

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

IN THE MATTER OF THE )  
CANCELLATION OF PERMITS 47471, )  
47473 AND 56386 FILED TO )  
APPROPRIATE THE UNDERGROUND )  
WATERS OF THE LAS VEGAS VALLEY )  
HYDROGRAPHIC BASIN (212), )  
CLARK COUNTY, NEVADA. )

RULING

#5284

GENERAL

I.

Revocable Permit 47471 was granted on August 7, 1984, to appropriate 1.0 cubic foot per second (cfs), not to exceed 34.31 million gallons annually (mga), of the underground water of the Las Vegas Valley Hydrographic Basin for quasi-municipal purposes within a portion of the SE $\frac{1}{4}$  of Section 25 and a portion of the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T.18S., R.56E., M.D.B.&M. The point of diversion is described as being located within the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T.18S., R.56E., M.D.B. & M.<sup>1</sup>

Revocable Permit 47473 was granted on August 7, 1984, to appropriate 1.0 cfs, not to exceed 34.31 mga, of the underground water of the Las Vegas Valley Hydrographic Basin for quasi-municipal purposes within a portion of the SE $\frac{1}{4}$  of Section 25 and a portion of the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T.18S., R.56E., M.D.B.&M. The point of diversion is described as being located within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 25, T.18S., R.56E., M.D.B. & M.<sup>2</sup>

<sup>1</sup> File No. 47471, official records of the Office of the State Engineer.

<sup>2</sup> File No. 47473, official records of the Office of the State Engineer.

Revocable Permit 56386 was granted on July 10, 1992, to change the point of diversion of 1.0 cfs of the water appropriated under Permit 47472 for quasi-municipal purposes to serve an 84-lot residential subdivision. The point of diversion is described as being located within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 25, T.18S., R.56E., M.D.B. & M.<sup>3</sup>

Permit 56386 was approved for an amount not to exceed 30.66 mga for quasi-municipal purposes to serve the 84 residential lots with a total combined duty under Permits 47471, 47473 and 56386 not to exceed 34.31 mga. Permit 56386 was approved to correct the location of the point of diversion approved under Permit 47472 and totally abrogated that permit.

The original project envisioned under Applications 47471, 47472 and 47473 was a 450-space recreational vehicle park, office, country store and cabins. The project was revised and Permits 47471, 47472 and 47473 were approved to serve 200 lodge units, 139 recreational vehicle spaces, 138 cabins, 40 camping sites, a restaurant, bar and store, with a total combined duty not to exceed 34.31 mga. The project was revised a third time and changed to an 84-lot residential subdivision.

## II.

Under the terms of Permits 47471, 47472 and 47473, the permittee was to file in the Office of the State Engineer proof of

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<sup>3</sup> File No. 56386, official records of the Office of the State Engineer.

completion of the works of diversion on or before September 7, 1986.<sup>1</sup> Proof of beneficial use of the water under the permits was due on or before September 7, 1991.

Under the terms of Permit 56386, the permittee was to file in the Office of the State Engineer proof of completion of the works of diversion on or before October 10, 1992, and proof of beneficial use of the water under the permit on or before March 3, 1993.<sup>3</sup>

### III.

By letter dated November 27, 2002, the State Engineer cancelled Permits 47471, 47473 and 56386.<sup>4</sup> The cancellation letter provides a complete history of all the reasons given by the permittee on the requests for extensions of time submitted to the State Engineer for filing the proof of completion of the works of diversion or proof of beneficial use of the water.

### IV.

On December 30, 2002, Rhodes Homes requested a public administrative hearing pursuant to NRS § 533.395 to review the cancellation of the permits.<sup>5</sup> Rhodes Homes indicated that it is the present holder of Permits 47471, 47473 and 56386. At the time of the administrative hearing, Rhodes Homes had not requested

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<sup>4</sup> Exhibit No. 2, public administrative hearing before the State Engineer, February 11, 2003. Hereinafter the exhibits will be referred to by exhibit number and the transcript by page number.

<sup>5</sup> Exhibit No. 3.

assignment of the water rights into its name in the records of the Office of the State Engineer.

