

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

IN THE MATTER OF CANCELLED PERMIT)
50131 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF AN UNDERGROUND)
SOURCE WITHIN THE ELDORADO)
VALLEY GROUNDWATER BASIN (167),)
CLARK COUNTY, NEVADA.)

RULING

4765

GENERAL

I.

Application 50131 was filed on August 28, 1986, by Susan E. Brown to appropriate 2.0 cubic feet per second (cfs) of the waters of an underground source located within the Eldorado Valley Groundwater Basin for mining and ore processing purposes within the SE $\frac{1}{4}$ of Section 12, T.27S., R.63E., M.D.B.&M.¹ The proposed point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, T.27S., R.63E., M.D.B.&M.¹ Pilot Plant, Inc., is the current owner of record.¹

II.

The applicant indicated the proposed works of diversion would be a drilled and cased well with pump, motor and distribution system to a mineral processing area. The applicant also estimated a three year period was needed to construct the proposed works, and a five year period was needed to complete the application of the water to its intended beneficial use.¹

Permit 50131 was issued on March 1, 1988, for 2.0 cfs, not to exceed 166 million gallons annually, for use within the above specified place of use.² A term of the permit limited the total

¹ File No. 50131, official records in the office of the State Engineer.

² Exhibit No. 2, public administrative hearing before the State Engineer, June 14, 1999. (Hereinafter "Exhibit No.")

combined duty of water under Permit 50131 and associated Permit 50129 to an amount of water not to exceed 166 million gallons annually.²

The permittee was initially required to file the Proof of Completion of Work in the office of the State Engineer on or before April 1, 1990, and the Proof of Beneficial Use on or before April 1, 1993, under the terms of Permit 50131.¹ To date neither document has been received by the State Engineer.

III.

Beginning in August 7, 1990, and continuing through December 4, 1997, the permittee filed and the State Engineer granted a number of applications for extension of time for filing the required Proof of Completion of Work and Proof of Beneficial Use of the waters.¹ The extensions were requested for a multitude of reasons, including changes in ownership, litigation, and engineering problems, an inability to access the mining claims, and unresolved disputes with Federal Agencies, such as the Bureau of Land Management (BLM), the U.S. Fish & Wildlife Service, and the U.S. Forest Service on grounds relating to the control and management of the Desert Tortoise and other endangered species.

IV.

A certified letter from the State Engineer's office dated March 31, 1998,³ noticed the permittee that unless substantial progress was made, or significant mitigating circumstances existed, future applications for an extension of time would be denied. Permit 50131 was canceled by the State Engineer on March

³ Exhibit No. 6.

30, 1999.⁴ The State Engineer found that the owner had not shown good cause to grant an extension of time as provided under NRS § 533.390 and 533.410, and that the owner was not proceeding in good faith and with reasonable diligence as provided under NRS § 533.395(1). The permittee timely petitioned the State Engineer for a public administrative hearing to review the cancellation pursuant to NRS § 533.395(2).⁵

V.

After all parties of interest were duly noticed by certified mail,⁶ a public hearing was held on June 14, 1999, in Las Vegas, Nevada, before representatives of the State Engineer regarding the petition for review of the cancellation of Permit 50131.⁷

FINDINGS OF FACT

I.

The petition for review of cancelled Permit 50131, submitted by Kenneth Ian Matheson, as agent, referenced Railroad Pass, project mining claims Mijo 16 and/or Mijo 17 and reclamation and air pollution control permits, in the explanation of the request for a review of the cancellation of Permit 50131.⁵ This project site and mining claims are not appurtenant to the point of diversion and place of use of Permit 50131. The petition evidently references potential water use within a portion of

⁴ Exhibit No. 7.

⁵ Exhibit No. 8.

⁶ Exhibit No. 1.

⁷ Transcript, public administrative hearing before the State Engineer, June 14, 1999. (Hereinafter "Transcript")

Section 14, T.23S., R.63E., M.D.B.&M.,⁸ approximately 23 miles north of the place of use allowed by Permit 50131.

At the administrative hearing, Mr. Kenneth Ian Matheson, agent for the permittee, submitted documentary evidence⁹ and provided testimony concerning the history of the project envisioned under Permit 50131 and at other projects he was involved with in the area. Again, some of the documentary evidence submitted may not reference Permit, 50131, including information on possible developmental delays, costs, location, milling, processing and BLM correspondence associated with the Railroad Pass, Mijo 16 and/or Mijo 17 projects.¹⁰ The permittee supplied no finite date for the completion of a drilled well and the measurement of beneficial use of Permit 50131.²

Mr. Matheson reviewed the permittee's extension requests from 1990 through 1998 with representatives of the State Engineer.¹¹ Mr. Matheson referenced what he called significant and substantial problems with various entities, including the BLM, regarding the conservation plan for the Desert Tortoise, the governmental policy for holding mining claims, the legal issues concerning financing, and the assay findings.¹² He also indicated that the engineering problems, as mentioned in the extension requests, were assaying problems.¹³ Mr. Matheson testified that

⁸ File No. 61661, official records in the office of the State Engineer.

