

IN THE MATTER OF PERMIT 22873)
TO APPROPRIATE WATER FROM AN)
UNDERGROUND SOURCE IN FISH)
LAKE VALLEY, ESMERALDA COUNTY,)
NEVADA)

RULING

FINDINGS OF FACT

I

Permit 16622 was issued on October 5, 1959, in the name of M. E. Swanger for the appropriation of 2.5 c.f.s. of water from an underground source located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 22, T.4S., R.36E., M.D.B. & M., for the irrigation of a total of 160 acres and for domestic use within the NW $\frac{1}{4}$ of said Section 22. The Proof of Beneficial Use and supporting cultural map, as required under the terms of the permit, were received by the State Engineer's office on November 8, 1965 which indicated that the well had been drilled within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22 rather than the SW $\frac{1}{4}$ NW $\frac{1}{4}$. Accordingly, Application 22873 was filed on November 29, 1965, to change the point of diversion of Permit 16622.

II

Permit 22873 was issued on May 13, 1966, to change the point of diversion of water previously appropriated under Permit 16622. The proposed point of diversion was the existing well located within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 22, T.4S., R.36E., M.D.B. & M., which had been drilled under Permit 16622. Permit 22873 was issued in the amount of 2.5 c.f.s. for the irrigation of a total of 160 acres within the NW $\frac{1}{4}$ of said Section 22. The cultural map which had originally been submitted in support of the Proof of Beneficial Use under Permit 16622 was used in support of new Permit 22873.

Due to the fact that Permit 22873 was issued for the purpose of changing the location of the point of diversion under Permit 16622 to an existing well and because the Proof of Beneficial Use had been submitted under Permit 16622, the period for the filing of Proof of Commencement of Work, Proof of Completion of Work and Proof of Beneficial Use with supporting cultural map under Permit 22873 was limited to ninety (90) days from the date of issuance of the permit, to September 13, 1966.

A final notice of the deadline for the filing of the required proofs and cultural map was sent to both Mr. Swanger and to agent James C. Perkins, Jr. by certified letter dated September 19, 1966 as

required under NRS 533.390. Upon proper application being timely filed by Mr. Perkins for the permit holder, an extension of time for a period of thirty (30) days was granted to November 13, 1966.

A final notice of the deadline for the filing of Proof of Commencement of Work, Proof of Completion of Work and Proof of Beneficial Use and cultural map, dated November 21, 1966, was sent by certified mail to James C. Perkins, Jr. No copy of that notice was sent to permit holder Swanger. The notice allowed a thirty (30) day grace period for the filing of the required proofs and cultural map. A properly endorsed receipt for that certified notice, bearing the signature of James C. Perkins, Jr., was returned to the State Engineer's office on November 25, 1966. The required proofs were not received within the grace period allowed and Permit 22873 was cancelled on December 22, 1966, for failure by the permit holder to comply with the requirements of the permit.

III

A letter was received by the State Engineer's office on February 24, 1981, under the signature of Bruce L. Rice, agent, seeking the reinstatement of Permit 22873 to an active and valid status. The letter indicates that permit holder M. E. Swanger had not been given final notice of the requirement for the filing of Proof of Commencement of Work, Proof of Completion of Work and Proof of Beneficial Use under Permit 22873 as required by statute. The letter further states that the permit holder had only become recently aware that the permit had been cancelled, and that he had used the well continuously for irrigation of portions of the permitted place of use since the time that Permit 22873 had originally been issued.

IV

State Engineer's Order No. 760 was issued on April 3, 1981. The Order required that the permittee under cancelled Permit 22873 provide evidence to the State Engineer to show the amount of water used, the capacity of the well, and the limit and extent of the beneficial use, by crop and acreage, of water authorized under Permit 22873 as of November 13, 1966. The Order further required that such evidence and data be submitted within ninety (90) days of the date of the Order for the purpose of consideration by the State Engineer of the request to rescind the cancellation of Permit 22873.