**FINDINGS OF FACT**

**I.**

The original permits for the Lee Canyon project were granted to Ron Rudin on August 7, 1984, with proof of completion of works of diversion due to be filed in the Office of the State Engineer in September 1986 and proof of beneficial use due in September 1991. As noted, the project changed from the original project of a 450-space recreational vehicle park, office, country store and cabins to a project envisioning 200 lodge units, 139 recreational vehicle spaces, 138 cabins, 40 camping sites, a restaurant, bar and store, and then in August 1989 to a project envisioning an 89-lot planned unit development and a large open-space common area.<sup>6</sup> The final subdivision map was signed by the State Engineer on June 27, 1991, but was never approved by the Clark County agencies.<sup>7</sup>

During the years Ron Rudin worked on the Lee Canyon project his applications for extension of time indicated the following reasons as to why more time was needed to comply with his permit terms:

1986 - there had been delays in filing and acquiring State approvals and marketing the Retreat at Lee Canyon;

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<sup>6</sup> Exhibit No. 2; Transcript, p. 62.

<sup>7</sup> Exhibit No. 2.

1987 - an extended period of time was needed to complete the zoning and engineering plans and construction documents;

1988 - there had been delays in filing and obtaining approvals and Mr. Rudin had been unable to acquire adequate financing;

1989 - Mr. Rudin had failed to obtain adequate financing for the recreational vehicle camp ground, and the project had been revised from a recreational vehicle camping area to an 89-lot planned unit development subdivision;

1991 - an extended period of time was needed to complete the zoning and engineering plans and construction documents;

1992 - sixty days were needed to file the proof of completion of the works of diversion and time was needed for the snow to melt;

1993 - time was needed to obtain a joint venture with Clark County Parks and Recreation Department, to bring power to the project and to get final approvals from the Clark County Health Department and Flood Control Division;

1994 - snow fall on Mt. Charleston made it impossible to drill the well and additional time was needed to comply with the conditions specified by the Clark County Commissioners and the Nevada Department of Transportation; and

1995 - the property had gone into the estate of Ron Rudin and time was needed to determine the status of the project in order to beneficially use the water.

Ron Rudin, the original holder of the permits, died in

December 1993.<sup>8</sup> Rhodes Design and Development Corporation purchased the Lee Canyon property and water rights from the Ron Rudin estate on May 21, 1996.<sup>9</sup>

The State Engineer finds that acquisition of a water right permit by a new owner does not initiate a new compliance period or new compliance requirements without regard to the historical record of the previous owner concerning compliance with the permit requirements. The State Engineer finds he does not ignore the historical record when evaluating the merits as to whether to grant an extension of time or cancel a permit. Rhodes Homes as the new holder of the permits incurred the same obligations and time limitations as the previous owner to comply with permit requirements, and any delays in moving forward with a project by the previous owner passed to the new owner. A new owner accepts the obligations of the previous owner to comply with completion of work and beneficial use requirements as determined by the terms of the permit. The State Engineer finds nine years of extensions of time were given to the previous holder of the permit.

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<sup>8</sup> Exhibit No. 2.

<sup>9</sup> Exhibit No. 4.

**II.**

After Rhodes Homes acquired the property and the water right permits in May 1996, the extensions of time indicated the following reasons why more time was required to comply with the permit terms:

1996 - Ron Rudin's estate had been involved in considerable litigation and a new tentative subdivision map had been approved by Clark County in March 1996;

1997; 1998 and 1999 - that civil engineering design plans were being prepared by Baughman & Turner, Inc. and time was needed to complete the plans and begin construction; and

2000, 2001 - that civil engineering design plans were being prepared by CVL Consultants Inc. and time was needed to complete the plans and begin construction.

Testimony provided at the administrative hearing indicated that developing mountain property is more difficult and time consuming than developing valley property, and with this particular project there are complex slope, drainage and access issues due to the fact that Lee Canyon is a major wash, and that a 15-year development time on mountain property is not uncommon.<sup>10</sup>

The State Engineer finds that after Rhodes Homes acquired the property and water rights the requests for extensions of time filed indicated that five additional years were taken up with

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<sup>10</sup> Transcript, pp. 66-68, 85.

civil engineering design plans. The State Engineer finds 14 years of extensions of time have been to the holders of these permits.

### III.

Testimony presented at the administrative hearing indicates that at the time Rhodes Homes purchased the property it did not have the money to develop the project and from 1996 to 1998 it could not obtain financing to move forward with the Lee Canyon project.<sup>11</sup> Around 1999, Rhodes Homes was approached by the United States Forest Service (USFS),<sup>12</sup> which indicated that it was interested in acquiring the parcels of land along with the water right permits at issue here.<sup>13</sup> Testimony indicated that Rhodes Homes declined to sell to the USFS and indicated that it was still interested in developing the parcels. However, apparently discussion on the USFS acquisition of the property must have continued, because in late 1999 an eight million dollar appraisal was presented to Rhodes Homes for the property.<sup>14</sup> Rhodes Homes declined to sell the property at that price.

