

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

IN THE MATTER OF APPLICATIONS)
FOR EXTENSION OF TIME FOR)
PERMITS 61931, 62584, 66555, 66556)
AND 66557 WITHIN THE DODGE FLAT)
HYDROGRAPHIC BASIN (82),)
WASHOE COUNTY, NEVADA.)

RULING

5598

GENERAL

I.

Application 61931 was filed on March 4, 1996, by Robert I. Cowles to change the point of diversion and place of use of 2.0 cubic feet per second (cfs) of water from an underground source previously appropriated under Permit 46997. The proposed manner of use was unchanged from the original use for mining, milling and domestic purposes. The proposed place of use is described as being located within Sections 16, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T.21N., R.23E., Sections 19 and 30, T.21N., R.24E., and Section 5, T.20N., R.23E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, T.21N., R.23E., M.D.B.&M. In accordance with State Engineer's Ruling No. 4444, the protest to the application was overruled and Permit 61931 was issued on February 4, 1997.¹

II.

Application 62584 was filed on November 13, 1996, by Robert I. Cowles to appropriate 2.0 cfs of water from an underground source for mining, milling and domestic purposes. The proposed place of use is described as being located within Sections 16, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, T.21N., R.23E., Sections 19 and 30, T.21N., R.24E., and Section 5, T.20N., R.23E., M.D.B.&M. The proposed point of diversion is described as being located within the

¹ File No. 61931, official records in the Office of the State Engineer. Exhibit No. 33, public administrative hearing before the State Engineer, August 4, 2005. Hereinafter the transcript and exhibits of the hearing will be referred to by page number or exhibit number.

SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, T.21N., R.23E., M.D.B.&M. Permit 62584 was issued April 10, 1997.²

III.

Application 66555 was filed on July 13, 2000, by Nevada Land & Resource Co., LLC, to change the place of use and manner of use of 4.0 cfs of water from an underground source previously appropriated under Permit 46908. The proposed manner of use was changed from mining, milling and domestic to industrial power generation. The proposed place of use is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and the SE $\frac{1}{4}$ of Section 25, T.21N., R.23E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 19, T.21N., R.24E., M.D.B.&M. Permit 66555 was issued January 18, 2002.³

IV.

Application 66556 was filed on July 13, 2000, by Nevada Land & Resource Co., LLC, to change the place of use and manner of use of 4.0 cfs of water from an underground source previously appropriated under Permit 57310. The proposed manner of use was changed from mining, milling and domestic to industrial power generation. The proposed place of use is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and the SE $\frac{1}{4}$ of Section 25, T.21N., R.23E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, T.21N., R.23E., M.D.B.&M. Permit 66556 was issued January 18, 2002.⁴

V.

Application 66557 was filed on July 13, 2000, by Nevada Land & Resource Co., LLC, to change the place of use and manner of use of 4.0 cfs of water from an underground source previously appropriated under Permit 52763. The proposed manner of use was changed from mining, milling and domestic to industrial power generation. The proposed place of use is described as being located within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, and the SE $\frac{1}{4}$ of Section 25, T.21N., R.23E., M.D.B.&M. The proposed point of

² File No. 62584, official records in the Office of the State Engineer. Exhibit No. 34.

³ File No. 66555, official records in the Office of the State Engineer. Exhibit No. 21.

⁴ File No. 66556, official records in the Office of the State Engineer. Exhibit No. 22.

diversion is described as being located within the NE¼ NE¼ of Section 25, T.21N., R.23E., M.D.B.&M. Permit 66557 was issued January 18, 2002.⁵

VI.

On March 4, 2005, Applications for Extensions of Time to file Proof of Beneficial Use of the waters were filed under Permits 61931 and 62584.⁶ The Pyramid Lake Paiute Tribe filed an objection to the requests for extensions of time under Permits 61931 and 62584.⁷

On March 12, 2004, Applications for Extensions of Time to file Proof of Beneficial Use of the waters were filed under Permits 66555, 66556 and 66557.⁸ The City of Fernley filed an objection to the requests for extensions of time under Permits 66555, 66556 and 66557.⁹ However, it later withdrew that objection.¹⁰

VII.

