

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

IN THE MATTER OF CANCELLED PERMIT)
34905 FILED TO CHANGE THE MANNER)
AND PLACE OF USE OF WATERS)
PREVIOUSLY APPROPRIATED FROM AN)
UNDERGROUND SOURCE WITHIN THE)
ANTELOPE VALLEY GROUNDWATER BASIN)
(106), DOUGLAS COUNTY, NEVADA.)

RULING

4379

GENERAL

I.

Application 34905 was filed on January 23, 1978, by Joseph S. Lodato to change the manner and place of use of 1.337 cubic feet per second, not to exceed 76.64 acre-feet annually, of water previously appropriated under Permit 16610 for commercial and domestic purposes for use within the Holbrook Business Park within portions of the S $\frac{1}{2}$ of Section 17, SE $\frac{1}{4}$ of Section 18, NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 19, all within T.10 N., R.22 E., M.D.B. & M.¹ The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 17. Permit 34905 was granted by the State Engineer on June 13, 1978, with Proof of Completion of Work to be filed in the Office of the State Engineer on or before January 13, 1980, and Proof of Beneficial Use of the waters as allowed under permit to be filed in the Office of the State Engineer on or before January 13, 1983.¹

II.

Eight extensions of time for filing proof of beneficial use of the waters were granted by the State Engineer with Proof of Beneficial Use last due to be filed on January 13, 1991. The ninth Application for Extension of Time was not timely filed; therefore, on April 1, 1991, the State Engineer cancelled Permit 34905 as required by law.² After an administrative hearing held on July 15,

¹File No. 34905, official records of the Office of the State Engineer.

²NRS 533.410.

1992, the State Engineer rescinded the cancellation of Permit 34905 giving the permit a new priority date of April 9, 1991,³ with Proof of Beneficial Use due to be filed on or before July 15, 1992. A tenth extension of time for filing proof of beneficial use was granted, and in August 1993, the permittee filed an eleventh Application for Extension of Time to place the waters to beneficial use which was granted through July 15, 1994.¹

III.

After the permittee failed to timely file the required proof of beneficial use on July 15, 1994, the State Engineer notified the permittee by certified mail that he had failed to comply with the terms of his permit and that he had a 30-day grace period in which to file proof of beneficial use of the waters or an application for extension of time for filing proof of beneficial use or the permit would be cancelled.¹ Upon the permittee's failure to file the required proof of beneficial use or the application for extension of time, on September 12, 1994, the State Engineer cancelled the 32.14 acre-foot portion of Permit 34905 that remains in the name of Mr. Lodato.

IV.

Pursuant to NRS 533.395, Mr. Lodato timely filed a written petition requesting review of the cancellation. After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on May 2, 1996, at Carson City, Nevada, before representatives of the Office of the State Engineer.⁴ Pursuant to the hearing notice the State Engineer also requested Mr. Lodato provide more information with regard to

³NRS 533.395(2) allows the holder of a permit to request an administrative hearing to review the cancellation; however, the priority date of the appropriation is changed to the date of the petition for review.

⁴Exhibit No. 1, public administrative hearing before the State Engineer, May 2, 1996. Hereinafter "Exhibit No. ___ or Transcript, p. ___".

Application 43113 which was filed to change the point of diversion of waters under Permit 34906.⁵

FINDINGS OF FACT

I.

At the administrative hearing Mr. Lodato testified that he sold some of the land under the identified place of use to Mr. Nottke and failed to reserve out the portion of Permit 34905 that would go with the land. Mr. Nottke later reconveyed the water portion of Permit 34905 back to Mr. Lodato and later sold that land to an entity known as Walker River Enterprises. Around 1994 when Walker River Enterprises learned that no water rights accompanied the conveyance it filed a lawsuit against Mr. Lodato and Mr. Nottke which litigation took more than one year to resolve, concluding approximately in May 1995.⁶

Mr. Lodato further testified that at the time he received the State Engineer's July 15, 1994, notice that he had failed to comply with the terms of his permit and that he had a 30-day grace period in which to file proof of beneficial use of the waters or an application for extension of time for filing proof of beneficial use he was in the process of undergoing tests for cancer in San Jose, California, and Seattle, Washington, and was not paying much attention to matters such as this; thus, the notice was most likely lost in the shuffle on his desk.⁷

The State Engineer finds that Mr. Lodato's preoccupation with the testing and diagnosis for his medical problems is a legitimate reason for his failure to timely file a request for extension of time for filing proof of beneficial use of the waters.

