

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

IN THE MATTER OF THE COMPLAINT )  
FILED BY M.W. LOYD AGAINST )  
LARRY BRINKERHOFF, NEVADA )  
LICENSED WELL DRILLER NO. 1161, )  
FOR ALLEGED VIOLATIONS OF )  
THE LAWS AND REGULATIONS )  
APPLICABLE TO WELL DRILLERS IN )  
THE STATE OF NEVADA )

RULING

# 4371

GENERAL

I.

On or about December 5, 1995, M.W. Loyd, dba Loyd Mining (hereinafter "Loyd") filed a complaint with the Nevada State Engineer against Larry Brinkerhoff, dba American Drilling (hereinafter "Brinkerhoff").<sup>1</sup> The complaint alleges that Brinkerhoff, a Nevada licensed well driller, failed to complete a water well in the Black Rock Desert area of Pershing County, Nevada, as agreed upon in the original Well Drilling Proposal signed by Loyd and Brinkerhoff.

In summary, Loyd claims that Brinkerhoff refused to continue drilling the water well until he was paid additional monies above the amount set forth in the Well Drilling Proposal. Brinkerhoff claims that the Well Drilling Proposal was not a contract, that conditions at the drilling site were not as represented to him, that no adequate water source was present to support the drilling operation, and that he could not drill under the conditions found for the cost quoted in the Well Drilling Proposal.

II.

By certified letter dated December 7, 1995, the State Engineer requested Brinkerhoff respond to the complaint<sup>2</sup> which he did by letter dated December 9, 1995.<sup>3</sup>

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<sup>1</sup>Exhibit No. 1, public administrative hearing before the State Engineer, March 1, 1996. Hereinafter "Exhibit No."

<sup>2</sup>Exhibit No. 2.

<sup>3</sup>Exhibit No. 7.

III.

The State Engineer then requested the State Well Driller's Advisory Board (hereinafter "Advisory Board") review the matter at their next regularly scheduled meeting and provide the State Engineer with a recommendation as to whether to pursue or dismiss the complaint. On January 11, 1996, the Board reviewed the complaint and recommended to the State Engineer that the matter be set for a public administrative hearing.<sup>4</sup>

IV.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on March 1, 1996, at Carson City, Nevada, before representatives of the Office of the State Engineer.<sup>5</sup> As provided in NRS 534.150(7), the State Engineer availed himself of the services of the Advisory Board and three members of the Advisory Board were present during the administrative hearing.

FINDINGS OF FACT

I.

The State Engineer finds that Brinkerhoff holds Nevada Well Driller License No. 1161.

II.

Testimony and evidence indicate that Loyd approached Brinkerhoff with regard to the drilling of a water well.<sup>6</sup> On or about October 16, 1995, Loyd and Brinkerhoff signed a Well Drilling Proposal prepared by American Drilling for the drilling of a 500 foot water well, the setting of 12" casing, and gravel packing at

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<sup>4</sup>Transcript, pp. 11-13, public administrative hearing before the State Well Driller's Advisory Board, January 11, 1996, official records of the Office of the State Engineer.

<sup>5</sup>Exhibit No. 4 and Exhibit No. 5.

<sup>6</sup>Transcript, p. 61, public administrative hearing before the State Engineer, March 1, 1996. Hereinafter "Transcript".

a cost of \$20,000 dollars.<sup>7</sup> Pursuant to the proposal, a payment of \$13,700 dollars was to be made on October 16, 1995, and the remainder of \$6,300 dollars was to be paid at the completion of the well.<sup>8</sup>

The State Engineer finds that much of the testimony and evidence presented at the public administrative hearing went to issues of what equipment broke down at what time, problems encountered with geologic formations and lack of a reliable water source of sufficient quantity to support the drilling operation. However, the State Engineer further finds that testimony and evidence provided at the administrative hearing indicate that the real issue between the parties goes to the question of performance under the Well Drilling Proposal/Contract.

### III.

Most of the testimony and evidence presented at the public administrative hearing can be summarized as follows:

Brinkerhoff testified that the Well Drilling Proposal signed by both parties was based on various representations and conditions. He testified that before signing the Well Drilling Proposal discussions took place regarding:

1. the geologic materials to be drilled into (with Loyd allegedly stating the drilling would take place in alluvium);<sup>9</sup>
2. his never supplying water for the drilling of wells by reverse circulation<sup>10</sup>; and

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<sup>7</sup>Exhibit No. 1.