On August 4, 2005, the State Engineer held a public administrative hearing to consider the matter of the applications for extensions of time to file Proof of Beneficial Use filed as to Permits 61931 and 62584 and Permits 66555, 66556 and 66557. All permits are within the Dodge Flat Hydrographic Basin.¹¹

FINDINGS OF FACT

I.

Permits 61931 and 62584 were issued on February 4, 1997, for mining, milling and domestic purposes. The applications were protested on the grounds that there was no unappropriated water in the groundwater basin. The permits were issued as a result of State Engineer's Ruling No. 4444. Justification for the issuance of the permits is found in the findings and conclusions of the ruling. The State Engineer found that the proposed manner of use requested under the permits was mining, milling and domestic, and mining and milling, which uses are considered temporary in nature and are expected to have no long-term effect on the groundwater resource. Further, mining has been a predominant economic force in Nevada since before statehood. It has had such

⁵ File No. 66557, official records in the Office of the State Engineer. Exhibit No. 23.

⁶ Exhibit Nos. 42 and 49.

⁷ Exhibit No. 51.

⁸ Exhibit Nos. 3, 5 and 7.

⁹ Exhibit No. 9.

¹⁰ Exhibit No. 11.

¹¹ Exhibit No. 1.

an impact that the Nevada legislature declared mining and milling related activities to be recognized as a paramount interest of the State. Given the temporary nature of mining, the proposed use of water was not expected to have a long-term effect on the groundwater resource.¹²

When the Office of the State Engineer issues a permit, it comes with a set of limitations and conditions collectively referred to as the permit terms. A review of the terms of Permits 61931 and 62584 show that the permits were issued as a temporary use of water and any application to change the manner of use would be subject to additional determination and evaluation with respect to the permanent effects on existing rights and the resource with the groundwater basin.¹³

The State Engineer finds that Permits 61931 and 62584 were issued as a temporary use of water from the Dodge Flat Hydrographic Basin for mining and milling purposes.

II.

The State Engineer issued Permits 61931 and 62584 with the condition that the Proof of Completion of Work was to be filed by March 4, 1998, and the Proof of Beneficial Use was to be filed by March 4, 2000. An examination of the files show that the Proof of Completion of Work was filed on January 22, 1999; however, the Proof of Beneficial Use deadlines could not be met by the permittee and extensions of time were filed and approved on an annual basis from March 4, 2000, to March 4, 2005.¹⁴

On January 3, 2005, as noted below, the Office of the State Engineer warned the permittee that future applications for extension of time for Permits 61931 and 62584 might be denied.¹⁵

In reviewing your reasons for needing an extension of time, you state that you have "looked outside the mining industry for ways to place this water to beneficial use. There is a current letter of intent between Robert Cowles and Paiute Pipeline Company". I would like to call your attention to Ruling No. 4656 (attached) which denied change applications 64083, 64084 and 64085. Those applications attempted to

¹² State Engineer's Ruling No. 4444, dated October 2, 1996, official records in the Office of the State Engineer.

¹³ Exhibit Nos. 33 and 34.

¹⁴ Exhibit Nos. 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, and 50.

¹⁵ See, Letter to applicant and agent regarding applications for extension of time for Permit 61931 and 62584 from the Office of the State Engineer, January 3, 2005, File No. 61931, official records in the Office of the State Engineer.

change the place of use and manner of use of existing mining and milling permits located in Dodge Flat. Like the permits being granted an extension of time here, those permits have a condition of approval that, to paraphrase, were issued for a finite period of time which would conclude with the cessation of the mining and milling operation.

