt of applications that describe substantial progress is being made to put the water to beneficial use.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/cl

Dated this 10th day of
August, 1999.