

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

IN THE MATTER OF CANCELLED PERMITS)
56708 AND 56709 FILED TO CHANGE THE)
POINT OF DIVERSION AND THE PLACE OF)
USE OF THE PUBLIC WATERS OF AN)
UNDERGROUND SOURCE PREVIOUSLY)
APPROPRIATED UNDER PERMIT 46124)
WITHIN THE HONEY LAKE VALLEY)
HYDROGRAPHIC BASIN (97), WASHOE)
COUNTY, NEVADA.)

RULING ON REMAND

#5468

GENERAL

I.

Application 56708 was filed on August 29, 1991, by Raymond D. May and Gary L. Tope to change the point of diversion and the place of use of 3.0 cubic feet per second (cfs), not to exceed 748.0 acre-feet annually (afa), that being a portion of water previously appropriated under Permit 46124. The proposed manner and place of use was for irrigation purposes within the SW $\frac{1}{4}$ and a portion of the S $\frac{1}{2}$ S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 11, T.26N., R.18E., M.D.B.&M. The proposed point of diversion was described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 11.¹ A Permit was granted under the application on August 5, 1992. The Proof of Completion of Work was first due to be filed on November 2, 1992, and the Proof of Beneficial Use of the water was first due to be filed on November 2, 1993.

II.

Application 56709 was filed on August 29, 1991, by Raymond D. May and Gary L. Tope to change the point of diversion and the place of use of 3.0 cfs, not to exceed 748.0 afa, that being a portion of water previously appropriated under Permit 46124. The proposed manner and place of use was for irrigation purposes within a portion of the NW $\frac{1}{4}$ of Section 11 and a portion of the S $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 2, T.26N., R.18E., M.D.B.&M. The proposed point of diversion was described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of

¹ File No. 56708, official records in the Office of the State Engineer.

said Section 11.² A Permit was granted under the application on August 5, 1992. The Proof of Completion of Work was first due to be filed on November 2, 1992, and the Proof of Beneficial Use of the water was first due to be filed on November 2, 1993.

III.

Permits 56708 and 56709 were cancelled January 25, 2002, and State Engineer's Ruling No. 5135 affirmed the cancellation after the opportunity for hearing was scheduled based on the permittees' petition for review of the cancellation.³ State Engineer's Ruling No. 5135 was appealed to the 2nd Judicial District Court, Washoe County (Court). On July 1, the Court ordered the matter remanded to the State Engineer for a hearing to establish whether the wells drilled on the Petitioners' property were evidenced by filed Proofs of Completion of Work and whether the existence of those proofs would have made any difference in his decision in upholding the cancellation of these permits.

Pursuant to the Court's order, the State Engineer held a public administrative hearing to consider the matter of cancelled Permits 56708 and 56709 on August 19, 2004.⁴

FINDINGS OF FACT

I.

At the hearing, legal counsel for the petitioners Ray May and Gary Tope, was accompanied by Briscoe Sanderson and Gary Tope. It was explained that Mr. May was in poor health and unable to attend the hearing. Mr. Sanderson, described as being employed in the past to assist Mr. May and Mr. Tope with their water permits in the Honey Lake Valley and as being familiar with the wells in question and was present to offer testimony in Mr. May's stead.⁵

Mr. Sanderson offered testimony on behalf of the petitioners. The witness indicated that there are in fact two wells on the property owned by Mr. May and Mr. Tope and that the wells are the same wells described by the Proofs of Completion of Work filed under Permits 38546 and 38547, in 1981, which are not the permits under consideration.⁶ When asked if the wells were equipped with a pump, the witness answered, "No."

² File No. 56709, official records in the Office of the State Engineer.

³ State Engineer's Ruling No. 5135, dated July 10, 2002, official records in the Office of the State Engineer.

⁴ Transcript and Exhibits, public administrative hearing before the State Engineer, August 19, 2004. Hereinafter the transcript will be referred to by page number and the exhibits by exhibit number.

⁵ Transcript, pp. 4, 7 and 8.

⁶ File Nos. 38546 and 38547, official records in the Office of the State Engineer.

However, the witness later indicated that the wells are welded shut and there was no way to see if a pump was in the well.⁷ The described points of diversion of Permit 56708 corresponds to the same well location as Permit 38547 and Permit 56709 describes the same well location as Permit 38546.^{1,2}

The State Engineer finds the existing wells originally drilled under Permits 38546 and 38547 are the same points of diversion described by Permits 56708 and 56709.

