

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

IN THE MATTER OF CANCELLED PERMITS )  
52229, 52232 AND 52235, FILED TO )  
CHANGE THE UNDERGROUND WATERS OF )  
THE WESTERN PART OF THE LEMMON )  
VALLEY GROUNDWATER BASIN (92A), )  
WASHOE COUNTY, NEVADA. )

RULING

# 4164

GENERAL

I.

Application 52229 was filed on June 15, 1988, to change the point of diversion, manner and place of use of 0.00184 cfs, a portion of water heretofore appropriated under Permit 34762, for commercial and domestic purposes, located within the W $\frac{1}{2}$  NW $\frac{1}{4}$  Section 1, T.20N., R.18E., M.D.B.&M., on a parcel of land identified by Assessors Parcel No. 87-350-05. The proposed point of diversion is located within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 1. Permit 52229 was issued on January 10, 1989, for 0.00184 cfs and not to exceed 1.3333 AFA.<sup>1</sup>

Application 52232 was filed on June 15, 1988, to change the point of diversion, manner and place of use of 0.00184 cfs, a portion of water heretofore appropriated under Permit 34763. The manner of use, place of use and point of diversion are the same as that as described above under Permit 52229. Permit 52232 was issued on January 10, 1989, for 0.00184 cfs and not to exceed 1.3333 AFA.<sup>2</sup>

Application 52235 was filed on June 15, 1988, to change the point of diversion, manner and place of use of 0.00184 cfs, a portion of water heretofore appropriated under Permit 34764. The manner of use, place of use and point of diversion are the same as that as described above under Permit 52229. Permit 52235 was

<sup>1</sup> File No. 52229, official records in the office of the State Engineer.

<sup>2</sup> File No. 52232, official records in the office of the State Engineer.

issued on January 10, 1989, for 0.00184 cfs and not to exceed 1.3334 AFA.<sup>3</sup>

Permits 52229, 52232 and 52235 were approved for a total combined amount not to exceed 4.0 AFA. The current owners of record of said permits are John R. and Barbara A. Jardine.

II.

The proof of completion of work under Permits 52229, 52232 and 52235 was first due on April 14, 1989, and five one-year extensions of time were granted to April 14, 1994. The proof of beneficial use under said permits was first due on April 14, 1990, and four one-year extensions of time were granted until April 14, 1994.<sup>1,2,3</sup>

On three occasions in granting the extensions of time, September 20, 1991, November 24, 1992 and March 28, 1994, it was the opinion of the State Engineer that the Permittees had not proceeded in good faith and with reasonable diligence to perfect the appropriations, as required under NRS 533.395(1). On these occasions, the Permittees were informed that any additional requests for extensions of time would be critically reviewed to determine progress toward completing the diversion works and establishing beneficial use of the water. The Permittees were also informed that further requests for extension of time would be denied, unless good faith and reasonable diligence were demonstrated.<sup>1,2,3</sup>

On April 15, 1994, the Permittees filed requests for extension of time for filing the proof of completion of work and proof of beneficial use under Permits 52229, 52232 and 52235. The State Engineer determined that proof of good faith and reasonable diligence toward completing the diversion of works and establishing beneficial use was not submitted with the requests for extension of time. On June 17, 1994, the State Engineer found that the Permittees had not shown good cause to grant an extension of time as provided under NRS 533.390 and 533.410, and that the Permittees

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<sup>3</sup> File No. 52235, official records in the office of the State Engineer.

had not proceeded in good faith and with reasonable diligence as required under NRS 533.395(1). Permits 52229, 52232 and 52235 were then cancelled.<sup>1,2,3</sup>

III.

On July 1, 1994, the State Engineer received a written petition requesting a review of cancelled Permits 52229, 52232 and 52235. On December 13, 1994, a hearing was held in the matter of the review of cancelled Permits 52229, 52232 and 52235.<sup>1,2,3</sup>

FINDINGS OF FACT

I.

The underlying water rights which formed the basis for Permits-to-Change 52229, 52232 and 52235 are Permits 34762, 34763 and 34764, respectively, which were approved on April 14, 1978. Since that time, the proof of beneficial use has not been filed.<sup>4</sup> These water rights were not acquired by the Jardines until 1984, however, there is nothing in the record to indicate that any of this water was put to beneficial use by the prior owner. The State Engineer had previously ruled, and been upheld on appeal<sup>5</sup>, that when a person acquires a water right, he acquires all of the assets and liabilities that go along with that water right. This includes any conditions that may be placed on a water right permit and on any extensions of time that have been granted to that permit prior to the person's acquiring title.<sup>6</sup>

The State Engineer finds that since 1978, when Permits 34762, 34763 and 34764 were approved, the water obtained by the Jardines in 1984 and subsequently changed by Permits 52229, 52232 and 52235, has never been put to beneficial use.

