

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

IN THE MATTER OF APPLICATION FOR )  
EXTENSION OF TIME UNDER PERMIT )  
9405 FILED TO APPROPRIATE THE )  
WATER OF THE WEST WALKER RIVER, )  
DOUGLAS COUNTY, NEVADA. )

RULING

# 4746

GENERAL

I.

Application 9405 was filed on January 23, 1931, by the Walker River Irrigation District ("WRID") to appropriate surface water from the West Walker River and its tributaries. Permit 9405 was approved on August 18, 1954, for the appropriation of 3,500 cubic feet per second, not to exceed 200,000 acre-feet. This includes 50,000 acre-feet annually of refill water from the West Walker River and its tributaries for irrigation and domestic purposes on all the irrigable lands within the boundaries of the Walker River Irrigation District as in the list comprising the lands of said district irrigable from the West and Main Walker Rivers totalling 100,000 acres. The application was intended to complete the storage originally contemplated in Topaz Lake Reservoir, as well as the original Hoye Canyon proposal. The permit proposed the construction of an impounding dam across the West Walker River Channel at Hoye Canyon situated in the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 17, T.10N., R.23E., M.D.B.& M., the south end of which extends into the SW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 17.<sup>1</sup>

Under the terms of the permit, Proof of Completion of Work was first due to be filed in the office of the State Engineer on or before March 18, 1957, with Proof of Beneficial Use first due to be filed in the office of the State Engineer on or before March 18, 1965. Various applications for extensions of time to file Proof of Completion and Proof of Beneficial Use have been granted by state engineers through March 18, 1999.

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<sup>1</sup> File No. 9405, official records in the office of the State Engineer.

## II.

On April 15, 1999, the WRID filed an Application for Extension of Time for filing Proof of Completion and Proof of Beneficial Use under Permit 9405. That application indicated that the WRID cannot determine the amount of time needed to complete the project until it is determined that the water needed to fill the reservoir is actually available and that cannot occur until there is an enforceable allocation of the waters of the Walker River system between Nevada and California and until there is a resolution to the claims for additional water for the Walker River Indian Reservation and Walker Lake.<sup>1</sup> On March 16, 1999,<sup>2</sup> the Walker River Paiute Tribe ("Tribe") filed a protest to the granting of the request for extension of time, and on April 28, 1999, The Charles N. Mathewson Trust ("Trust") also filed a protest to the granting of the request for extension of time.<sup>1</sup>

The Tribe alleges that:

(1) the WRID has failed to demonstrate due diligence in perfecting Permit 9405 or beneficial use of those waters and has failed to commence construction of Hoye Canyon Dam.

(2) The Tribe has asserted claims to additional water from the Walker River for use on lands restored to the Walker River Indian Reservation in 1936 for storage in Weber Reservoir and for ground water and the potential construction of Hoye Canyon Dam threatens the Tribe's ability to obtain the additional water it seeks.

(3) The construction of another impoundment structure in the Walker River system is untenable in light of the fact that the system is over-appropriated and various interests have expressed strong interests in preserving Walker Lake and the construction of the proposed dam is contrary to such conservation interests.

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<sup>2</sup> The State Engineer recognizes that the Tribe filed its protest even before the application for extension of time had been filed by the WRID.

(4) There is no evidence that the WRID is financially capable of constructing Hoyo Canyon Dam.

(5) Due diligence requires compliance with federal environmental laws and there is no evidence the WRID has taken steps to assure compliance.

(6) There is no evidence the WRID has taken steps to prove the engineering viability of constructing a dam at Hoyo Canyon and the Tribe asserts that it would not be viable from an engineering and structural perspective.

The Trust's allegations are nearly identical to the Tribe's but for the Tribe's claims to additional water from the system, and including a protest claim that the Trust owns 5,200 acres of land subject to an easement in favor of the WRID negatively impacting the Trust's use of its property.

#### FINDINGS OF FACT

##### I.

By decision dated January 9, 1996,<sup>3</sup> after a public administrative hearing on a previous protest to an application for extension of time the State Engineer found the following:

(1) Storage has been declared a beneficial use under Nevada water law.

(2) The WRID has been constrained from building a dam at Hoyo Canyon because of the threat of litigation by California stemming from the California/Nevada Interstate Compact and because of new claims by the Walker River Paiute Tribe and Mineral County to the waters of the Walker River, and that extensions of time are routinely granted when there is pending litigation. The State Engineer found because of these pending claims for additional waters from the Walker River system by others, the lack of firm water supply would constitute an irresponsibility on the part of the WRID to proceed with

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<sup>3</sup> State Engineer's Ruling No. 4281, dated January 9, 1996, official records in the office of the State Engineer.

actual construction of the dam.

(3) The State Engineer found that Permit 9405 represents an appropriation of water and Nevada water law provides for the filing of a change application if it becomes impracticable to construct the point of diversion at the original permit location.

(4) The WRID's financial ability to construct the dam has been somewhat constrained because of litigation, particularly litigation since 1988, and including proceedings such as protests to applications for extensions of time.

(5) There is a reasonable expectation that the litigation filed by the Tribe and Mineral County will someday be concluded and it will be known if a firm water supply exists, if other permits can be obtained, and the project is feasible and can be financed.