<sup>8</sup>Exhibit No. 1.

<sup>9</sup>Transcript, pp. 59-64, (see also 99, 120-123).

<sup>10</sup>Transcript, p. 61.

3. the 50 to 60 gallons per minute required to support the drilling operation ( with Loyd allegedly agreeing to provide 50 to 60 gallons per minute of water and failing to do so).<sup>11</sup>

Loyd testified that:

1. Brinkerhoff knew there was an existing well nearby that could be used as a water source to support the drilling operation (a well for which no documentation exists in the Office of the State Engineer<sup>12</sup>);

2. Brinkerhoff had been out to the site a year before to probe the well<sup>13</sup>; and

3. he agreed to supply a source of power to pump the well, but never agreed to supply the drilling operation with water.<sup>14</sup>

The State Engineer finds that the Well Drilling Proposal did not cover the subject of water supply to support the drilling operation and the parties dispute who was responsible for the adequate water supply to support the drilling operation. The State Engineer finds that the issue of responsibility for the water source supply is a matter of contract interpretation and is not a matter of a violation of either NRS Chapter 534 nor NAC Chapter 534.

#### IV.

Another issue of contention between the parties is what geologic materials were encountered upon actual drilling. Brinkerhoff testified that:

1. Loyd represented to him that the subsurface conditions

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<sup>11</sup>Transcript, pp. 29, 59-63 (see also 120-123).

<sup>12</sup>Transcript, p. 114.

<sup>13</sup>Transcript, p. 25, 59.

<sup>14</sup>Transcript, pp. 18-25.

would be alluvium;<sup>15</sup>

2. the Well Drilling Proposal was based on Loyd's representation as to geologic materials to be encountered;<sup>16</sup>

3. he had indicated to Loyd that if anything other than alluvium were encountered it would significantly increase drilling costs;<sup>17</sup>

4. alluvium was not what he encountered upon drilling,<sup>18</sup> and

5. he was very hesitant when he started this well drilling project because when he began to dig the water supply pit encountered boulders.<sup>19</sup>

Loyd testified that he did not discuss the type of material that would be encountered, but rather stated that Brinkerhoff said he knew the area and could drill a well in 5 or 6 days.<sup>20</sup>

The State Engineer finds that it is highly unlikely that no discussion took place between Loyd as a miner and Brinkerhoff as a well driller with regard to the geologic materials to be encountered upon drilling. However, upon questioning by a member of the Advisory Board, it was clear that Loyd and Brinkerhoff have different definitions of alluvium<sup>21</sup>. Well Driller's Reports from other wells within a three mile radius of the well at issue generally show the geologic materials in the area.<sup>22</sup> The State

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<sup>15</sup>Transcript, pp. 59, 63-64, 99, (see also 123).

<sup>16</sup>Transcript, p. 61.

<sup>17</sup>Transcript, p. 63.

<sup>18</sup>Transcript, pp. 69-70, 74, 77.

<sup>19</sup>Transcript, p. 147.

<sup>20</sup>Transcript, p. 29.

<sup>21</sup>Transcript, pp. 133-134.

<sup>22</sup>Exhibit No. 23.

Engineer finds that the geologic material drilled was alluvium.

The State Engineer finds that nothing in the Well Drilling Proposal reflects an understanding that the proposal/agreement was based on the geology encountered nor restricts the method of drilling to be used in the drilling of this well. The State Engineer finds that the issue of geologic material to be encountered is a matter of contract interpretation and is not a matter of a violation of either NRS Chapter 534 nor NAC Chapter 534.

v.

Testimony and evidence indicate that before Brinkerhoff commenced actually drilling he was very hesitant when he started this project because when he first began the water supply pit he encountered boulders.<sup>23</sup> Then when Brinkerhoff commenced actual drilling of the well he encountered difficulties with subsurface conditions,<sup>24</sup> with his equipment and with maintaining pumps in the water source.<sup>25</sup> Loyd testified that after 5 or 6 days into the project Brinkerhoff quit and informed him that he needed the balance of the original \$20,000 dollars agreed upon to finish the job, and would not continue unless Loyd gave him more money.<sup>26</sup> After being paid the remainder of the stated \$20,000 dollar price, Brinkerhoff continued drilling, but at 40 feet abandoned the hole due to lack of structural integrity at the surface.<sup>27</sup>

Brinkerhoff then attempted to drill a second hole and at 70

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<sup>23</sup>Transcript, p. 147.