In accordance with the requirements of Order No. 760, a map was submitted to the State Engineer's office on April 29, 1981 by Bruce L. Rice, agent. This map delineates various parcels located within the NW $\frac{1}{2}$ of Section 22, T.4S., R.36E., M.D.B. & M. which have purportedly

been under cultivation at various times since 1966. The map shows the total of 63.9 acres to have been placed under cultivation since 1966, with 54.5 acres of that total being in cultivation in 1966, and with 1.5 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 7.7 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ being first placed under cultivation in 1974. The map was accompanied with an affidavit by Max E. Swanger which swears to the validity of the information contained within the above described map.

V

Notes made as the result of a field investigation conducted in 1967 by Larry Reynolds as a representative of the State Engineer's office, indicate that 40 acres were irrigated at that time from the well allowed under cancelled Permit 22873. However, those notes do not indicate exactly where within the NW $\frac{1}{4}$ of Section 22, T.4S., R.36E., the 40 acres under cultivation were located.

CONCLUSIONS

The State Engineer has jurisdiction over parties and subject matter of this action in accordance with the provisions of NRS 533.025, NRS 533.030, subsection 1.

II

Both agent James C. Perkins, Jr. and permit holder M. E. Swanger were notified by certified letter dated September 19, 1966 of the deadline for the filing of Proofs of Commencement of Work, Proof of Completion of Work and Proof of Beneficial Use with cultural map under Permit 22873. However, subsequent notice dated November 21, 1966 of a deadline for such filing was mailed by certified letter to agent James C. Perkins, Jr. only. Since permit holder Swanger had been notified of the first deadline, he should have also been able to rely upon the State Engineer's office for notice of any other future deadlines which might arise under the permit. There is nothing in the file under Permit 22873 which indicates that permit holder Swanger requested that no further notice of such deadlines be sent to him.

At the time of the filing of Application 22873, for those applications filed by an agent for any applicant, it was the policy of the State Engineer's office to notify only the agent of actions taken with regards to that application or any permits subsequently issued under that application unless a specific request was received for notice to also be given to the applicant or permit holder. The matter of Permit 22873 is differentiated from those cases where the applicant and permit holder were never given notice, by the fact that permit holder Swanger was sent a copy of the final notice dated September 19, 1966.

III

Information and data submitted to the State Engineer's office under the requirements of Order No. 760 indicate that a total of 54.5 acres were under cultivation and were irrigated by water from the well under Permit 22873 in 1966, at the time that the final deadline for filing of Proof of Beneficial Use and cultural map under that permit expired. That date is reasonably supported by field investigation notes prepared in 1967 as the result of an inspection by a representative of the State Engineer's office at that time.

IV

As is established under the provisions of NRS 533.035, beneficial use is the basis, the measure and the limit of the right to use of water. The water rights allowed by the reinstatement of Permit 22873 must therefore necessarily be limited to the amount of water that was actually placed to beneficial use at the time that the last deadline for the filing of Proof of Beneficial Use expired under that permit.

RULING

The cancellation of Permit 22873 is herewith rescinded. A period of thirty (30) days from the date of this Ruling is hereby allowed for the submission of a completed Proof of Commencement of Work, Proof of Completion of Work with well log, Proof of Beneficial Use and supporting cultural map, and the required filing fee for each. The acreage claimed under the Proof of Beneficial Use and supporting cultural map will be limited to those 54.5 acres which were under cultivation in 1966, as delineated by the data submitted by agent Bruce L. Rice in response to State Engineer's Order No. 760. The additional acreage delineated by the Rice Plat, including 1.5 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 7.7 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 22, T.4S., R.36E., M.D.B. & M. which was first cultivated in 1974, is hereby declared to be an illegal use and no water is allowed by the reinstatement of Permit 22873 for the irrigation of said 9.2 acres.

Respectfully submitted,

William J. Newman
William J. Newman, P.E.
State Engineer

Dated this 1st day of
June, 1981