II.

At the hearing, Mr. Tope was asked about the lack of a power source. He indicated that in the past he had two large generators out there, but the generators were removed due to concerns of vandalism and theft. When asked if those generators were still available, Mr. Tope stated, "No. No, we don't still have them right now."⁸

Mr. Tope was also asked about his financial ability to move forward with this project and a time frame for placing water to beneficial use. Mr. Tope indicated that back in 2000, he didn't have the financial ability to proceed but stated, "I'm back on my feet now. At this time we have the financial where we could go and do it."⁹ In regards to a time frame Mr. Tope indicated, "It could happen in two to three years easy. Basically the only thing you do is clear the ground again, go back in and make sure that there's plenty of water there. If not, go down a little deeper and make sure – in other words, two or three years it could be done easily."¹⁰

While the State Engineer does not doubt the sincerity of Mr. Tope, it is difficult to believe that water could be placed to beneficial use in a maximum of three years given the current condition of the property, the condition of the wells, the lack of a power source, the apparent lack of any equipment, and the lack of any planning. The petitioners did not present any evidence to back up the financial claims of Mr. Tope and there was no evidence that the petitioners own any irrigation equipment, equipment to clear and work the land, pumps and motors for the wells, or a power source to operate the wells. No plan was offered to demonstrate how the petitioners would proceed to develop the wells and the property within the two to three year time limit offered by Mr. Tope. There were no cost

⁷ Transcript, pp. 8 and 9.

⁸ Transcript, pp. 17, 18.

⁹ Transcript, p. 25.

¹⁰ Transcript, p. 26.

estimates for labor or equipment. There was no description of the type or method of irrigation (i.e. flood irrigation, pivots, wheel lines etc.). There was no description of the type of crop to be planted. There was no evidence of any water or soil testing showing the land and water is suitable for the type of crop to be grown.

The law requires that the State Engineer shall not grant an extension of time unless it is determined that the applicant has submitted proof and evidence of proceeding in good faith and with reasonable diligence to perfect the application. The failure to provide the proof and evidence required is prima facie evidence that the holder is not proceeding with good faith and reasonable diligence to perfect the water right.¹¹

The State Engineer finds that the petitioner simply stating that he has the financial ability to proceed and that beneficial use can be completed in three years, without any evidence to back up these statements, is not sufficient proof and evidence of proceeding in good faith and with reasonable diligence to perfect the water right.

III.

Subsequent to the remand order from the Court, the State Engineer requested his staff conduct a field investigation.¹² The points of diversion and place of use, described in Permits 56708 and 56709, are located upon land owned by Raymond D. May located upon the Honey Lake Basin floor. An informal field investigation of the property was conducted on June 4, 2004, with the observations and findings summarized in the field investigation report.¹³

The first well visited was drilled under Permit 38547. The associated Proof of Completion of Work was filed in the Office of the State Engineer on December 21, 1981. The proof indicates the improvements consisted of a 12¼-inch diameter well, 298 feet deep and equipped with a ¾ HP submersible Red-Jacket pump.¹⁴ The work was completed prior to July 21, 1979. The field investigation describes the well as follows.

The well is not equipped and consists of a 12 inch casing projecting several feet above the ground. The top of the casing was partially covered by a welded metal plate, which has since been pried open on one side, allowing

¹¹ NRS § 533.380(3),(4).

¹² Report of Field Investigation No. 1056, August 16, 2004, official records in the Office of the State Engineer. Copies of the field investigation report are also contained within File Nos. 56708 and 56709. Hereinafter the field investigation will be referred to by Report No. 1056 and by page number.

¹³ Report No. 1056, p. 3.

¹⁴ Exhibit No. 1.

access to the well. Several lengths of small diameter black plastic pipe were found near the well, as were two wood pallets. There were no signs of a pump, motor, or power supply at the well site.¹⁵

The area surrounding the well site that is within the permitted place of use was described as neither cleared nor developed, and resembled the surrounding desert.

The second well visited was drilled under Permit 38546. The associated Proof of Completion of Work was filed in the Office of the State Engineer on December 21, 1981. The proof indicates the improvements consisted of a 12¼-inch diameter well, 200 feet deep and equipped with a ¾ HP submersible Red-Jacket pump.¹⁶ The work was completed prior to July 24, 1979. The field investigation describes the well as follows.