The State Engineer finds that you may not be proceeding in good faith and with reasonable diligence as required under Nevada Revised Statutes (NRS) 533.395(1) in putting the water to beneficial use for the manner of use for which the permit was granted. **Unless substantial progress is made, or significant mitigating circumstances exist, future Applications for Extension of Time may be denied.**

On March 4, 2005, the permittee again requested additional extensions of time for the filing of the Proof of Beneficial Use for Permits 61931 and 62584.¹⁶ The reasons given for the extensions of time indicated, in part, that the Cowles family had a lease agreement with the Alta Gold Mining Company (Alta Gold) for the use of the water for mining and milling purposes and Alta Gold had financial difficulties and had filed for bankruptcy. It is inferred that around the year 2002 that the water right lease agreement between the permittee and Alta Gold had been broken. As a result, the permittee sought a lease arrangement with Duke Energy such that Duke Energy would utilize these same water rights to facilitate an electrical generation facility in the Dodge Flat area. Applications 68874 and 68875 were then filed to change the manner of use from mining and milling to industrial power generation in 2002. The Duke Energy power generation project apparently became no longer viable and the lease agreement was terminated in 2004 and change Applications 68874 and 68875 were withdrawn by the applicant.¹⁷ It was noted that the permittee had made efforts to find other mining and milling interests within the place of use for the water but "none existed at that time or for the foreseeable future".¹⁸ Further, due to Alta Gold's bankruptcy and Duke Energy's contractual obligations, the permittee was not able to pursue placing the water to beneficial use under Permits 61931 and 62584. Then, in late 2004, Applications 72004 and 72005 were filed to change the place of use and manner of use to municipal

¹⁶ Exhibit Nos. 42 and 50.

¹⁷ File Nos. 68879 and 68875, official records in the Office of the State Engineer and Exhibit No. 50.

¹⁸ Exhibit No. 50.

and domestic uses to serve the City of Fernley, Town of Wadsworth, the Stamp Mill Subdivision and the Tahoe Reno Industrial complex.

The State Engineer originally approved permits 61931 and 62584 with the conditions that the amount of water granted was a temporary allowance due to the temporary nature of mining projects. The requests for extension of time clearly indicate that the mining and milling project originally envisioned has ceased. In addition, the attempt to locate another temporary use of the water for either a mining operation or a power generation facility has also been unsuccessful. The permittee's latest attempt to change the manner of use to a permanent consumptive use of municipal and domestic purposes would conflict with the original conditions upon which Permits 61931 and 62584 were approved. The permittee has failed to show any substantial progress toward placing the water to beneficial use and has clearly indicated in the request for extension of time that "the Cowles family has not been able to pursue placing the water allocated under Permit Nos. 61931 and 62584 to beneficial use."

The State Engineer finds that the project for which Permits 61931 and 62584 were issued no longer exists. The State Engineer further finds that the permittee has failed to make any progress toward placing the water under Permits 61931 and 62584 to beneficial use.

III.

The State Engineer finds that on December 10, 2004, the permittee filed Applications 72004 and 72005 to change the place of use and manner of use of Permits 61931 and 62584.

IV.

The law requires that the State Engineer shall not grant an extension of time unless it is determined that the permittee 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.¹⁹ In regards to an extension of time, reasonable diligence is the steady application

¹⁹ NRS § 533.380 (3).

of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances.²⁰

The extensions of time clearly indicate that the original mining project no longer exists. At the administrative hearing the permittee was given the opportunity to present additional evidence and testimony regarding any progress made to place the water under the permits to beneficial use. One witness was called on behalf of the permittee. The witness indicated that he was aware that the permits were issued as a temporary use of water.²¹ Further, the witness indicated that as agent for the permittee there have been no direct inquires for the use of the water for a mining project but there have been attempts to otherwise develop the property and water rights. An agreement was reached with the Paiute Pipeline to purchase 48.24 acres of land in September of 2004, but the water rights were reserved from the sale.²²

The attempts by the permittee to find a project for the water does not constitute a steady application of effort to perfect Permits 61931 and 62584. No evidence was provided at the hearing or within the applications for extension of time to indicate that the permittee has made any recent progress towards placing the water to beneficial use for mining and milling purposes in accordance with the terms of the permits. The evidence and testimony does indicate that the original mining project no longer exists and there are no plans to use the water under Permits 61931 and 62584 at their permitted points of diversion and places of use, for a mining project, in the foreseeable future.

The State Engineer finds that extensions of time are reviewed as to the project for which the water rights were originally permitted, in this case mining and milling and not some other new use contemplated. The State Engineer finds that the permittee has failed to provide sufficient proof and evidence of proceeding in good faith and with reasonable diligence to perfect the water rights in the manner approved under the permits.