<sup>24</sup>Transcript, pp. 65.

<sup>25</sup>Transcript, pp. 65-78, 87-96.

<sup>26</sup>Transcript, p. 13; Exhibit No. 2.

<sup>27</sup>Transcript, pp. 14, 65-66, 91-92.

feet lost drilling water due to hitting a void.<sup>28</sup> After adding some wood chips and drilling mud Brinkerhoff was able to stop the water loss and resumed drilling, continuing to a depth of 80 feet where he completely lost drilling water.<sup>29</sup> There was apparently some water being pumped from the existing well that was stored in a water supply pit, but when certain subsurface zones were encountered all of the water in the storage pit was lost into the well bore hole.<sup>30</sup> On or about November 28, 1995,<sup>31</sup> Brinkerhoff then informed Loyd that he would not finish the job until Loyd paid him another \$16,000 dollars.<sup>32</sup>

Testimony and evidence indicate that Loyd then filed a complaint with the State Contractors' Board.<sup>33</sup> After being approached by the Contractors' Board, Brinkerhoff agreed to go back to attempt to drill one last time on December 4, 1995, as long as adequate water was on location to support the drilling operation.<sup>34</sup> Brinkerhoff attempted to continue the drilling, but again lost all of the drilling water at the 80 to 85 foot depth and then removed all his equipment from the site without completing the well or plugging the hole.<sup>35</sup> On December 5, 1995, Brinkerhoff's legal

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<sup>28</sup>Transcript, p. 15, 66-69, 93-97, (see also 140-142).

<sup>29</sup>Transcript, pp. 15, 68-69, 141-142.

<sup>30</sup>Transcript, pp. 42-44, 141-142.

<sup>31</sup>Exhibit No. 1.

<sup>32</sup>Transcript, pp. 16-17, 43.

<sup>33</sup>Exhibit No. 1. Note that a copy of the complaint filed with the State Contractors' Board was also filed as a complaint with the Office of the State Engineer.

<sup>34</sup>Exhibit No. 3.

<sup>35</sup>Transcript, pp. 17-18, 42-44, 79-81, 92-94, 105; Exhibit No. 1, Exhibit No. 2.

counsel sent Loyd a Notice of Breach of the Well Drilling Proposal.<sup>36</sup>

Brinkerhoff testified that he is familiar with other drilling methods besides the reverse circulation method chosen for this drilling project and that another drilling method would have been able to complete the well, but with additional costs for materials.<sup>37</sup>

The State Engineer finds that Brinkerhoff has been a well driller licensed in the State of Nevada since 1971.<sup>38</sup> The State Engineer further finds that when Brinkerhoff first began to encounter difficulties with this project it was his responsibility as the licensed well driller to immediately stop work and inform Loyd that the job could not be done under the conditions found at the site, if he really believed such conditions presented a serious problem to completion of the project for the stated price in the Well Drilling Proposal. The State Engineer finds that Brinkerhoff did not attempt to renegotiate the contract until after the drilling and water supply conditions had been abundantly clear for at least a month. The State Engineer further finds that Brinkerhoff's continuation with the same drilling method while he continually had problems with an adequate water source calls into question Brinkerhoff's competence as a well driller and a business man. The State Engineer further finds that at no time did Brinkerhoff contact the State Engineer to discuss the matter or request approval to suspend drilling operations prior to abandoning this project.

## VI.

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<sup>36</sup>Exhibit No. 3.

<sup>37</sup>Transcript, pp. 108-109.

<sup>38</sup>Official records of the Office of the State Engineer.

As provided in NRS 534.140(7) every well driller who is the owner of a well-drilling rig is required to obtain a license as a well driller from the State Contractors' Board. NRS 624.301 provides the grounds for disciplinary action by the State Contractors' Board which include: abandonment without legal excuse of a project undertaken by the licensee, and failure in a material respect on the part of the licensee to construct any project for the price stated in the contract.