⁹ Exhibit No. 9.

¹⁰ Exhibit No. 9, tabs 3, 4, 9, 14, and 15.

¹¹ Exhibit No. 3.

¹² Transcript, pp. 10, 13, 14, 17, 28, 32 and 33.

¹³ Transcript, p. 28.

no well has been drilled at the point of diversion identified under Permit 50131.¹⁴

The State Engineer finds that over eleven years have passed since Permit 50131 was granted and that the permittee is unable to timely resolve the multiple conflicts and problems concerning access and development of the property and cannot determine a definite period of time to establish beneficial use. The State Engineer further finds that no well has been drilled, that no proof of completion of work or proof of beneficial use have been filed, and that no water has been beneficially used at the point of diversion identified under Permit 50131, despite the numerous extensions of time granted by the State Engineer. Additionally, the State Engineer finds that some documentary evidence and information, provided by the permittee in support of further extension requests, was not pertinent to Permit 50131.

II.

The Application for Extension of Time request submitted by the permittee on April 18, 1995, referenced a pending appeal to the BLM.¹ By certified letter dated April 28, 1995, the State Engineer's office requested a copy of the BLM's response to the permittee's appeal within 30 days of receipt of the response.¹⁵ The permittee's response dated May 9, 1995, indicated that the BLM had rejected the appeal and the permittee intended to file applications to move Permits 50129 and 50131 to a mining claim in the north part of the basin not subject to the same Desert Tortoise regulation.¹

¹⁴ Transcript, pp. 39 and 40.

¹⁵ Exhibit No. 4.

By letter dated May 21, 1995, the State Engineer's office sent notice to the permittee that unless substantial progress was made, or significant mitigating circumstances existed, future applications for the extension of time would be denied.¹⁶ With regards to Permits 50129 and 50131 "substantial progress" was considered to include the filing of the proposed change applications, as suggested by the permittee, prior to April 1, 1996.¹⁴

Application 61661 was filed on November 1, 1995, to change the point of diversion and place of use of the water previously appropriated under Permit 50129.⁸ Permit 61661 was granted by the State Engineer on December 6, 1996, and moved half of the original total combined duty of Permits 50129 and 50131 (83 million gallons annually) to a new place of use different than that identified under Permit 50131. No change application was filed prior to April 1, 1996, as set forth in the May 21, 1995, letter from the State Engineer nor had a change application been filed even prior to the cancellation of Permit 50131. At the administrative hearing, Mr. Matheson again proposed to also transfer Permit 50131 to another project area where he could put the water to beneficial use.¹⁷

The State Engineer finds that the permittee had ample time to apply to transfer the remaining portion of the total combined duty under Permit 50131 to another point of diversion and place of use, yet never applied to do so within the time frame established by the State Engineer or prior to the cancellation of

¹⁶ Exhibit No. 5.

¹⁷ Transcript, pp. 42 and 48.

Permit 50131. The State Engineer further finds that the permittee was duly notified that additional extensions would not be granted without substantial progress toward perfecting Permit 50131. Additionally, the State Engineer finds that the permittee did not present evidence at the administrative hearing to demonstrate substantial progress to put the water to beneficial use as envisioned under Permit 50131.

III.

The State Engineer granted eight extensions of time for filing the proof of completion of work and also granted five extensions of time to establish beneficial use and file the beneficial use under Permit 50131.⁹ Pilot Plant, Inc., has owned Permit 50131 since June, 1993, and has been shown as owner-of-record of Permit 50131 in the State Engineer's office since September 3, 1996.¹

In the notice of cancellation of Permit 50131 dated March 30, 1999, the State Engineer found that retaining a water right permit for an indefinite period of time for the proposed, prospective or pending use of water was contrary to the intent of Nevada Water Law.⁴ The State Engineer finds the permittee did not show good cause for any further extension of time and verifies the original finding of cancellation.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁸

¹⁸ NRS Chapters 533 and 534.

II.

The State Engineer concludes that the permittee has not shown good cause to rescind or modify the cancellation of Permit 50131 and concludes that the permittee has not demonstrated good faith and reasonable diligence as provided under NRS § 533.395(1).¹⁹ The State Engineer further concludes that since the approval of Permit 50131 in 1988 the evidence indicates that water was not put to beneficial use at the permitted place of use within the SE¼ of Section 12, T.27S., R.63E., M.D.B.&M.

RULING

The cancellation of Permit 50131 is hereby affirmed on the grounds that no evidence was provided showing that good faith and reasonable diligence were exercised in timely applying water to the place of use identified under Permit 50131.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.

State Engineer

RMT/DJL/cl

Dated this 11th day of
August, 1999.

¹⁹ NRS § 533.390(2) and 533.395.