(6) That the appropriation of water, the financial viability or feasibility are not at issue in an application for extension of time, that decision being made at the time the permit was granted.

(7) That the only issue in an application for extension of time is whether the permittee has shown the steady application of effort to perfect the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances.

(8) That the protestant had knowledge that the WRID had an easement on a portion of his property.

(9) That good faith and due diligence were found on the part of the WRID in its political efforts, litigation efforts, contracts with consultants and formation of the Walker River Water Users Association.

(10) That issues related to the WRID easement, water quality, evaporation, uses of the land and whether or not they have obtained all the permits necessary to build the dam are irrelevant and not part of the due diligence test.

The State Engineer concluded that the WRID had proceeded in good faith and with reasonable diligence to resolve the obstacles preventing them from building this dam and there was good cause to grant the applied for extension of time.

The State Engineer finds that the findings and conclusions made in State Engineer's Ruling No. 4281 were affirmed by the Ninth Judicial District Court, in and for the State of Nevada, on May 19, 1997.

## II.

The permittee alleges in its answer to the protests that Nevada water law does not provide for the filing of a protest to an application for extension of time.<sup>1</sup> The State Engineer finds that while Nevada water law does not provide specifically for the filing of such a protest it is within his discretion to consider an objection to such a filing.

## III.

The protests alone to the application for extension of time demonstrate there are unresolved issues as to whether water will actually be available to pursue the project. The Tribe's claims to additional water threaten the construction of the dam rather than as it asserted that the dam threatens the Tribe's claims. Mineral County's claims for water to preserve Walker Lake could have a significant impact on the flows available to fill such a reservoir and while the construction of the dam may be contrary to the conservation interests of the lake, the WRID presently holds a valid permit for such reservoir while Mineral County merely has a claim filed in court that has not been brought to resolution. The State Engineer finds these claims alone demonstrate the conflicting interests which must be resolved in the present litigation before it would be prudent for the WRID to proceed with construction of the dam.

## IV.

The State Engineer finds whether the WRID is financially capable of constructing the dam was an issue to be raised in any

protest to the filing of the application and has no relevance to an application for extension of time for filing Proof of Completion or Proof of Beneficial Use.

V.

In light of the fact that there are multiple cases presently filed in the Federal District Court asserting claims to water from the Walker River system, and that the interstate allocation of the waters of the river between California and Nevada has not been finalized, it would not appear prudent for the WRID to expend significant amounts of money in pursuing compliance with the federal environmental laws until those issues are resolved. The State Engineer further finds that whether the WRID has taken the initial steps to comply with federal environmental law is not part of the determination of whether the WRID has demonstrated good faith and due diligence in perfecting the appropriation. While such compliance would demonstrate acts in furtherance of the project, the lack of such compliance does not demonstrate a failure to pursue the project with due diligence.

VI.

The State Engineer finds whether a dam is viable from an engineering standpoint is again not an element of the due diligence test.

VII.

The State Engineer finds that the Trust's argument that the WRID's easement affects its ability to use its property is again not an element of the due diligence test. The State Engineer can only assume the Trust purchased its land with actual and constructive knowledge of the easement.

VIII.

As affirmed by the Ninth Judicial District Court in its decision of May 19, 1997, the State Engineer's previous decision to grant the application for extension of time was supported by the evidence of the WRID's involvement in attempts to negotiate an interstate compact between Nevada and California over the waters of

the Walker River, its involvement in legislation over the same, involvement in pending litigation and settlement discussions over the waters of the Walker River and absent resolution of that litigation the WRID cannot obtain the financing to construct the dam. The State Engineer finds the WRID's answers to the protests demonstrate good faith and due diligence in pursuing the matters which must be resolved prior to WRID actually having a reasonable expectation to place the waters to beneficial use.

CONCLUSION

I.

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

II.

NRS § 533.395(5) provides that the measure of reasonable diligence is the steady application of effort to perfect the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances. When a project or integrated system is comprised of several features, work on one of the features of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system. The WRID has completed many features of its irrigation system. However, the threat to whether water will be available for the completion of Hoye Canyon Dam is demonstrated by the lack of an interstate compact with California and the claims to additional water from the system by the Tribe and Mineral County. These issues require resolution before the WRID can prudently proceed. The State Engineer concludes the WRID has demonstrated good faith and due diligence in pursuing resolution to the competing claims over the waters of the Walker River, a prerequisite to it having a reasonable expectation to place the waters under Permit 9405 to beneficial use. It would not be prudent on behalf of the WRID to

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<sup>4</sup> NRS Chapter 533.

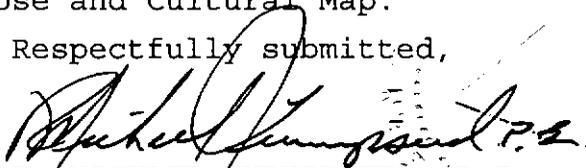
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build a dam when the waters to fill that dam are uncertain even though it holds a valid permit to do so.

**RULING**

The protests to the Application for Extension of Time filed under Permit 9405 are hereby denied and an extension is hereby granted to March 18, 2000, to file the Proof of Completion of Work and Proof of Beneficial Use and Cultural Map.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/cl

Dated this 14th day  
of July, 1999.