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<sup>4</sup> File No's. 34762, 34763 and 34764, official records in the office of the State Engineer.

<sup>5</sup> Honey Lake Basin Company v. State Engineer of the State of Nevada, R. Michael Turnipseed, Case No. 22948, Second Judicial District Court of Nevada, December 13, 1991.

<sup>6</sup> State Engineer's Ruling No. 3799, dated May 2, 1991, official records in the office of the State Engineer.

II.

During the period from 1984 through 1987, the water rights obtained by the Jardines, were the subject of litigation,<sup>7</sup> and therefore, the Jardines were prevented from placing the water to beneficial use.<sup>8</sup> The State Engineer finds that although progress toward placing the water to beneficial use was interrupted until after the litigation was finalized in 1988, definite plans could have been formulated to place the water to beneficial use once the litigation was finalized. The record reflects no such plan.

After the litigation was finalized, the Permittee attempted to complete the purchase of portions of Permits 34762, 34763 and 34764 from LaBerge.<sup>9</sup> However, both Mr. and Mrs. LaBerge had died and the permittee had to deal with the LaBerge Estate. The permittee asserts that he was prevented from placing the water to beneficial use until after the purchase was completed. The Permittee paid for these water rights in 1984 and paid interest on the borrowed money to Pioneer Bank.<sup>10</sup> There is nothing in the record that indicates that the permittee could not use the water while the purchase transactions with the LaBerge Estate were being completed. The deeds were executed on December 6, 1984, and on file with the State Engineer on December 18, 1984. The State Engineer finds that the Permittee was not prevented from placing the water to beneficial use while the payments to the LaBerge Estate were being made. The State Engineer further finds that engaging in the closing of the

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<sup>7</sup> Morsweg v. State Engineer of Nevada, Case No. 84-11162, Department 4, Second Judicial District Court of Nevada, May 23, 1988.

<sup>8</sup> Transcript pp. 13-14, Public Administrative Hearing before the State Engineer December 13, 1994.

<sup>9</sup> Transcript pp. 18-19, Public Administrative Hearing before the State Engineer December 13, 1994.

<sup>10</sup> Transcript pp. 12-13, Public Administrative Hearing before the State Engineer December 13, 1994.

purchase of the water rights is not proof of good faith and reasonable diligence related to the beneficial use of water.

III.

On June 15, 1988, the Permittees filed Applications 52229, 52232 and 52235 to change portions of Permits 34763, 34764 and 34765, respectively. On line no. 13 of each of these applications, the Permittees stated that the estimated time required to construct the works of diversion was two years.<sup>1,2,3</sup> To date, over five years after said applications were filed, the Permittee still has not constructed the works of diversion.

On line no. 14 of said applications, the Permittees stated that the estimated time required to complete the application of water to beneficial use was five years.<sup>1,2,3</sup> To date, over five years later, no water has ever been put to beneficial use.

The State Engineer finds that the Permittee has failed to construct the works of diversion and put the water to beneficial use within the time periods stated on the application.

IV.

At the hearing on December 13, 1994, the Permittee stated that a change in zoning by Washoe County was required for the property described as the place of use under Permits 52229, 52232 and 52235.<sup>11</sup> However, the Permittee testified that Washoe County is not receiving applications for zoning changes at this time.<sup>10</sup> The State Engineer presumes that the zone change process could have begun in or prior to 1984, if the permittee had a plan to beneficially use this water.

The State Engineer finds that the inability of the Permittee to obtain the correct zoning designation is not good cause to grant an extension of time and is not evidence of good faith and reasonable diligence to place the water to beneficial use.

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<sup>11</sup> Transcript p. 23, Public Administrative Hearing before the State Engineer December 13, 1994.

V.

The Permittee attempted to sell Permits 52229, 52232 and 52235 to Intercoast Power Company.<sup>12</sup> However, the sale was not completed and title to said permits remained with the Jardines.<sup>13</sup>

The Permittee has negotiated to sell these water rights to Dan Douglass, who filed Applications 59795, 59796 and 59797 to change Permits 52229, 52232 and 52235, respectively.

The State Engineer finds that negotiating with perspective buyers is not proof of good faith and reasonable diligence in placing the water to beneficial use under the terms and conditions of Permits 52229, 52232 and 52235.

VI.

When a permittee requests an extension of time, he is required to state the reason why an extension is needed and why cumstances prevented the permittee from completing the project as anticipated when the applications were filed. The reasons given on the requests for extension of time for filing the proof of completion of work and the proof of beneficial use for Permits 52229, 52232 and 52235 are shown below.