Again the well consisted of an open 12-inch casing, projecting several feet from the desert floor. No pump, motor, or power source was observed, nor were the remnants of any such devices.¹⁷

The Proof of Completion of Work form is an affidavit from the permittee indicating that water is now ready to be diverted for beneficial use. For an underground source, the permittee is required to state the size and depth of well with casing, make and type of pump and motor and any other information regarding improvements essential to the actual diversion of water. This information must be entered on the Proof of Completion of Work form between the following statements. The form states, "Said improvements consisted of ...said work being essential to the actual diversion of the water applied for and in the completion of the work required under said permit." The field investigation clearly shows that the Proofs of Completion of Work previously filed under Permits 38546 and 38547 do not accurately describe the current condition of the wells due to the fact that the wells are no longer equipped with the pump and motor described on said proofs and the wells are not prepared for the actual diversion of water.

Proof of Completion of Work forms are evaluated by a professional engineer employed in the Engineering Section of the Nevada Division of Water Resources (Division) and are approved or rejected on a case-by-case basis. The minimum information required is the size and depth of well with casing description and make and

¹⁵ Report No. 1056, pp. 6 and 7.

¹⁶ Exhibit No. 1.

¹⁷ Report No. 1056, p. 9.

type of pump and motor. A Well Driller's Report completed by a Nevada licensed driller and filed describing the drilling work and well construction should be on file at the Division.

The terms of the water right permit often times have special requirements. For example, these can include a minimum or maximum well depth, depth and location of annular seals, location of casing perforations, and the installation of water measuring devices. When these requirements exist, verification that the requirements have been met is necessary at the time the Proof of Completion of Work is filed. In this case, the permit terms of Permits 56708 and 56709 states, "The well shall be equipped with a 2-inch opening and a totalizing meter must be installed and maintained in the discharge pipeline near the point of diversion and accurate measurements must be kept of water placed to beneficial use. The totalizing meter must be installed before any use of the water begins or *before the proof of completion of work is filed* [emphasis added]."^{1,2}

The State Engineer finds that Permits 56708 and 56709 were issued on existing wells in 1992 and Proofs of Completion of Work were filed on those wells back in 1981 under Permits 38546 and 38547. The State Engineer further finds that the Proofs of Completion of Work filed in 1981 cannot be used to satisfy the proof of completion requirements under Permits 56708 and 56709, due to the fact that the wells are no longer equipped with the pump and motor described on said proofs, the required totalizing meters have not been installed, and water is not ready to be diverted for beneficial use.

IV.

Photographs taken during the field investigation in 2004, show the property has returned to its natural vegetative state. Structures and equipment, in and around the property area, have not been maintained and appear torn apart by man or elements.¹⁸

Mr. Tope testified that at one point the land was cleared and the generators and pumps were there but "we got stopped." When asked about the time frame Mr. Tope stated, "Approximately 90, somewhere right around there." When asked about being "stopped", the petitioners' attorney clarified that Mr. Tope was referring to another proceeding where there were objections filed to an earlier permit, not the permits that are

¹⁸ Report No. 1056, pp. 2-6.

involved with here.¹⁹ It bears reminding that Permits 56708 and 56709 were not approved until August 5, 1992. The witness offered no testimony on any progress made from 1992 to 2004.

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.²⁰ In regards to an extension of time, 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.²¹ The testimony in this case has shown that around 1990, the land was cleared, the wells were equipped with pumps and generators were on-site. As of August of 2004, the land has returned to a natural vegetative state, the generators are no longer available for use, the wells are no longer equipped with pumps and motors, one well is welded shut, and structures and equipment in and around the property have not been maintained and are in various states of disrepair.²²

From 1990 to 2004 the state of the property has regressed from once being prepared to place water to beneficial use, around 1990 and under a different set of permits, to its current state of dilapidation. The State Engineer finds that this does not meet the standard of good faith and reasonable diligence; therefore, the cancellation of these permits must be upheld.

V.

The water at issue first came into existence with the approval of Permit 46124 on March 21, 1985. The State Engineer issued Permit 46124 with the condition that the Proof of Completion of Work is filed by April 21, 1987, and the Proof of Beneficial Use is filed by April 21, 1990. An examination of the file shows various owners of Permit 46124 failed to meet the required deadlines and, in lieu of filing the proofs, obtained extensions of time from 1987 to 1992. In August of 1991, then owners, Raymond D. May and Gary L. Tope, filed change Applications 56708 and 56709 on Permit 46124 for the purposes of changing the point of diversion and place of use of the permit to new locations. These

¹⁹ Transcript, pp. 18, 19.