⁵NRS 533.395 allows the State Engineer to require the permittee to supply evidence of good faith and reasonable diligence toward the perfection of the permit.

⁶Transcript, pp. 7-11.

⁷Transcript, pp. 9-10.

II.

Permit 34905 was granted for the development of commercial and domestic uses within the Holbrook Business Park. Mr. Lodato testified that the water system envisioned for the business park would be what he called a loop system.⁸ At the administrative hearing Mr. Lodato presented a diagram identified as Preliminary Phase I Water System for Joseph S. Lodato, dated June 16, 1979.⁹ This diagram describes the S½ of Section 17, a portion of the SE¼ of Section 18, and the NE¼ of Section 19,¹⁰ which is a much smaller area than that described as the place of use under Permit 34905.¹¹ The State Engineer finds that the Phase I design plan only covers a portion of the area identified as the Holbrook Business Park and the plan was not designed to service all parcels of land identified as being part of the Holbrook Business Park.¹²

III.

The only part of the water system that has been built to date is the well that was already in existence as it was drilled under Permit 16610, and several pipelines running across the road to service a few lots.¹³ The State Engineer finds that only 20% of the entire loop-system identified under the design identified as the Preliminary Phase I Water System for Joseph S. Lodato, dated June 16, 1979, has been constructed to date.¹⁴ Nearly all the extensions of time for filing proof of beneficial use filed by Mr.

⁸Transcript, pp. 13-17.

⁹Transcript, p. 13.

¹⁰Transcript, pp. 13-14.

¹¹Exhibit No. 2 and Exhibit No. 3; Transcript, p. 14-15.

¹²Transcript, pp. 15-16.

¹³Transcript, p. 16.

¹⁴Transcript, p. 17.

Lodato indicate that financial hardship has prevented him from going forward with the project. Further, to date Mr. Lodato has not arranged any financing which would allow him to go forward with the project.¹⁵ Further, since the granting of this permit in 1978 no water has been used from the well.¹⁶

Mr. Lodato further testified that his plans really encompass just letting the water right and project "sit there" until the population builds up in the area.¹⁷ The State Engineer finds that Mr. Lodato's plans to "just let it sit there" is not a legitimate reason for allowing a person to hold on to a water right under Nevada law.

IV.

Testimony and evidence indicate that Mr. Lodato has sold¹⁸ or is negotiating for sale various parcels of land to other individuals or entities without water rights within the place of use identified under Permit 34905.¹⁹ Other portions of the land identified as the place of use under Permit 34905 are now covered by a subdivision map which allows for the development of a domestic-well subdivision which will not be served by any water developed under Permit 34905. The State Engineer finds that portions of the area identified as the place of use under Permit 34905 are presently planned for a domestic-well subdivision and will not be served by any water system that would be developed under Permit 34905.

¹⁵ Transcript, pp. 17-18.

¹⁶ Transcript, p. 25.

¹⁷ Transcript, p. 18.

¹⁸ Transcript, pp. 31-34.

¹⁹ Transcript, pp. 19-24.

V.

Mr. Lodato testified that it was his intention to construct the water system and be the water purveyor for the Holbrook Business Park,²⁰ but that the development has not yet taken place out there, that it is too early yet.²¹ He would construct the water system some time in the future, but he does not know when the future is, he knows it is not now, but hopes it would be within the next five years.²² The State Engineer finds that Mr. Lodato does not have concrete plans for the development of any water system as envisioned under Permit 34905 in the near future.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²³

II.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise²⁴ 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.²⁵ In the perfection of a water right a permittee is generally allowed under the law sufficient time after the date of approval of the

²⁰ Transcript, p. 26.

²¹ Transcript, p. 27.