²⁰ NRS § 533.380 (6).

²¹ Transcript, p. 73.

²² Transcript, pp. 70 and 71.

V.

Permits 66555, 66556 and 66557 were issued on January 18, 2002, for industrial power generation purposes. The permits were issued as a result of State Engineer's Ruling No. 5079. Within the ruling, justification for the issuance of the permits can be found in the findings and conclusions of the ruling. The ruling indicates that the purpose of the permits is to serve the proposed Duke Energy power generation facilities utilizing a natural gas fueled combined cycle operation. It is noted that the water rights that form the basis for these permits were for temporary mining and milling purposes, but Permits 66555, 66556 and 66557 were approved to change the manner of use to industrial power generation on the basis that 1,428 acre-feet annually of the perennial yield remained uncommitted on a permanent basis.²³

The water at issue first came into existence with the approval of Permits 42609, 42610 and 42614, over 23 years ago. The following is a history of the water and the associated dates for filing the required affidavits involving Proof of Completion of Work and Proof of Beneficial Use.

Permit 42609 was issued on October 20, 1982, for the temporary use of mining and milling purposes. Prior to the issuance of Permit 42609, the Applicant filed Application 45042 to change the point of diversion. The State Engineer issued Permit 45042 on October 20, 1982, with the conditions that the Proof of Completion of Work be filed by February 21, 1984, and the Proof of Beneficial Use be filed by February 21, 1987. In lieu of filing the required affidavits, the permittee filed Application 46910 to change the place of use. The State Engineer issued Permit 46910 on January 25, 1984, with the conditions that the Proof of Completion of Work be filed by February 21, 1984, and the Proof of Beneficial Use be filed by February 21, 1987. The permittee was unable to meet the deadline for filing the Proof of Completion of Work and filed an extension of time citing delays in getting the mining property into operation. The extension of time was approved and the permittee filed the Proof of Completion of Work the following year in 1985. However, the permittee was unable to meet the deadline for the filing of the Proof of Beneficial Use for the next two years and filed for extensions of time from 1987 to 1989. Citing a Chapter 11 bankruptcy, the permittee

²³ State Engineer's Ruling No. 5079, dated September 27, 2001, official records in the Office of the State Engineer.

filed Application 57310 to change the point of diversion of Permit 46910, which was approved on November 3, 1995. Permit 57310 was approved with the conditions that the Proof of Completion of Work be filed by February 21, 1996, and the Proof of Beneficial Use be filed by February 21, 1997. The permittee filed the Proof of Completion of Work but was unable to meet the deadline for the filing of the Proof of Beneficial Use and instead filed five consecutive annual extensions of time. On July 13, 2000, Application 66556 was filed, and later approved on January 18, 2002, to change the place of use and manner of use to the Duke Energy project with the condition that the Proof of Beneficial Use be filed by February 18, 2003. The permittee could not meet this deadline and filed an application for extension of time, which was approved for a period of one year to February 18, 2004. Again the permittee could not meet this deadline and filed for the extension of time that is the subject of this ruling.²⁴

Permit 42610 was issued on January 21, 1982, for the temporary use of mining and milling purposes. The State Engineer issued Permit 42610 with the condition that the Proof of Completion of Work be filed by February 21, 1984, and the Proof of Beneficial Use be filed by February 21, 1987. Prior to their deadlines, the permittee filed Application 46906 to change the place of use. The State Engineer approved Permit 46906 on January 25, 1984, with the condition that the Proof of Completion of Work be filed by February 21, 1984, and the Proof of Beneficial Use be filed by February 21, 1987. The permittee was unable to meet these deadlines and filed for extensions of time from 1984 to 1990. In lieu of filing the required affidavits, the permittee filed Application 52763 to change the point of diversion of Permit 46906. The State Engineer approved Permit 52763 on November 6, 1989, with the condition that the Proof of Completion of Work be filed by February 21, 1990, and the Proof of Beneficial Use be filed by February 21, 1991. The permittee was unable to meet these deadlines and filed annual extensions of time through 1993. The Office of the State Engineer expressed its concerns over the lack of progress in developing the water rights by a warning letter dated April 1, 1993. In that letter, the permittee was informed that no further extensions would be granted for the filing of the Proof of Completion of Work and further extensions for Proof of Beneficial Use would be reviewed to