After the close of the hearing in this matter, the State Engineer was informed by Brinkerhoff's legal counsel that Brinkerhoff had filed a complaint against Loyd in the Sixth Judicial District Court for breach of contract. The State Engineer was further informed that the State Contractors' Board had scheduled a hearing regarding the complaint filed by Loyd with the Contractors' Board; however, he was later informed that the State Contractor's Board would not act while the matter was in civil litigation. The State Engineer finds that genuine issues exist as to performance or non-performance of Brinkerhoff and Loyd under the Well Drilling Proposal; however, the State Engineer will not address performance under the contract as both the Contractors' Board and the District Court appropriately have that issue presently before them. Therefore, the State Engineer will confine his ruling only to violations of NRS Chapter 534 and NAC Chapter 534.

#### VII.

Loyd testified as to his disagreement with most of the ways Brinkerhoff went about drilling this well. He appears to believe that Brinkerhoff should not have used a "drag" bit, but rather should have used a roller cone drill bit, and that enough water was available to support the drilling operation. He does not agree with the level at which Brinkerhoff placed pumps in the water supply source well and appears to believe that it was Brinkerhoff's fault that neither the pumps nor the source well could produce a

quantity of water at the 50-60 gallon per minute flow rate needed to support the drilling operation.<sup>39</sup> The State Engineer finds that Loyd is not a licensed well driller nor was he recognized as an expert witness with regard to well drilling or water supply equipment; therefore, his testimony as to matters such as placement of pumps or well production does not carry much weight.

#### VIII.

Loyd testified when the first 40 foot hole had to be abandoned Brinkerhoff filled it using a backhoe and native materials.<sup>40</sup> It was undisputed that when Brinkerhoff quit and abandoned the second 80 foot hole that he dumped three bags of wood shavings into the hole, took a piece of scrap corrugated culvert and put it over the hole and dumped a bucket of dirt on it and that is the way it stands today.<sup>41</sup>

The Nevada regulations for water well and related drilling provide that every well driller must take reasonable precautions to prevent pollution or contamination of an aquifer.<sup>42</sup> If it becomes necessary for the driller to discontinue the drilling operation before completion of the water well, the drill hole must be protected from contamination and rendered safe.<sup>43</sup> On abandonment of a well it must be plugged and a report must be filed with the Division of Water Resources within 30 days after the well has been plugged.<sup>44</sup> The State Engineer finds that Brinkerhoff did not

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<sup>39</sup>See generally Loyd's testimony, Transcript, pp. 11-57.

<sup>40</sup>Transcript, pp. 54-55. The State Engineer notes that Loyd also testified that the 40 hole had collapsed. Transcript, p. 14.

<sup>41</sup>Transcript, pp. 18, 55.

<sup>42</sup>NAC 534.370.

<sup>43</sup>NAC 534.370(3).

<sup>44</sup>NAC 534.420.

dispute the testimony as to the conditions left at the drilling site upon the removal of his equipment and refusal to continue the job, and that Brinkerhoff did not adequately protect from contamination, render safe, nor plug the 80 hole in compliance with the regulations. The State Engineer further finds as the 40 hole had collapsed there was not much Brinkerhoff could have done to plug that hole.

IX.

The State Engineer finds that the three State Well Driller's Advisory Board members at the public administrative hearing each individually submitted recommendations to the State Engineer regarding this matter. NRS 533.150(7) provides that the State Engineer may avail himself of the services of the "Board" in an advisory capacity. The State Engineer must reject the individual recommendations for two reasons: (1) the matter was not properly noticed as an agenda item in Compliance with the Open Meeting Law, and (2) the recommendation must be from the Board as a whole and not individual recommendations from various Board members.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>45</sup>

II.

A contract is defined as an agreement between two or more persons which creates an obligation to do or not to do a particular task. Its essential components are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation.<sup>46</sup> The Well Driller Proposal signed by both Loyd and Brinkerhoff is a writing to which Loyd and Brinkerhoff are

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<sup>45</sup>NRS Chapter 534 and NAC Chapter 534.