PCW & PBU  
DUE

REASON ON REQUEST FOR EXTENSION OF TIME

4-14-89  
PCW Only

Previous litigation involving this permit (Morsweg, et al. v. State of Nevada, et al.) these permittees have not had an adequate period of time to place all water under said permit to beneficial use. A portion of said water rights have been sold and have been placed in use.

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<sup>12</sup> Exhibit No. 1 and Transcript p. 24, Public Administrative Hearing before the State Engineer December 13, 1994.

<sup>13</sup> Transcript pp. 29-30, Public Administrative Hearing before the State Engineer December 13, 1994.

PCW & PBU  
DUE

REASON ON REQUEST FOR EXTENSION OF TIME

4-14-90

Previous litigation involving this permit (Morsweg, et al. v. State of Nevada, et al.) these permittees have not had an adequate period of time to place all water under said permit to beneficial use. A portion of said water rights have been sold and have been placed in use.

4-14-91

Previous litigation involving this permit (Morsweg, et al. v. State of Nevada, et al.) these permittees have not had an adequate period of time to place all water under said permit to beneficial use. A functioning totalizing meter is being installed and readings will be made by a licensed water rights surveyor. The water rights are being used on the farm income property for farm landscaping, stables and animal watering, out building's water supply and dust control.

4-14-92

Because of restrictions at the current location imposed by the Washoe County Regional Planning Commission, these water rights are being moved to a parcel zoned residential. A tentative plat map for the use of the parcel and water rights has been filed with Washoe County. This extension is necessary to allow time for the construction of two (2) single family residences.

Previous litigation involving these water rights (Morsweg, et al. v. State of Nevada, et al., Case No. 11162, Second Judicial District - Washoe County) resulted in a four (4) year delay prior to the water rights being released from the litigation.

4-14-93

These Permits, referenced above, comprise 4 acre feet of water rights. During the past year the point of diversion of these Permits has been changed to the service area of the Silver Lake Water Distribution Company for purposes of placing the water to use in such service area in connection with a power generation plant presently being

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REASON ON REQUEST FOR EXTENSION OF TIME

designed by Illinois-Iowa Power and Gas. Agreements and plans of said generation facility can be furnished upon request.

4-14-94

Permit Nos. 52229, 52232, and 52235 were filed on July 15, 1988, by John R. and Barbara A. Jardine. They were filed as Applications to Change the point of diversion, manner, and place of use of portions of Permit Nos. 34762, 34763, and 34764. These water rights are located in Lemmon Valley Groundwater Basin.

Since 1988, the Jardines have been attempting to develop and then to sell these water rights. On November 2, 1992, Application To Change Nos. 58285 through 58287 were filed by John R. and Barbara A. Jardine to change the point of diversion, manner, and place of use of Permit Nos. 52229, 52232, and 52235. These applications were filed in conjunction with a Purchase Option Agreement between the Jardines and InterCoast Energy Company, an energy company who was responding to a request for proposals by Sierra Pacific Power Company for development of an electric power generation plant.

The proposal was submitted, but Sierra Pacific Power Company made the decision to keep development in house. As a consequence, the Purchase Option Agreement that was the basis for these applications to change expired without a final purchase.

On December 14, 1993, the Jardines entered into a Purchase Option Agreement with Dan Douglass for the water rights under Permit Nos. 52229, 52232, and 52235.

On March 3, 1994, Application to Change Nos. 59795, 59796, and 59797 to change the point of diversion, manner, and place of use of Permit Nos. 52229, 52232, and 52235, were filed by Dan Douglass, as was a supporting map. Permission was given in a letter dated February 10, 1994, by

PCW & PBU  
DUE

REASON ON REQUEST FOR EXTENSION OF TIME

the Jardines for Mr. Douglass to use their map on file for the base permits.

On February 8, 1994, John R. and Barbara A. Jardine withdrew Application to Change Nos. 58285, 58286, and 58287, the electric power generation plant applications.

The final conveyance of the water rights between the Jardines and Dan Douglass is contingent upon the approval of Application to Change Nos. 59795, 59796, and 59797 by the State Engineer. On April 11, 1994, the Publication Notices for these applications were approved on the map table.

This Request for Extension of Time for filing the Proofs of Completion of Work and Proofs of Beneficial use for Permit Nos. 52229, 52232, and 52235 is being requested for one year and is being submitted to keep these water rights in good standing throughout the Purchase Option Agreement process.

The Jardines have demonstrated due diligence in their attempts to develop the water rights themselves for several years and again in their repeated attempts to sell them to someone who will be able to develop them. It is imperative that this Extension of Time be granted to maintain the good standing and validity of these permits in order for Dan Douglass to have full opportunity to exercise the Purchase Option Agreement and develop these water rights.

