

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

IN THE MATTER OF THE CANCELLATION)
OF PERMIT 35625, WASHOE VALLEY)
GROUNDWATER BASIN (89), WASHOE)
COUNTY, NEVADA)

RULING

4307

GENERAL

I.

Permit 35625 was granted on January 16, 1979, to appropriate 0.5 cubic feet per second (cfs) of water from an underground source within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 23, T.17N., R.19E., M.D.B. & M.¹ The permit was approved for an amount not to exceed 9.82 million gallons annually (mga) for commercial and domestic purposes within portions of the NE $\frac{1}{4}$ SW $\frac{1}{4}$, and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 23.¹

II.

Proof of beneficial use of the waters under Permit 35625 was first due to be filed in the Office on the State Engineer on August 16, 1983.² Nine extensions of time have been granted under Permit 35625 to establish beneficial use of the water with proof of beneficial use of the water last due to be filed in the Office of the State Engineer on August 16, 1992.¹

III.

Permit 56742 which was granted on September 3, 1992, changed the point of diversion and place of use of 0.28 cfs, 16.88 afa, a portion of the waters previously appropriated under Permit 35625.³ This left a diversion rate of 0.22 cfs and a total duty of 4.32 mga remaining under Permit 35625.

¹ File No. 35625, official records of the Office of the State Engineer.

² NRS 533.380 requires the State Engineer to endorse a permit with times to complete the diversion works and to put the water to beneficial use.

³ File No. 56742, official records of the Office of the State Engineer.

IV.

The remaining 0.22 cfs, 4.32 mga, under Permit 35625 was cancelled by the State Engineer on October 15, 1992, for failure to comply with the terms of the permit for filing proof of beneficial use.¹ The State Engineer did not find good cause to grant another extension of time for filing proof of beneficial use on the remaining waters under Permit 35625.⁴

V.

Application 58255 was filed on October 16, 1992, by Paul E. and Rita C. Oakes to change the point of diversion and place of use of 0.22 cfs, a portion of the underground waters previously appropriated under Permit 35625; the same portion cancelled by the State Engineer on October 15, 1992. The proposed point of diversion under Application 58255 is described as being located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 9, T.16N., R.19E., M.D.B. & M., with the proposed place of use being described as located within Lots 7, 8 and 11 of the Franktown Hills Subdivision No. 2, in the E $\frac{1}{2}$ NE $\frac{1}{4}$, the SW $\frac{1}{4}$ NE $\frac{1}{4}$, and the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 9.⁵

VI.

On December 10, 1992, the permittee requested a hearing pursuant to NRS 533.395 on the cancellation of Permit 35625.¹ After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the cancellation of Permit 35625 on September 11, 1995, at Carson City, Nevada, before representatives of the Office of the State Engineer.⁶

⁴ NRS 533.395 requires the State Engineer to cancel a permit if the permittee is not proceeding in good faith and with reasonable diligence to perfect the appropriation.

⁵ File No. 58255, official records of the Office of the State Engineer.

⁶ Transcript, public administrative hearing before the State Engineer, September 11, 1995.

FINDINGS OF FACT

I.

At the time Permit 35625 was granted in 1979 the land status of the place of use under the permit was described by the permittees as being a ten acre parcel consisting of two one-acre residential parcels on the west edge of the property, a six-acre commercial parcel on the east edge of the property, with a 1.88-acre parcel in the center of the property.⁷ At the evidentiary hearing, permittee Paul Oakes testified that at the time the permittees purchased the property they had no knowledge of plans to expand the highway⁸ which would affect their property.

The request for extension of time filed on September 15, 1983⁹, indicates, at that time, the most recent highway alignment decision had created a floating easement across the commercial portion of the permittees' property. The State Engineer finds that as of September 15, 1983, the permittees were aware that they would not be able to develop a portion of the related property due to the highway realignment.

II.

In each of the requests for extension of time filed in 1983¹⁰, 1984¹, 1985¹¹, 1986¹², 1987¹, 1988¹ and 1989¹³, the permittees stated

⁷ Transcript, p. 9 and Exhibit No. 2, public administrative hearing before the State Engineer, September 11, 1995.

⁸ Transcript, p. 10, public administrative hearing before the State Engineer, September 11, 1995.

⁹ Exhibit 12, public administrative hearing before the State Engineer, September 11, 1995.

¹⁰ Exhibit No. 12, public administrative hearing before the State Engineer, September 11, 1995.

¹¹ Exhibit No. 18, public administrative hearing before the State Engineer, September 11, 1995.