²² Transcript, p. 27-28.

²³ NRS Chapters 533 and 534.

²⁴ NRS 533.030 and 533.035.

²⁵ NRS 533.330 and 533.335.

application to complete application of the water to beneficial use.²⁶ 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.²⁷ The measure of 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.²⁸ 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.

The intent of the extension of time provision under Nevada law is to provide the opportunity for the permittee to resolve temporary adverse conditions, which prevent compliance with the proof of completion of works and proof of beneficial use requirements set forth on the permit. When Application 34905 was filed, it was estimated that three months would be needed to complete the diversion works and one year to prove beneficial use of the waters under the permit. Further, the well identified as the point of diversion under Permit 34905 is the same well that was in existence and used under Permit 16610, as Permit 34905 merely changed the manner and place of use of waters under Permit 16610. The State Engineer finds that more than eighteen years have passed since Permit 34905 was approved and to date, little work has been done to progress past the granting of the application.

²⁶NRS 533.380.

²⁷NRS 533.380.

²⁸NRS 533.380(6).

IV.

To ensure and maintain the integrity and equity of the appropriation process, it is essential that the process not be improperly applied to reserve the water resource without beneficial use of the water or to retain a water right without reasonable progress to comply with the beneficial use requirements. Permit 34905 was granted in 1978 to establish the Holbrook Business Park. The State Engineer concludes the permittee has been given ample time to make progress towards development of the project envisioned under Permit 34905 and ample time to prove beneficial use of the waters under Permit 34905, and has not been proceeding in good faith and with reasonable diligence in perfecting Permit 34905. However, the State Engineer further concludes that Mr. Lodato's health problems warrant some consideration of his failure to file proof of beneficial use or an application for extension of time for filing proof of beneficial use of the waters.

V.

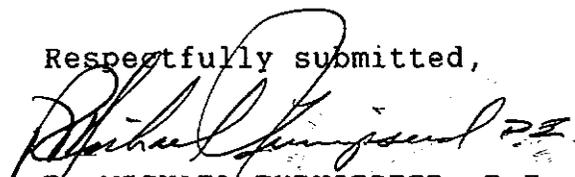
At the administrative hearing the permittee testified that he was sitting on the water for some future use. The appropriative system of water rights found under Nevada law is known as a "use it or lose it system" which does not allow for a person holding a water right to sit on that right in anticipation that some time in the future there may be some use for the water. It is this system that is reflected in the time limitations set forth in every water right permit for completing the diversion works and placing the water to beneficial use. The State Engineer concludes that Nevada water law does not provide for banking water for future use.

RULING

Based on the considerations stated in the conclusion portion of this ruling, the cancellation of Permit 34905 is hereby rescinded, the priority of Permit 34905 is changed to September 20, 1994. However, certain conditions are attached to the rescission of the cancellation:

1. Within 30 days of the date of this ruling Mr. Lodato shall file in the Office of the State Engineer an application for extension of time within which to file proof of beneficial use of the waters. The State Engineer will grant Mr. Lodato a one year extension of time pursuant to said application.
2. Within 90 days of the date of this ruling Mr. Lodato shall file in the Office of the State Engineer a final water system design for the entire water system envisioned under Permit 34905, and a time schedule for completion of Phase I and a projected schedule for the completion of Phase II of the water system. Failure to file the design and schedule will result in cancellation of Permit 34905.
3. Before any other applications for extension of time will be considered, Mr. Lodato must file documentation providing the State Engineer with evidence of a good faith effort and reasonable diligence in placing the waters under Permit 34905 to beneficial use. As the measure of reasonable diligence is the steady application of effort to perfect the appropriation in a reasonably expedient and efficient manner, sales of parcels of property will not be considered a measure of reasonable diligence.
4. Permit 34905 is limited to the place of use identified as the Holbrook Business Park as identified in the Final Map entitled Holbrook Business Park Instrument No. 37740 in Book 1079 of Maps, Page 1240, Records of Douglas County, Nevada, and will not be allowed to be transferred off of said property by the filing of a change application.

Respectfully submitted,


E. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 23rd day of
July, 1996.