In mid-2000, the Conservation Fund came on the scene and discussion took place as to having the Conservation Fund purchase

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<sup>11</sup> Transcript, pp. 11, 18, 19, 60.

<sup>12</sup> The record is somewhat confusing in that Rhodes Homes' witness goes back and forth talking about the U.S. Forest Service and the BLM; therefore, the State Engineer is not certain which federal agency was really at issue or if it was both.

<sup>13</sup> Transcript, pp. 20-21.

<sup>14</sup> Transcript, pp. 21-22.

the property and assure that all the requirements were satisfied for purchase by or land exchange with the United States.<sup>15</sup> Due to the difficulties of transferring property to the USFS, other routes of transfer were explored, i.e., first sell to the Conservation Fund and let them figure out how to transfer it to the Federal Government. Rhodes Homes was led to believe the purchase or exchange could be accomplished in three months.<sup>16</sup> The agreement with Conservation Fund was executed on June 25, 2001, and provided for a 60-day inspection period and a 30-day closing.<sup>17</sup> The Conservation Fund indicated right before the end of the inspection period that there were issues with the property boundaries and requested a continuance in the agreement.

The Conservation Fund kind of came in as the knight in shining armor. Basically they pointed out that, guess what, there's issues with your boundary. Whether you develop this or not, there's going to be an issue. And in so many words, basically you're arrested from developing. But we could come in, we know you didn't like the other appraisal you saw, we'll use an appraiser of your choice. We'll work out those issues with the BLM regarding the appraiser and we'll also represent your interest with the BLM and the Forestry Service regarding this boundary and we could make this a fairly quick transaction.

So Jim Rhodes looked at it and said the appraisers who did the original appraisal around 8 million were apparently out of town considered it for Forest and all these other things and Mike Ford said this appraiser

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<sup>15</sup> Transcript, p. 23.

<sup>16</sup> Transcript, p. 23.

<sup>17</sup> Transcript, p. 26.

could consider this as an actual subdivision. So Jim thought what a good way out of a lot of problems.<sup>18</sup>

The Conservation Fund requested and was given a two-week continuance, and continued to request - and was given - multiple two-week continuances until the contract was cancelled in November 2002.<sup>19</sup> The agreement with the Conservation Fund provided that Rhodes Homes could not take any action with regard to the property that would be detrimental to the use of the property for conservation or similar uses.<sup>20</sup> Rhodes Homes uses this agreement for the proposition that it could not move forward on the development because it would have voided the contract. "So we didn't move forward with any improvements to the site because a) the two obvious reasons, we were in a contract that said we have to keep this as a conservation area, so if we did that we thought we would void our contract; and b) we thought this whole time we were two weeks away from having our issues resolved."<sup>21</sup>

Rhodes Homes indicates they would not have put the water rights at risk except for reliance on the Federal Government entities that pursued the project. "[O]bviously had we known things would turn out the way they did, we had the experience we did with the Conservation Fund and Forest Service, we wouldn't have done anything, we would have just developed the land."<sup>22</sup> Rhodes Homes indicated it believed it was "led astray by the Conservation Fund and the federal entities in that they came to [Rhodes Homes]."<sup>23</sup> The "Conservation Fund walked in the door

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<sup>18</sup> Transcript, pp. 25-26.

<sup>19</sup> Transcript, pp. 27-28.

<sup>20</sup> Transcript, p. 32.

<sup>21</sup> Transcript, p. 34.

<sup>22</sup> Transcript, p. 56.

<sup>23</sup> Transcript, p. 39.

literally is when the BLM notified the Forest Service or us to some degree, there's a boundary issue here. And that's when the Conservation Fund walked in the door and said, you're stuck. I mean, what can you do? You're not going to be able to develop this thing, but we can come in and fix it for you."<sup>24</sup> The testimony provided on behalf of Rhodes Homes indicated that the it was "pursued relentlessly on this piece of property" and was "tied up" by the Conservation Fund and the federal entities with what ultimately turned out to be a non-issue in a 1½ year delay in the survey.<sup>25</sup>

The State Engineer finds Rhodes Homes chose to keep granting two-week extensions of the contract; therefore, it cannot be said to have been stopped from moving forward with the project. It was the one that chose to agree to the continuances due to its attempts to close on selling the property. The State Engineer finds Rhodes Homes, while allegedly relying on the Federal Government to pursue the project, was still subject to the requirements of its State issued water right permits. The State Engineer finds that from 1996 to 1998 Rhodes Homes did not have the financial ability to move forward with the project and from mid-2000 through November 2002 Rhodes Homes was attempting to sell the property and water rights and would have sold them if the sale could have been completed. The State Engineer finds if Rhodes Homes believed there were questions as to the boundary it was not stopped from having the property surveyed. The State Engineer finds this does not demonstrate good faith and reasonable diligence towards placing the water to beneficial use.