¹² Exhibit No. 24, public administrative hearing before the State Engineer, September 11, 1995.

their reason for delay in putting the water to beneficial use was that the Nevada Department of Transportation had still not made a final decision as to the proposed alignment of Highway 395. In the 1989 request for extension of time, the permittees stated that the affected portion of their property was now listed for offer of purchase by Highway Department, but that official notice would not be mailed for three to four months.

Paul Oakes testified at the hearing that in 1989 he had knowledge that the Nevada Department of Transportation did not want to acquire the water right in addition to the real estate.¹⁴ The State Engineer finds that at least by 1989 the permittees knew that the Nevada Department of Transportation did not want to acquire any water rights associated with the related property.

III.

The permittees provided evidence at the administrative hearing that in June 1989 a map showed the area of the permittees' land the freeway would pass over.¹⁵ The permittees also provided evidence that by April 11, 1990, the Nevada Department of Transportation was in the process of acquiring a portion of the permittees' property.¹⁶ The deed transferring to the Nevada Department of Transportation was not signed until February 5, 1991;¹⁷ however, it describes the same parcels of land as identified in the June 1989 map. The State Engineer finds that

¹³ Exhibit No. 35, public administrative hearing before the State Engineer, September 11, 1995.

¹⁴ Transcript, p. 45, public administrative hearing before the State Engineer, September 11, 1995.

¹⁵ Exhibit No. 39, public administrative hearing before the State Engineer, September 11, 1995.

¹⁶ Exhibit No. 40, public administrative hearing before the State Engineer, September 11, 1995.

¹⁷ Exhibit No. 45, public administrative hearing before the State Engineer, September 11, 1995.

based on Mr. Oakes testimony and evidence provided at the administrative hearing the permittees knew by at least April 1990 which portion of their property was to be conveyed to the Nevada Department of Transportation without any water rights,¹⁸ and could identify that only the two one-acre residential parcels and a two acre portion of the commercial property would remain as potentially viable places to use the water allowed under Permit 35625.

IV.

Paul Oakes testified at the hearing that the two one-acre parcels on the east side of the place of use under Permit 35625 had been sold in 1984 and 1987,¹⁹ and that no portion of Permit 35625 had been sold to the purchasers of those lots. Mr. Oakes further testified that he had discussed the possibility of utilizing a water system to serve the two residential parcels, if the well system was developed for that purpose;²⁰ however, no agreements were reached and the purchasers only agreed to consider such a system once they started construction of their homes. The State Engineer finds that speculating that some time in the future there may be an agreement to use the water for these two parcels is not good faith and reasonable diligence in perfecting this water right permit and is not good cause for granting an extension of time to perfect the water right.

V.

On October 11, 1990, the permittees filed a request for extension of time stating that current advanced acquisition negotiations with the Nevada Highway Department affected the permittees ability to develop the property as the final description

¹⁸ Transcript, p. 45, public administrative hearing before the State Engineer, September 11, 1995.

¹⁹ Transcript, p. 25-29, public administrative hearing before the State Engineer, September 11, 1995.

²⁰ Transcript, pp. 29-30, public administrative hearing before the State Engineer, September 11, 1995.

of the residual property was unknown.²¹ By letter dated July 11, 1991, the State Engineer found that permittees were not proceeding in good faith and with reasonable diligence as required under NRS 533.395(10), but based on State Engineer's belief that permittees should be informed of extension of time conditions before a request for extension of time is denied, the State Engineer granted the permittees' 1990 request for extension of time, and gave the permittees until August 16, 1991, to establish proof of beneficial use of the waters under the permit. The State Engineer finds that by July 1991 the permittees had been informed that the State Engineer had determined they were not proceeding in good faith and with reasonable diligence in proving beneficial use of the water. The permittees were put on notice that without a demonstration of good faith and reasonable diligence further requests for extensions of time would be denied.¹

VI.

On August 16, 1991, the permittees filed another request for extension of time stating that the problem with the Nevada Highway Department regarding the alignment of the highway had finally been resolved as of February 22, 1991, and that the permittees needed an extension of time for one year to acquire property and/or transfer the water right and change the point of diversion.¹ By letter dated November 5, 1991, the State Engineer requested the permittees send additional information to support the application for extension of time.¹ On December 3, 1991, the permittees responded that a portion of the water rights under Permit 35625 were being transferred to Merle Stewart, were being moved pursuant to change Application 56742, and time was needed to complete the transaction.

The State Engineer finds that the transfer of a portion of the water rights under Permit 35625 to Merle Stewart does not show any evidence of good faith or reasonable diligence as to the remaining

²¹ Exhibit No. 43, public administrative hearing before the State Engineer, September 11, 1995.

waters under the permit. The State Engineer further finds that trying to acquire other property and/or the transference of the water right to another point of diversion or place of use by the filing of a change application is not evidence of good faith and reasonable diligence in perfecting the water right as allowed under Permit 35625.

