

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

IN THE MATTER OF PERMITS 56708 AND )  
56709 FILED TO CHANGE THE POINT OF )  
DIVERSION AND THE PLACE OF USE OF A )  
PORTION OF THE UNDERGROUND WATER )  
PREVIOUSLY APPROPRIATED UNDER )  
PERMIT 46124, WITHIN THE HONEY LAKE )  
VALLEY HYDROGRAPHIC BASIN (097), )  
WASHOE COUNTY, NEVADA. )

RULING

# 5135

GENERAL

I.

Application 56708 was filed on August 29, 1991, by Raymond D. May and Gary L. Tope to change the point of diversion and the place of use of 3.0 cubic feet per second (cfs), not to exceed 748.0 acre feet annually (afa), that being a portion of the water previously appropriated under Permit 46124. The proposed manner and place of use is for irrigation purposes within the SW $\frac{1}{4}$  and a portion of the S $\frac{1}{2}$  S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 11, T.26N., R.18E., M.D.B.&M. The proposed point of diversion is described as being located within the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 11.<sup>1</sup>

II.

Application 56709 was filed on August 29, 1991, by Raymond D. May and Gary L. Tope to change the point of diversion and the place of use of 3.0 cfs, not to exceed 748.0 afa of water, that being a portion of the water previously appropriated under Permit 46124. The proposed manner and place of use is for irrigation purposes within a portion of the NW $\frac{1}{4}$  of Section 11, and a portion of the S $\frac{1}{2}$  SW $\frac{1}{4}$  of Section 2, T.26N., R.18E., M.D.B.&M. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 11.<sup>2</sup>

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<sup>1</sup> File No. 56708, official records in the Office of the State Engineer.

<sup>2</sup> File No. 56709, official records in the Office of the State Engineer.

### III.

Title to Permit 46124 has been assigned through a series of owners with the current owners of record, Gary L. Tope and Ray D. May, being assigned ownership on March 18, 1992.<sup>3</sup>

### FINDINGS OF FACT

#### I.

Permits 56708 and 56709 were issued to change the point of diversion and the place of use of the water previously granted for appropriation under Permit 46124. Although this senior water right was totally abrogated with the approval of Permits 56708 and 56709, it still represents the starting point at which the history of Permits 56708 and 56709 begins. The State Engineer finds that any review of the development of the water granted under Permits 56708 and 56709 must also include those events that have occurred under Permit 46124.

#### II.

The State Engineer issues a water right permit with the assumption that there is a reasonable probability that the water requested for appropriation will be placed to its intended beneficial use. This assumption takes into consideration that the development of a water right to its full beneficial use often occurs in stages, the first of which is the construction of the works of diversion. When amended Application 46124 was filed on September 8, 1982, the applicant estimated that it would take two years to construct and equip the well. The State Engineer accepted this estimate and issued Permit 46124 with the condition that the well must be drilled and fully functional on or before April 21, 1987. This date also represents the deadline for the filing of the proof of completion, which describes the well characteristics.

Once the works of diversion have been properly constructed and the proof of completion filed in its correct and complete form, the permittee can proceed with the application of the water to its permitted beneficial use. The State Engineer realizes that the development of a water resource to a point where full beneficial use can be recorded may require several years of gradual forward progress. This point is reflected by the State Engineer allowing the permittee five years from the issuance of the permit to establish full beneficial use.<sup>3</sup>

Under the terms and conditions issued with Permit 46124, the permittee was expected to construct and operate the proposed well within two years and establish beneficial use of the water

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<sup>3</sup> File No. 46124, official records in the Office of the State Engineer.

within a five year period. The State Engineer finds that these initial deadlines serve as the starting point beyond which the history of any extensions of time requested under Permits 46124, 56708 and 56709 will be measured.