In 1989, 1990, and 1991, the Permittee stated he needed more time due to the Morsweg litigation. That litigation ended in May, 1988.<sup>6</sup> Also, in 1991, the Permittee stated the a totalizing meter was being installed and readings of the water used on the property would be taken. No proof that the totalizing meter was installed and no meter readings were ever submitted to this office. In 1992, the Permittee stated that because of restrictions imposed by the Washoe County Planning Commission, the water rights were being moved to a residential parcel where two single family residences

would be constructed. In 1993, the Permittee stated that these water rights have been changed to the Silver Lake Water Distribution Company service area for use in a power generation project. The project was later cancelled and the change applications were withdrawn. Finally, in 1994, the Permittee stated that a period of one year is needed to keep these water rights in good standing throughout the Purchase Option Agreement process with a new buyer.

None of the reasons stated in the requests for extension of time demonstrate that the Permittee has made any effort toward completing the works of diversion and putting the water to commercial and domestic use as required under Permits 52229, 52232 and 52235. It is evident that the Permittees had no definite plan to put the water to beneficial use when they purchased it, when they filed the changes, when the permits were issued or even today. Considering these requests for extension of time, together with the testimony provided by the Permittee at the hearing on December 13, 1994, the State Engineer finds that the Permittee has not proceeded in good faith and reasonable diligence to perfect the water rights under the terms and conditions of Permits 52229, 52232 and 52235.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction over the subject matter.<sup>14</sup>

##### II.

The State Engineer may, for good cause shown, extend the time within which construction work must be completed, or water must be applied to a beneficial use, but an application for extension must in all cases be accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application. The purpose of an application for an extension of time is to inform the State Engineer of unforeseen circumstances which prevented the project from being completed in the time

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<sup>14</sup> NRS 533 and 534.

anticipated when the change applications were filed. 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 appropriation. The failure to provide the proof and evidence required is prima facie evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the appropriation.<sup>15</sup>

### III.

If, at any time in the judgment of the State Engineer, the holder of any permit to appropriate the public water is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the State Engineer shall require the submission of such proof and evidence as may be necessary to show a compliance with the law. If in his judgment, the holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the State Engineer shall cancel the permit, and advise the holder of its cancellation. The failure to provide the proof and evidence required, is prima facie evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the appropriation.<sup>16</sup>

If any permit is cancelled under the provisions of NRS 533.390, 533.395, or 533.410, the holder of the permit may within 60 days of the cancellation of the permit file a written petition with the State Engineer requesting a review of the cancellation by the State Engineer at a public hearing. The State Engineer may, after receiving and considering evidence, affirm, modify or rescind the cancellation.<sup>17</sup>

The measure of reasonable diligence is defined by statute as the steady application of effort to perfect the appropriation in a

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<sup>15</sup> NRS 533.380(3).

<sup>16</sup> NRS 533.395(1).

<sup>17</sup> NRS 533.395(2).

reasonably expedient and efficient manner under all the facts and circumstances. When a project or integrated system is comprised of several features, work on one feature of the project or system may be considered in finding that reasonable diligence has been shown in the development of water rights for all features of the entire project or system.<sup>18</sup>

IV.

Since 1978, when Permits 34762, 34763 and 34764 were issued, no water has been placed to a beneficial use.

V.

Since 1984, when the Permittee obtained those portions of Permits 34762, 34763 and 34764, which are the basis for Permits 52229, 52232 and 52235, respectively, the Permittee has had ample time to complete the works of diversion and place the water to beneficial use, even considering the Morsweg litigation which was completed in 1988.

VI.

The Permittee's attempts to sell Permits 52229, 52232 and 52235 cannot be considered as proof of good faith and reasonable diligence to complete the works of diversion and place the water to beneficial use under the terms and conditions of said Permits. The testimony and evidence presented by the Permittee at the hearing on December 13, 1994, does not meet the standard of proof of good faith and reasonable diligence to place the water to beneficial use. The information provided on the requests for extension of time also fails to meet this standard. Therefore, the State Engineer concludes that the Permittee has not proceeded in good faith and reasonable diligence as required under NRS 533.395. The cancellation of Permits 52229, 52232 and 52235 should be affirmed.

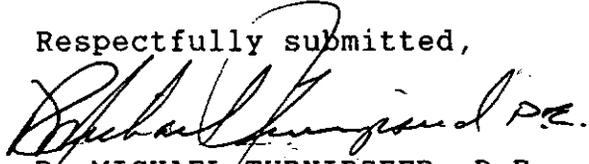
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<sup>18</sup> NRS 533.395(5).

RULING

The cancellation of Permits 52229, 52232 and 52235 is hereby affirmed on the grounds that the Permittee has not proceeded in good faith and reasonable diligence to complete the works of diversion and place the water to beneficial use under the terms and conditions of said permits.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/JCP/pm

Dated this 2nd day of  
February, 1995.