#### IV.

Rhodes Homes then presented information to the State Engineer as to a proposed construction schedule if the cancellation of the

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<sup>24</sup> Transcript, p. 39.

<sup>25</sup> Transcript, p. 39.

water rights is rescinded.<sup>26</sup> This construction schedule was prepared at the request of Rhodes Homes legal counsel for the administrative hearing,<sup>27</sup> and indicates that the tentative subdivision map would need to be resubmitted as the previous map expired during the contract with the Conservation Fund.<sup>28</sup> A drainage study needs to be performed, improvement plans need to be submitted to Nevada Division of Transportation, work would need to be accomplished with the Nevada Division of Environmental Protection, Nevada Division of Water Resources, and the Health District.<sup>29</sup> All these are necessary for getting the lots in a position to sell.<sup>30</sup> Rhodes Homes indicated that between 5 and 14 years is needed to get the lots sold and it is not planning on building the homes on the lots.<sup>31</sup> It believes it is cost prohibitive to run electric power to the area, so the wells would be run by generators and the homes placed on the lots would use solar power.<sup>32</sup>

Testimony indicated that if the cancellation of the water right permits is rescinded in the next year Rhodes Homes would locate and install the third well, build a pump house, put generators on the wells, put in the facilities to connect the wells, and put in the roads.<sup>33</sup> The drainage study, tentative map, improvement drawings all need to be completed prior to recording

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<sup>26</sup> Exhibit No. 5.

<sup>27</sup> Transcript, pp. 43-44.

<sup>28</sup> Transcript, p. 44.

<sup>29</sup> Transcript, p. 45.

<sup>30</sup> Transcript, p. 45.

<sup>31</sup> Transcript, pp. 12, 41.

<sup>32</sup> Transcript, pp. 42-43.

<sup>33</sup> Transcript, pp. 46-47.

the final map, but would be completed in about one year, having lots ready to sell within one year.<sup>34</sup> Further, testimony indicated that Rhodes Homes would not need to incur any debt to accomplish this work.<sup>35</sup>

However, Rhodes Homes also testified that it was making maps, creating plans and documents for construction during the same period of time the Conservation Fund was working with them; it was proceeding with the project from a design point of view, and that in late 2000 it "went to big cash" or could have obtained financing to develop the property.<sup>36</sup>

The gist of Rhodes Homes argument, which was summarized by their legal counsel, is that since 1999 or so, when it became financially able to develop the project, it was told by the buyers they would take the property, but the buyers invented problems, i.e., the boundary issue, that turned out to be incorrect, and had Rhodes Homes known that the buyers were not going to execute they would have gone out and developed the property.<sup>37</sup>

A witness for Rhodes Homes testified that during the years that Rhodes Homes filed requests for extensions of time with the Division of Water Resources it was continuing to work on plans for developing the property.

We worked with Jim Rhodes and we worked with Jim Leland with CVL in trying to assist Mr. Rhodes in developing the site and I have letters that the zoning site was good to September 17 of 2002, and that we encouraged him to do the water rights to keep those moving along,

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<sup>34</sup> Exhibit No. 5; Transcript, pp. 48-51.

<sup>35</sup> Transcript, p. 52.

<sup>36</sup> Transcript, p. 58. Later testimony indicated late 1999. Transcript, p. 60.

<sup>37</sup> Transcript, pp. 57, 60.

because they were getting very precariously outdated and they needed to do some work in regards to development of the water rights on the site.<sup>38</sup>

And we feel that Jim Rhodes was getting into a position so that he had funding. After our letter of 1998 is when he inferred to my partner, Steve Turner, cash resources were coming in and then he got tied up with the Conservatory, which stopped him from doing any development work on his site, and, I'm sorry, but I think he got caught in a trap.

Q. During this period you were being paid to do development work, the period that we talked about where Rhodes was tied up?

A. Yes.

HEARING OFFICER: What kind of work were you doing?

THE WITNESS: We were assisting in doing, keeping the zoning actions alive, engineering on the thing and CVL.

HEARING OFFICER: What kind of engineering if he was trying to sell the property?

THE WITNESS: Development site engineering. I didn't do any of the plans, they were all provided by CVL.

HEARING OFFICER: Give me specifics. What kind of development site engineering?

THE WITNESS: Grading plans, subdivision plans.

HEARING OFFICER: I'm sorry. I cut you off.