²⁴ File Nos. 42609, 45042, 46910, 57310 and 66556, official records in the Office of the State Engineer.

determine progress. In response, the permittee was able to file the Proof of Completion of Work in 1993, but continued to file additional extensions of time for the Proof of Beneficial Use. The Office of the State Engineer again expressed its concerns by a warning letter dated September 26, 1996, and by a warning letter dated January 6, 2000. In particular, the Office of the State Engineer was concerned about the number of extensions of time that had been requested and the apparent lack of progress in placing the water to beneficial use. Later, the permittee filed Application 66557 on July 13, 2000, to change the manner and place of use to the Duke Energy project. Permit 66557 was approved with the condition that the Proof of Beneficial Use be filed by February 18, 2003. The permittee could not meet this deadline and filed an application for extension of time, which was approved for a period of one year to February 18, 2004. Again the permittee could not meet this deadline and filed for the extension of time that is the subject of this ruling.²⁵

Permit 42614 was issued on January 21, 1982, for the temporary use of mining and milling purposes. The State Engineer issued Permit 42614 with the condition that the Proof of Completion of Work be filed by February 21, 1984, and the Proof of Beneficial Use be filed by February 21, 1987. Prior to their deadlines, the permittee filed Application 46908 to change the place of use. The State Engineer approved Permit 46908 on January 25, 1984, with the condition that the Proof of Completion of Work be filed by February 21, 1984, and the Proof of Beneficial Use be filed by February 21, 1987. The permittee was unable to meet these deadlines and filed for extensions of time. For the Proof of Completion of Work, extensions were filed from 1984 to the filing of the Proof of Completion of Work on September 13, 1996. For the Proof of Beneficial Use, extensions were filed from 1987 through January 8, 2002.²⁶

By letters dated April 1, 1993 and September 26, 1996, the Office of the State Engineer expressed concern over the lack of progress in placing the water to beneficial use. In particular, then State Engineer Turnipseed wrote in regard to Permits 46908 and 52763,

One of these permits has been approved in excess of twelve years and the other is approaching seven years, and to date there is no evidence

²⁵ File Nos. 42610, 46906, 52763 and 66557, official records in the Office of the State Engineer.

²⁶ File Nos. 42614 and 46908, official records in the Office of the State Engineer.

that any of this water has been put to beneficial use. Provisions described in NRS 533.390 and 533.410 allow me to grant extensions of time in the event the permit holder has sustained temporary difficulties in putting this water to beneficial use. The Nevada Water Law does not allow for applicants to apply for a permit, obtain approval and then shop around for a beneficial use of the water. Therefore, it is quite important that you describe to me in detail the scope of the beneficial use of this water and the time required to put the water to beneficial use.

The permittee was directed to respond within 30-days or face cancellation of the permits.²⁷

The permittee responded in a timely manner by letter dated October 25, 1996. The permittee indicated that the Silver State Land Company, LLC, a.k.a. Nevada Land and Resource Company (NLRC) had acquired the project. Further, NLRC indicated it was developing the water appropriated under Permits 46908, 52763 and 57310 as a common project to serve one or more mining projects to be conducted on land owned or leased by NLRC in the Olinghouse Mining District and further extensions should be allowed because NLRC's pending and proposed mining projects are more viable than the mining projects proposed by previous permittees since 1987.

Despite the promises in the 1996 letter from the permittee, a viable mining project was never initiated and further extensions of time were filed through 2002. In lieu of filing the required Proof of Beneficial Use, the permittee filed Application 66555 to change the manner and place of use to the Duke Energy project. The State Engineer approved Permit 66555 on January 18, 2002, with the condition that the Proof of Beneficial Use be filed by February 18, 2003. The permittee could not meet this deadline and filed an application for extension of time, which was approved for the period of one year to February 18, 2004. Again the permittee could not meet this deadline and filed for the extension of time that is the subject of this ruling.²⁸

The water rights issued under Permits 66555, 66556 and 66557 originated as temporary allocations of water for mining and milling purposes under Permits 42609, 42610 and 42614 dating back to 1982 and despite various intervening change applications, one cannot escape the fact that Proof of Beneficial Use has never been

²⁷ See, File No. 46908, Correspondence from State Engineer R. Michael Turnipseed to NLRC, September 26, 1996, official records in the Office of the State Engineer.