VII.

On January 15, 1992, the State Engineer sent the permittees another letter¹ in which the State Engineer again found that permittees were not proceeding in good faith and with reasonable diligence as required under NRS 533.395(1), but again based on State Engineer's belief that permittees should be informed of extension time conditions before a request for extension of time is denied, the State Engineer gave the permittees a second and last chance until August 16, 1992, to establish beneficial use of the waters under the permit. The permittees were again warned that without a demonstration of good faith and reasonable diligence and progress shown with regard to demonstrating use of the waters, further requests for extensions of time would be denied.¹

By form letter dated August 18, 1992, the State Engineer informed the permittees that they had failed to file the proof of beneficial use by the due date of August 16, 1992, but gave the permittees 30 days to file proof of beneficial use or a request for extension of time to file proof of beneficial use under the permit.¹ On September 16, 1992, the permittees filed another request for extension of time,²² this time stating that the reason they had been unable to put the water to beneficial use was that the sale of water rights and the change in point of diversion to Merle Stewart under Application 56742 was not yet concluded and

²² Exhibit No. 51, public administrative hearing before the State Engineer, September 11, 1995.

time was needed to acquire additional property and/or transfer and change the point of diversion of the remaining water rights under Permit 35625.

Mr. Oakes testified that in 1991 when he learned no more extensions of time would be granted to perfect this water right, his intent was "to transfer the point of diversion to another well either on acquired property or other property to where it could be approved."²³ In the September 16, 1992, request for extension of time the permittees noted that time was needed to acquire additional property and/or transfer and change the point of diversion.²⁴

The State Engineer finds that the Nevada Legislature has become increasingly concerned over applications and permits being used for speculation.²⁵ The permittees have demonstrated that prior to the cancellation of Permit 35625 they had yet to formulate any specific long term commitments or definitive plan for the use of this water. The State Engineer further finds that the permittees are merely speculating they will find a beneficial use for the water either by selling the water right or finding some place to put the water to beneficial use and this is not the type of good faith and reasonable diligence for perfecting a water right as required under Nevada law, and that the filing of a change application does not rise to good faith or reasonable diligence in putting water to beneficial use as allowed under Permit 35625.

²³ Transcript, p. 54, public administrative hearing before the State Engineer, September 11, 1995.

²⁴ Exhibit No. 51, public administrative hearing before the State Engineer, September 11, 1995.

²⁵ See 1993 Legislative testimony before the Senate Natural Resources Committee and Assembly Government Affairs Committee on AB314, AB337 and AB624.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁶

II.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise²⁷ and beneficial use is the basis, the measure and the limit of the right to the use of water.

III.

A permit to appropriate water grants to the permittee the right to develop a certain amount of water from a particular source for a certain purpose to be used at a definite location.²⁸ In the perfection of a water right a permittee is generally allowed under the law sufficient time after the date of approval of the application to complete application of the water to beneficial use.²⁹ Nevada water law provides that the State Engineer may for good cause shown extend the time within which the water is to be placed to beneficial use. The State Engineer shall not grant an extension of time unless proof and evidence is submitted that shows the permittee is proceeding in good faith and with reasonable diligence to perfect the application.³⁰ The State Engineer concludes that the permittees knew since 1989 the Nevada Department of Transportation was not interested in acquiring any of the waters

²⁶ NRS Chapters 533 and 534.

²⁷ NRS 533.030 and 533.035.

²⁸ NRS 533.330 and 533.335.

²⁹ NRS 533.380.

³⁰ NRS 533.380.

under Permit 35625; thus, they would not be able to put a substantial portion of the water under Permit 35625 to beneficial use as set forth in Permit 35625.

IV.

The State Engineer concludes that speculating as to some future use of the water on the two one-acre residential parcels on the east side of the place of use is not evidence of good faith and reasonable diligence in perfecting this water right nor is it good cause for granting an extension of time to perfect the right.

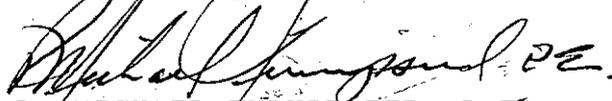
V.

The State Engineer concludes that trying to find a place to where or a person to whom the permittees could move the water right, a purchaser to whom they could sell the water and then move it, or some property they could acquire where they could put the water to beneficial use is a clear indication that the permittees did not have a viable plan for the development of the water under this permit, and that speculating about a future use for the water or filing a change application to try to find some use for the water is not good cause and reasonable diligence warranting reversal of the State Engineer's decision cancelling Permit 35625.

RULING

The cancellation of Permit 35625 is hereby affirmed.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 5th day of
March, 1996.