

IN THE OFFICE OF STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF APPLICATION 5003)
FILED TO APPROPRIATE THE PUBLIC)
WATERS OF FRENCH SPRING LOCATED)
WITHIN THE LITTLE SMOKY VALLEY)
SOUTHERN PART HYDROGRAPHIC BASIN)
(155-C) NYE COUNTY, NEVADA.)

RULING

#5357

GENERAL

I.

Application 5003 was filed on April 12, 1918, by Martin Etchemendy to appropriate 0.025 cubic foot per second of water from French Spring for the stock watering of 3,500 head of sheep. The precise location of this source and the proposed place of use it will serve are not clearly defined due to lack of a reliable cadastral survey at this time and place.¹

II.

It should also be noted that a series of ownership transfers occurred during the early 1920's and that the Willow Creek Livestock Co. and Nazareth Hachquet et al. represent the current owners of record of Permit 5003, in the Office of the State Engineer.¹

FINDINGS OF FACT

I.

The path that Permit 5003 has taken through the State Engineer's permitting process differs from that taken by most of the water rights permits that have been issued certificates of appropriation by the State Engineer. This difference is found in the fact that although all of the required proofs, including the Proof of Beneficial Use have been filed, a formal certificate of appropriation was never issued under

¹ File No. 5003, official records within the Office of the State Engineer.

this permit. To gain an understanding of why this occurred, the general history of this permit must be reviewed.

Application 5003 was filed on April 12, 1918, approximately 15 years after the establishment of the Office of the State Engineer. Upon a review and evaluation of the application, a water right permit to appropriate water from French Spring was issued to Martin Etchemendy, granting him the right to water 3,500 head of sheep from this source. The approval of Permit 5003 carried with it a set of permit terms, which required the submittal of separate proofs, each of which was assigned a specific deadline. The filing of these proofs signifies that the permittee had completed one phase of the perfection of the water right, and was prepared to move forward to the next. In the case of Permit 5003, three separate proofs were required, these being the Proof of Labor and Improvements, the Proof of Completion of Work and the Proof of Beneficial Use. The first two proofs relate to the construction and completion of the works of diversion necessary to capture and distribute the water appropriated under the permit. Once the works of diversion have been properly constructed, an appropriation of water can occur in the manner set forth in the permit. The permit file, which contains the original proofs in their order of filing, indicates that the Proofs of Labor and Proof of Completion of Work associated with Permit 5003 were both filed in a timely manner. The Proof of Completion of Labor describes a 4 x 4 foot water tunnel, which was driven 27 feet into the side of a hill. This tunnel was then barricaded with rock and timber, forming a collection chamber.¹ Through this development work, the permittee was able to collect and distribute the waters of French Spring to support his livestock operation. The State Engineer finds by 1919, the permittee had completed the diversion works, filed the associated proofs and initiated a beneficial use of the water from French Spring.

II.

When Permit 5003 was issued, the permittee was assigned a deadline of November 24, 1919, to file the Proof of Beneficial Use. This deadline was satisfied with the filing of said proof on that date. The receipt of this proof and its filing fee was acknowledged by letter dated November 25, 1919. From this point forward, a series of correspondence exchanged between the Office of the State Engineer and various interests provides the only insight into the events, which left Permit 5003 in its current state.

The first indication that there was a problem with the Proof of Beneficial Use is brought out in a letter to the permittee dated March 6, 1929. Here it was stated that, "...we find that in your Proof of Beneficial Use you did not state the number of head of sheep watered. Before we can continue with the issuance of a certificate it is necessary for us to have this information...". This letter also expressed a hope that this information would be submitted in the near future. Unfortunately, this was not the case, and no reply to this letter was ever received in the Office of the State Engineer.¹

The need for this information was restated two years later in response to a November 18, 1931, inquiry into the status of a group of water right filings, which included Permit 5003. Again the issue of the missing information was presented in addition to the suggestion that an amended Proof of Beneficial Use be filed containing all the required information. Unlike its predecessor, this letter was answered by a representative of the First National Bank of Elko, who requested the blank forms necessary to file the referenced amended Proof of Beneficial Use. Accordingly, blank forms for the amended proof were sent to this individual on December 4, 1931. It can only be assumed that an amended Proof of Beneficial Use was submitted, since an amended proof is not found within the permit file. What is present, however, is a hand written draft certificate, which states that 3,500 head

certificate carries no date, but was written during George Malone's tenure as State Engineer, which would place it in the 1930's. The State Engineer finds that an eventual solution was found to the problem created by the information omitted from the original Proof of Beneficial Use, and that the certificate process could progress to the final step.