²⁸ File Nos. 42614, 46908 and 66558, official records in the Office of the State Engineer.

filed over a 23-year period. The myriad of reasons 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 that there exists an unequal balance between the amount of additional time that the permittee has been allowed to develop its water rights and the complete lack of results they have achieved and presented to the State Engineer.

VI.

Permits 66555, 66556 and 66557 were issued to provide water for industrial power generation for the proposed Duke Energy power plant. Duke Energy decided not to pursue its contractual agreement because of a decline in the power market and litigation involving the Pyramid Lake Paiute Tribe (Tribe). The contractual agreement had an option for Duke Energy to acquire the property and water rights under Permits 66555, 66556 and 66557.²⁹

The State Engineer finds that the Duke Energy power project, for which Permits 66555, 66556 and 66557 were approved no longer exists; therefore, the necessity to divert water as proposed under the subject permits has ceased.

VII.

Permits 66555, 66556 and 66557 were issued as a result of State Engineer's Ruling No. 5079. The Tribe appealed this decision and initiated litigation against the State Engineer, Duke Energy and NLRC.³⁰ Duke Energy was dismissed from the case on the grounds that it has decided to no longer pursue the power project for which the water rights were acquired and, as a result, did not exercise its option to acquire the water rights, which are the subject matter of the State Engineer's decision and the appeal.³¹ NLRC provided testimony and evidence as to its efforts to settle the litigation and move some project forward as to its land and water rights.³² It indicated that it has discussed selling the land and the water to the Pyramid Lake Paiute Tribe, that it met with a juice manufacturer, that it talked to other power plants and now wants to sell the water rights to a developer in Fernley.³³ Applications 66555, 66556 and 66557 were

²⁹ Transcript, pp. 18-21.

³⁰ Exhibit No. 24.

³¹ Exhibit No. 25.

³² Transcript pp. 17-31, Exhibit Nos. 30, 31, 32, 52 and 53.

³³ Exhibit No. 54.

granted based on the evidence that NLRC had an agreement with Duke Energy to build a power plant. Water rights are granted based on specific proof as to a specific project. They are not granted for the purpose of allowing the water right holder to shop around for a project. The facts and circumstances indicate there is no longer an intent to develop a power plant project and now the water rights are merely a marketable item from which the permittee only hopes to make a profit. The State Engineer finds that the facts and circumstances do not support approval of the requests for extensions of time as there is not sufficient demonstration as to due diligence for the permitted project.

VIII.

The permittee requested that the State Engineer consider litigation as good cause for approving an additional extension of time.³⁴ Nevada Revised Statute 533.380(3) provides that the State Engineer may for good cause shown grant an extension of time for filing Proofs of Completion of Work or Proof of Beneficial Use. Extensions of time are considered as to the original project that was permitted not some new proposal. While litigation discouraged the original project from proceeding, it does not change the fact that these permits were granted for the Duke power plant project. A permittee cannot hoard the water rights when the project has gone away. The Office of the State Engineer has considered litigation as a mitigating factor in considering extensions of time and has approved extensions of time on this ground.³⁵ However, there is no provision within Nevada Water Law that dictates litigation should result in an automatic approval of an extension of time.³⁶

The State Engineer finds that it is within his discretionary authority to consider what proof and evidence is sufficient for the granting of an extension of time based on consideration of all the facts and circumstances of each individual extension and he is not required to automatically approve an extension of time due to litigation. The State Engineer finds while extensions have been granted where litigation is pending, here it will also be balanced against the fact that these water rights have not been placed to beneficial use in over 23 years and the evidence demonstrates that a power plant is no longer

³⁴ Transcript, pp. 13-14.

³⁵ Transcript, p. 43.