²⁰ NRS § 533.380(3).

²¹ NRS § 533.380(4).

²² Report No. 1056, pp. 1-9.

applications were protested by Washoe County. Ultimately, the protests were overruled by State Engineer's Ruling No. 3892, which was issued on June 26, 1992.²³ In accordance with the ruling, Permits 56708 and 56709 were approved on August 5, 1992. The protestant appealed the ruling and the permits were the subject of litigation until the withdrawal of the protestant's appeal in 1997. During the 1992 to 1997 time frame, the permittees requested and received annual extensions of time citing the ongoing litigation as the reason no progress was being made.^{1,2}

After the conclusion of the protestant's appeal in August of 1997, the permittees again requested an extension of time in December of 1997, with the following explanation.

The subject permit was granted by the State Engineer on August 5, 1992 and subsequently appealed to judicial review by an outside party. The Owner was recently informed that the subject appeal has been withdrawn/overturned. Accordingly, the Owner is now prepared to proceed with completing the work(s) necessary to place the subject rights to beneficial use however, requires additional time to complete the improvements. The Owner, therefore, respectfully requests up to one (1) year within which to comply with the permit terms.^{1,2}

Based on these assurances, the extension was approved for an additional year, to November 2, 1998.

In 1998, the permittees again requested an extension of time in December 1998, with the following explanation.

These water rights have been in litigation with the State Engineer & the Second Judicial District Court since the acquisition. Completion & use were not possible until the water rights were confirmed in 1998.^{1,2}

As noted above, the litigation was actually resolved in August of 1997. The State Engineer granted this extension, thereby extending the deadline to November 2, 1999.

In 1999, the permittees again requested an extension of time in November 1999, with the following explanation.

These water rights have been in litigation with the State Engineer & the 2nd Judicial District Court since acquisition. Completion & use were not possible until the water rights were confirmed in 1998.^{1,2}

²³ State Engineer's Ruling No. 3892, dated June 26, 1992, official records in the Office of the State Engineer.

This explanation was the exact same explanation used in the previous extension request. This prompted the following warning letter to the permittees.

Gentlemen:

Please refer to the Application for Extension of Time forms submitted by Gary L. Tope, permittee, on November 19, 1999, under the water right permits listed above.

A review of our records indicates the following history of extensions of time granted to date:

Permit 56708, with point of diversion in the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 11, T.26N., R.18E., M.D.B.&M., has had seven extensions of time granted for filing the Proof of Completion of work and six extensions of time for filing the Proof of Beneficial Use and Cultural Map.

Permit 56709, with point of diversion in the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 18, T.26N., R.18E., M.D.B.&M., has had seven extensions of time granted for filing the Proof of Completion of Work and six extensions of time for filing the Proof of Beneficial Use and Cultural Map.

In addition, Permits 56708 and 56709 changed the point of diversion and place of use of Permit 46124, which was originally permitted March 21, 1985.

Enclosed is the standard notice granting the requested extension of time. However, in view of the above extensions granted and in reviewing the permit files, the State Engineer finds that the owner is not proceeding [sic] in good faith and with reasonable diligence as required under Nevada Revised Statutes (NRS) 533.395(1). Unless substantial progress is made, or significant mitigating circumstances exist, future applications for an extension of time may be denied.^{1,2}

As noted in the above letter, the extensions were approved for a period of one year to November 2, 2000.

In 2000, the permittees again requested an extension of time in December 2000, citing the prior litigation, a pending class action lawsuit against the Sierra Army Depot and the fact the warning letter received in March 2000 did not give the permittees sufficient time to proceed with good faith. A one-year extension was requested to "...allow the applicant to proceed in good faith and diligence to put this permit to beneficial use." The extension was approved to November 2, 2001, with the same proviso as previous approvals that no further extensions will be granted except for good cause shown as provided under NRS §§ 533.390 and 533.410.^{1,2}