<sup>46</sup>BLACK'S LAW DICTIONARY 291-292 (5th ed. 1979).

signatories. It covers the subject matter of the drilling of a 12" 500 foot deep water well, the stated consideration (the right, interest, profit or benefit accruing to one party and the forbearance, detriment, loss or responsibility undertaken by the other party) the drilling of a 500 foot well by Brinkerhoff and Loyd's payment to Brinkerhoff of \$20,000 dollars, and it reflects the mutual agreement and obligation between Loyd and Brinkerhoff.

The State Engineer concludes that once Loyd accepted and signed Brinkerhoff's proposal, the Well Driller Proposal became a contract between the parties for the drilling of the well. However, the State Engineer further concludes performance of the parties under the contract is left for resolution by the State Contractor's Board or the courts of civil jurisdiction.

The State Engineer further concludes that once Brinkerhoff believed that problems existed which prevented him from performing under the contract as negotiated he should have immediately stopped the project and renegotiated the contract. To continue with a drilling method for over a month after problems with the water source were so apparent raises questions as to Brinkerhoff's competence as a well-driller and a businessman.

### III.

NRS 534.160(2) provides that well drillers must comply with regulations adopted by the State Engineer governing the drilling of water wells. NAC 534.290(f) provides that the State Engineer may revoke a well driller's license if the well driller fails to comply with any law applicable to well drillers.

As to the second 80 foot hole, when Brinkerhoff left the job he merely dumped three bags of wood shavings into the hole, took a piece of scrap corrugated culvert, put it over the hole and dumped a bucket of dirt on it. There is no evidence in the record to dispute the fact that the construction of the subject well is in violation of the minimum standards for construction set forth in NAC 534.360 which requires a well be constructed to prevent

pollution or contamination of the ground water.

The State Engineer concludes that Brinkerhoff violated NAC 534.370(3) in that corrugated culvert and dirt is not a proper way to protect the well from pollution or contamination, and violated NAC 534.420 in that he failed to plug the well upon abandonment of the drilling operation.

V.

There is no evidence in the record to dispute the fact that the construction/abandonment of the subject well is in violation of the minimum standards set forth in the Nevada Administrative Code Chapter 534 applicable to well drillers. The State Engineer concludes it is the responsibility of the licensed well driller under NAC 534.330 to ensure that the drilling of a well complies with the provisions of NAC Chapter 534 and in this case the well driller failed to comply with the cited provisions of Chapter 534.

The State Engineer concludes that Brinkerhoff has not abandoned the well in compliance with the applicable regulations; and further, that the well is defective, and as provided in NRS 534.060(4), the State Engineer may, if necessary, direct the owner to repair or seal the well.

RULING

As provided in NRS 534.160 and NAC 534.290, the well-drilling license of Larry Brinkerhoff is hereby suspended on the grounds that he has failed to comply with the statutes and regulations governing the drilling of water wells in Nevada. The suspension will be lifted if Mr. Brinkerhoff immediately returns to the drilling site and properly reclaims the area by causing the subject well to be plugged and filing proof of said plugging in accordance with the applicable statutes and regulations. Failure to comply will result in permanent revocation of Mr. Brinkerhoff's well-drilling license.

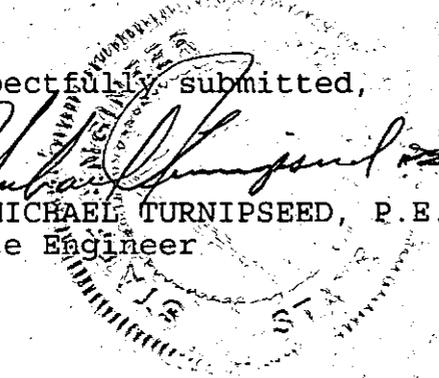
The issue of performance under the contract is left to the jurisdiction of the State Contractors' Board or the district court.

and will not be resolved in this instance by the State Engineer.

As provided under NRS 534.060(4), if Mr. Brinkerhoff fails to plug the well within 60 days of the date of this ruling, the owner of the well, Mr. Loyd, shall cause the subject well to either be constructed in compliance with the rules and regulations governing the drilling of wells in Nevada or properly plugged and abandoned as required in NAC 534.420.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer



RMT/SJT/bk

Dated this 11th day of  
July, 1996.