³⁶ NRS § 533.380.

contemplated under the permits. This is not a demonstration of good faith and due diligence in perfecting the water right as permitted.

As noted, litigation may be considered as a factor in determining whether to approve an extension of time. In this case, it has been demonstrated that the purpose for which the permits were issued, the Duke Energy power generation project, no longer exists; therefore, the issue of pending litigation is not relevant to the consideration of the extensions of time. The litigation is not preventing the water from being beneficially used for the Duke Energy power generation project. It is the withdrawal of Duke Energy from the project, due to the power market drop-off,³⁷ that has prevented the water from being placed to the beneficial use allowed under the permits. It was noted that the litigation has sat for over four years and only recently has anybody tried to move the litigation forward to get a final decision.³⁸

The State Engineer finds that the lack of beneficial use was due to the withdrawal of Duke Energy from the power generation project not the litigation. The State Engineer further finds that litigation may not be used as a delay to shop for a new project for the water.

IX.

The law requires that the State Engineer shall not grant an extension of time unless it is determined that the permittee 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 as permitted. 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 for the permitted project.³⁹

At the administrative hearing, the permittee was given the opportunity to present additional evidence and testimony regarding any progress made to place the water under the permits to beneficial use. The testimony and evidence state that the proposed Duke

³⁷ Transcript, p. 21.

³⁸ Transcript, p. 39.

³⁹ NRS § 533.380 (3), (6).

Energy power project is no longer viable.⁴⁰ There have been attempts by the permittee to secure other projects for the water such as a juice manufacturer, power plant and other economic development type people that have companies that might move to Nevada.⁴¹ However, the permittee indicated that the prospective projects never went forward due to the pending litigation with the Tribe.⁴² The permittee indicated that they have worked diligently to put the water to beneficial use when Duke Energy was there and when Duke Energy was not there they worked diligently on settling the litigation with the Tribe and on trying to bring other power plants into the site.⁴³

On August 1, 2005, three days prior to the administrative hearing, the permittee filed Applications 73111 and 73112 to change the point of diversion, place of use and manner of use of Permits 66555 and 66556, respectively.⁴⁴ Later Application 73112 was withdrawn and Applications 73207 and 73208 were filed on September 1, 2005, after the date of the hearing, to change the point of diversion, place of use and manner of use of a portion of Permits 66556 and 66557. The requested manner of use is for municipal purposes with the owners listed as the City of Fernley, DB Fernley-Rightway Holdings LLC (73111) and the City of Fernley and NLRC (73207 and 73208).

The attempts by the permittee to shop for a project for the water does not constitute a steady application of effort to perfect Permits 66555, 66556 and 66557. Further, the testimony and evidence indicate that the project for which the permits were issued no longer exists. The permittee has indicated that it has shopped for a new power plant project, a juice manufacturer and other companies that may be interested in a project that would use the water. Days before the hearing, the permittee appears to have found a project for its water as evidenced by the filing of change Applications 73111 and 73112 and later with the filing of Applications 73207 and 73208. This was also confirmed by the testimony of a partner of DB Fernley-Rightway Holdings LLC who indicated that his company had an agreement to use the water for the development of BC Ranch, which is a master planned community approved by the City of Fernley.⁴⁵

⁴⁰ Transcript, pp. 20-21.

⁴¹ Transcript, p. 22.

⁴² Transcript, p. 24.

⁴³ Transcript, p. 37-38.

⁴⁴ Exhibit Nos. 55 and 56.

⁴⁵ Transcript, p. 45.

Former State Engineer R. Michael Turnipseed succinctly informed the permittee in 1996, that "Nevada Water Law does not allow for permittees to apply for a permit, obtain approval and then shop around for a beneficial use of the water."⁴⁶ Permits 66555, 66556 and 66557 were issued under State Engineer's Ruling No. 5079, in part, due to the facts and evidence submitted at the administrative hearing regarding the proposed Duke Energy power plant project. The State Engineer was assured at the administrative hearing held on then Applications 66555, 66556 and 66557, that the water was finally going to be placed to beneficial use for the proposed Duke Energy power generation project.⁴⁷ Despite the assurances of the permittee, the project for which the permits were issued is gone and the permittee has instead shopped the water for various potential projects including the most recent proposed municipal project for which new change applications have again been filed.