III.

The certificate process as it existed in 1933, differed from that currently in effect in the State Engineer's office. One element that has been removed is the requirement to submit a fee for the filing and recording of the certificate. Section 72, Chapter 28, Statutes of 1913, as amended by Section 1, Chapter 128, Statutes of 1931, of the Nevada Revised Statutes, stated that, the sum of one dollar (\$1.00), shall be paid in advance to the State Engineer by the party in whose favor the certificate is issued. This \$1.00 fee was collected to offset the cost of filing a copy of the newly issued certificate with the proper county recorder. As required under this provision, a standard form letter was sent to the Willow Creek Livestock Company on May 31, 1933, advising them that it would be necessary to submit the certificate fee to the Office of the State Engineer within thirty days. This notice went unanswered, prompting the Office of the State Engineer to send out what is identified in the permit file as a "second and last" notice. This final notice restated the previous information, and allowed the permittee an additional thirty days from the date of the notice to submit the fee. This notice was also left unanswered.¹ At this point, Permit 5003 should have been cancelled by the State Engineer for failure to submit the certificate filing and recording fee. For reasons, which are not known, the cancellation of this permit was not pursued, and Permit 5003 was allowed to remain in good standing. The State Engineer finds that sufficient grounds existed in 1933 to justify the cancellation of Permit 5003 and that the record is unclear why this action was not taken at that time.

IV.

It is acknowledged that the final notices that were sent to the permittee were mailed many years ago, according to the regulations and policies of that time. A page by page examination of the documents and correspondence contained within the permit file does little to explain why this permit was not cancelled in 1933. If the volume of correspondence received and filed after the final notices were sent in 1933 is used to gauge the level of interest expressed by the permittee over the subsequent years, it becomes apparent that the two letters in the matter of this permit that have been directed to the State Engineer over the past 71 years, do not constitute a significant level of interest regarding this permit.¹ The State Engineer finds that the passage of time does little to alter the decision to cancel Permit 5003, if anything the long periods of silence, which dominate the timeline, strengthen the assumption that the permittee has no further interest in this water right.

V.

The Office of the State Engineer has created a database, which allows various queries to be made regarding the status of water right filings. Using this tool, it was possible to identify water rights that had scenarios similar to that found with Permit 5003. A search criteria tailored to search for cancelled water right permits under which the Proof of Beneficial Use had been filed located 212 examples.² A spot check of several of these cancelled permits discovered instances where a permit had been cancelled due to the failure to submit the statutory certificate fee. The fact that an office stamp labeled, "CANCELLED BECAUSE OF FAILURE TO SUBMIT STATUTORY CERTIFICATE FEE", was created to stamp the cancelled permit file covers, suggest that this type of cancellation was

² Nevada Division of Water Resources Water Right Database, search conducted February 11, 2004, output filed within the official records of the Office of the State Engineer under Permit 5003.

not uncommon.³ The State Engineer finds that the precedent has been set to cancel water right permits on the grounds that the certificate filing and recording fee have not been timely submitted.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴

II.

The State Engineer is prohibited by law from granting an application to appropriate the public waters where:⁵

- A. there is no unappropriated water at the proposed source;
- B. the proposed use conflicts with existing rights;
- C. the proposed use conflicts with protectible interests in existing domestic wells as set forth in NRS 533.024; or
- D. the proposed use threatens to prove detrimental to the public interest.

III.

The State Engineer concludes there is no value in resurrecting the certificate process for a water right permit in which no interest has been expressed by any party since 1961.

IV.

The State Engineer concludes that to perpetuate the delay in cancelling Permit 5003 would serve no purpose and would threaten to prove detrimental to the public interest.

³ File Nos. 4113, 4952 and 9672, official records in the Office of the State Engineer.

⁴ NRS chapter 533.

⁵ NRS § 533.370(4).

RULING

Permit 5003 is hereby cancelled on the grounds that the permittee has failed to express a continued interest in completing the permit, and that its approval would threaten to prove detrimental to the public interest.

Respectfully submitted,



Hugh Ricci, P.E.
State Engineer

HR/MDB/jm

Dated this 3rd day of

June, 2004.