Examination of the extensions of time filed under Permits 56708 and 56709 fail to show the steady application of effort to perfect the permits. In fact, there is no evidence on

the extensions that any work toward perfecting these water rights has been performed. While the past and present owners have been involved in protests and appeals, which may have delayed their projects, these obstacles were ultimately resolved in the permittees favor. In late 1997, the petitioners stated, "the owner is now prepared to proceed with completing the work(s) necessary to place the subject rights to beneficial use however, requires additional time to complete the improvements." Instead of proceeding with the project as indicated on the extension form in 1997, the petitioners filed extensions of time in 1998 and 1999 citing the past litigation and made no mention of any progress toward perfecting the water rights. It should be noted that from 1994 onward, each extension approval notice advised the permittees that no further extensions would be granted except for good cause shown. The petitioners were also sent an additional warning letter on March 30, 2000, due to the State Engineer's concern over the mounting number of extensions of time and apparent lack of any significant progress. In no uncertain terms, the permittees were put on notice that unless substantial progress was made or significant mitigating circumstances exist, future applications of time may be denied.^{1,2}

When looking at the totality of this irrigation project, which began in 1985 under Permit 46124 and now exists under Permits 56708 and 56709, one cannot escape the fact that not a single drop of water has ever been placed to beneficial use. The explanations offered on the extensions of time cannot fully explain the failure to proceed with the steady application of effort to perfect these permits in a reasonably expedient and efficient manner under all the facts and circumstances. The State Engineer finds the permittees' lack of financial resources around 2000 is not a consideration particularly since NRS § 533.370(1) requires an applicant have the financial ability to construct a project with reasonable diligence. The State Engineer finds that there exists an unequal balance between the amount of additional time that the permittees have been allowed to develop their water rights and the complete lack of results they have achieved and presented to the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁴

II.

The history of extensions of time associated with Permits 46124, 56708 and 56709 spans a period of time beginning April 21, 1987, and concluding on November 2, 2001. Examinations of the extension forms show no evidence or proof of a steady application of effort to perfect the water rights and offer only a myriad of excuses and failed promises. The State Engineer concludes that there is no longer a reasonable expectation that the water rights granted under Permits 56708 and 56709 will ever be placed to beneficial use.

III.

When Permits 56708 and 56709 were filed in 1992, the proposed points of diversion corresponded with existing wells drilled under Permits 38546 and 38547. Proofs of Completion of Work were filed in 1981, under Permits 38546 and 38547 and described the wells as being equipped with pumps and motors. It has been found in this ruling that, based on the current condition of the wells (i.e. no pumps, no motors, no power supply, no meters, etc.), the Proofs of Completion of Work filed in 1981 under Permits 38546 and 38547 cannot be used to satisfy the proof of completion requirements under Permits 56708 and 56709.

The State Engineer concludes the existence of Proofs of Completion of Work filed in 1981 under Permits 38546 and 38547 would not have made any difference in his decision in upholding the cancellation of these permits in State Engineer's Ruling No. 5135.

IV.

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.²⁵ In regards to an extension of time, reasonable diligence is the steady application of effort to perfect the application in a

²⁴ NRS chapters 533 and 534.

²⁵ NRS § 533.380(3).

reasonably expedient and efficient manner under all the facts and circumstances.²⁶ Failure to provide the proof and evidence required is prima facie evidence that the holder is not proceeding with good faith and reasonable diligence to perfect the water right.²⁷ The testimony in this case has shown that around 1990, the land was cleared, the wells were equipped with pumps and generators were on-site. As of August of 2004, the land has returned to a natural vegetative state, the generators are no longer available for use, the wells are no longer equipped with pumps and motors, one well is welded shut, and structures and equipment in and around the property have not been maintained and are in various states of disrepair.²⁸ The witnesses for the petitioners offered no testimony or evidence of any progress made to perfect the water rights particularly since the resolution of litigation as to these permits in 1997.

The State Engineer concludes the permittees have failed to proceed in good faith and with reasonable diligence to perfect the water rights; therefore, the cancellations must be affirmed.

RULING

The cancellation of Permits 56708 and 56709 is hereby affirmed. The applications requesting an extension of time to file the Proofs of Completion of Work and the Proofs of Beneficial Use filed on May 1, 2002, under Permits 56708 and 56709 are hereby denied and Permits 56708 and 56709 remain cancelled.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/TW/jm

Dated this 11th day of
January, 2005.

²⁶ NRS § 533.380(6).

²⁷ NRS § 533.380(3).

²⁸ Report No. 1056, pp. 1-9.