The State Engineer finds that the permittee has failed to provide sufficient proof and evidence of proceeding in good faith and with reasonable diligence to perfect the water rights for the permitted project. The State Engineer further finds that Nevada Water Law does not allow for permittees to apply for a permit, obtain approval and then shop around for a beneficial use of the water.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁴⁸

II.

The history of extensions of time associated with Permits 61931 and 62584 spans a period of time from permit approval in 1997 and the approval of extensions of time from 2000 to present. Examinations of the extension forms, and the testimony and evidence at the administrative hearing, show no evidence or proof of a steady application of effort to perfect the water rights.

⁴⁶ See, File No. 46908, Correspondence from State Engineer R. Michael Turnipseed to NLRC, September 26, 1996, official records in the Office of the State Engineer.

⁴⁷ Transcript, public administrative hearing before the State Engineer, June 19-21, 2001.

⁴⁸ NRS chapters 533 and 534.

The State Engineer concludes that there is no longer a reasonable expectation that the water rights granted under Permits 61931 and 62584 would ever be placed to beneficial use as permitted.

III.

The State Engineer concludes that the filing of change Applications 68874, 68875, 72004 and 72005 further demonstrates that the permittee has no intention of placing water under Permits 61931 and 62584 to the beneficial use permitted.

IV

The history of extensions of time associated with Permits 66555, 66556 and 66557 and their respective base rights spans a period of time from 1982 to present. Examinations of the extension forms, and the testimony and evidence at the administrative hearing, show no evidence or proof of a steady application of effort to perfect the water rights and offer only a myriad of excuses. The permittee has admitted that the Duke Energy power generation project no longer exists and has admitted that they are actively shopping for new projects for the water.

The State Engineer concludes that there is no longer a reasonable expectation that the water rights granted under Permits 66555, 66556 and 66557 would ever be placed to beneficial use for the Duke Energy power generation project as the permitted project. The State Engineer further concludes that Nevada Water Law does not allow for permittees to apply for a permit, obtain approval and then shop around for a beneficial use of the water.

V.

The State Engineer concludes that the inability to place the water to beneficial use under Permits 66555, 66556 and 66557 is not a result of litigation but rather a result of Duke Energy withdrawing from the project.

VI.

The State Engineer concludes that the filing of change applications 73111, 73112, 73207 and 73208 further demonstrates that the permittees have no intention of placing the water under Permits 66555, 66556 and 66557 to the beneficial use permitted.

VII.

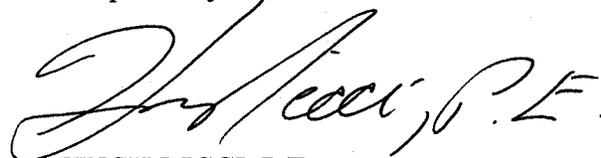
The State Engineer shall not grant an extension of time unless he determines from the proof and evidence so submitted that the permittee is proceeding in good faith and with reasonable diligence to perfect the water right as permitted.⁴⁹ In regards to an extension of time, reasonable diligence is the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances.⁵⁰ 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.⁵¹ The testimony and evidence show that the permittee has not made a steady application of effort to perfect the water rights and is not proceeding in good faith and with reasonable diligence to perfect the water rights.

The State Engineer concludes that there is no longer a reasonable expectation that the water rights granted under Permits 61931 and 62584 and the water rights granted under Permits 66555, 66556 and 66557 will ever be placed to beneficial use, in accordance with terms of their respective permits; therefore, Permits 61931 and 62584 and Permits 66555, 66556 and 66557 are subject to cancellation.

RULING

The applications for extension of time to file the Proof of Beneficial Use under Permits 61931 and 62584 and Permits 66555, 66556 and 66557 are hereby denied and the permits are hereby cancelled.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/TW/jm

Dated this 16th day of
March, 2006.

⁴⁹ NRS § 533.380 (3).

⁵⁰ NRS § 533.380 (6).

⁵¹ NRS § 533.380 (3).