THE WITNESS: And I understand it was resubmitted to tentative map. Excuse me.

HEARING OFFICER: And what time frame is this?

THE WITNESS: 1997, 1998.<sup>39</sup>

To get the project going would require submitting a tentative map, a plat map and all the normal engineering process that is normally needed for a project like this.<sup>40</sup> Testimony indicated that during 2002 and prior to the cancellation of the water rights, Rhodes Homes had the engineers keep the project current on the design, and as recently as July and August 2002 the drainage study was picked up by a new company and updated to reflect the current design standards for the county.<sup>41</sup> "The plans have always

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<sup>38</sup> Transcript, p. 77.

<sup>39</sup> Transcript, pp. 78-79.

<sup>40</sup> Transcript, p. 88.

<sup>41</sup> Transcript, pp. 91-92.

been sitting there, we just didn't do anything with them."<sup>42</sup> The purpose of updating the drainage study in 2002 was to make sure that Rhodes Homes had the ability to move forward with development should the Conservation Fund deal fall apart.<sup>43</sup>

The State Engineer finds the evidence and testimony presented focused on several points. First was that by the time Rhodes Homes became financially able to move the project forward it had lost a significant amount of time in the efforts to sell the property to the federal government. Second was that if Rhodes Homes had known that allowing the property to be tied up for several years was going to put the water rights in jeopardy, it would not have continued to negotiate for sale of the property, but rather it would have developed. Third was that the company is now in a position where it is able to finance the project itself and if the water rights are reinstated it can move forward quickly with the project. Fourth was that Rhodes Homes kept things like the site plans and engineering current so that if the conservation plan fell through it could develop. The information presented was not why the State Engineer was wrong in the decision he made based on the information he had before him. The information, in a nut shell, was that Rhodes Homes tried for several years to sell the property, and now that the sale has fallen through it could do the project envisioned for the property.

The State Engineer finds just keeping plans current, in light of the fact that there has not been significant forward movement on this project in the 18 years since the permits were originally granted, does not demonstrate good faith and reasonable diligence towards placing the water to beneficial use. The State Engineer

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<sup>42</sup> Transcript, p. 92.

<sup>43</sup> Transcript, p. 92.

finds that coming up with a new schedule to demonstrate that the project could move forward does not warrant rescinding the cancellation.

### CONCLUSIONS OF LAW

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>44</sup>

#### II.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise<sup>45</sup> and beneficial use is the basis, the measure and the limit of the right to the use of water.

#### III.

A permit to appropriate water grants to the permittee the right to develop a certain amount of water from a particular source for a certain purpose to be used at a definite location.<sup>46</sup> In the perfection of a water right, a permittee is allowed under the law sufficient time after the date of approval of the application to complete application of the water to beneficial use. Nevada Revised Statute § 533.380 provides that when the State Engineer approves an application he shall set a time before which the construction of the work must be completed, which must be within 5 years after the date of approval, and set a time before which the complete application of the water to a beneficial use must be made, which must not exceed 10 years after the date of the approval. The State Engineer may for good cause shown extend the time within which the water is to be placed to beneficial use, and any application for extension of time must be accompanied by proof and evidence of reasonable diligence with which the

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<sup>44</sup> NRS chapters 533 and 534.

<sup>45</sup> NRS § 533.030 and 533.035.

<sup>46</sup> NRS § 533.330 and 533.335.

applicant is pursuing the perfection of the water to beneficial use.<sup>47</sup> "The state engineer shall not grant an extension of time unless he determines from the proof and evidence so submitted that the applicant is proceeding in good faith and with reasonable diligence to perfect the application."<sup>48</sup> "For the purposes of this section, 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>49</sup>

The State Engineer concludes that the intent of the extension of time provision under Nevada law is to provide the opportunity for the permittee to resolve temporary adverse conditions, which prevent compliance with the proof of completion of works and proof of beneficial use requirements set forth on the permit. 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 without reasonable progress to comply with the beneficial use requirements. The original permits were granted in 1984 and 18 years have passed. The State Engineer concludes the holders of these permits have been given ample time to make progress towards development of the project envisioned. The State Engineer concludes that the argument that it takes more time to develop mountain property does not rise to a reason to rescind the cancellation because ample time was provided.

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<sup>47</sup> NRS § 533.380(3).

<sup>48</sup> NRS § 533.380(3)(b).

<sup>49</sup> NRS § 533.380(6).

Ruling  
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**RULING**

The cancellation of Permits 47471, 47473 and 56386 is hereby affirmed.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/SJT/jm

Dated this 30th day of  
September, 2003.