### III.

The proof of completion is the first proof, which must be filed under the conditions set forth by the State Engineer. If for reasons that must be brought to the State Engineer's attention, the holder of a water right permit is unable to drill and equip the permitted well before the arrival of the proof of completion deadline, additional time may be requested through the filing of an application requesting an extension of time.<sup>4</sup> This application must contain sufficient information to justify a granting of time beyond the proof deadline date. If approved, this extension of time does not exceed one year and must be applied for on an annual basis. The State Engineer will extend a deadline only for good cause shown as provided under NRS § 533.390. An identical process is in place, should a permittee be unable to meet the established deadline for submitting the proof of beneficial use.

The inability of the various owners of Permit 46124 to complete the works of diversion or achieve beneficial use within the time set forth within the permit terms is evidenced in the annual requests for additional time that were filed from 1987 to 1992. The approval of each of these annual extensions carried with it a written warning that no further extension would be granted except for good cause shown as provided under NRS § 533.390 and 533.400. The approval of the 1989 application for extension of time contained a detailed letter that placed the owner of Permit 46124 on notice that the failure to proceed in good faith and with reasonable diligence as provided under NRS § 533.395(1) would result in a denial of any further extension request and cancellation of the permit.<sup>5</sup> The approval of the 1989 request was based upon a willingness by the State Engineer to grant the permittee an opportunity to complete the proposed test wells and to determine whether the target area would produce water, and to demonstrate an acceptable degree of reasonable progress in completing the final works of diversion.<sup>3</sup> The State Engineer finds that as early as 1989 the Office of the State Engineer had expressed a serious concern over the lack of work that has been performed in perfecting the water right granted under Permit 46124.

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<sup>4</sup> NRS § 533.380(3)

<sup>5</sup> Letter dated May 23, 1989, File No. 46124, official records in the Office of the State Engineer.

#### IV.

The application for extension of time that was submitted on March 1, 1991, precipitated a response in the form of a protest, whose grounds were the subject of a public hearing held before the State Engineer on April 18 and May 2, 1991. It was the protestant's contention that although the permittee had received prior extensions of time to drill and equip the proposed point of diversion, little progress had been made in developing the well. After consideration of the evidence and testimony brought forth during the hearing, the State Engineer issued a verbal ruling in which the protest to the request for an extension of time was overruled. An extension of time under Permit 46124 was granted for a period of six months for the filing of the proof of completion and eighteen months for the proof of beneficial use.<sup>6</sup> The State Engineer finds that under the conditions set forth by State Engineer's Ruling No. 3799, a finite period of time was granted within which the owner of Permit 46124 was expected to complete the works of diversion and place the water to its intended beneficial use.

#### V.

The State Engineer's office has established a formal procedure for the transfer of title to a water right to a new owner. An examination of the record of information found within the permit file specific to Permit 46124 identifies several parties that have acquired and sold their interests in this permit, the most recent of which are Ray D. May and Gary L. Tope.<sup>3</sup> At the time of their acquisition of Permit 46124, the previous owners had not developed the water right to a degree that would allow the filing of the proofs of completion and beneficial use as required under the permit terms. The State Engineer finds that with the assignment of ownership Ray D. May and Gary L. Tope inherited the liabilities created by the prior owners failure to drill and equip the well and to establish beneficial use as required under the terms of the permit.

#### VI.

The Nevada Revised Statutes allow for a holder of a water right permit to request a change in the place of use, manner of use and point of diversion of all or a portion of a water right.<sup>7</sup> This transfer is accomplished through the submittal and eventual approval of a change permit through

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

<sup>7</sup> NRS § 533.345

the Office of the State Engineer. Although this transfer may totally abrogate an existing water right, stripping it of its diversion rate and annual duty of water, the fact that this transfer has been approved does not free the holder of the change permit from adhering to the conditions and limitations set forth within the permit that has been changed. Permit 46124 represents the base of the abrogation tree from which changes in its permitted place of use and point of diversion were granted under Permit 56708 and 56709. The State Engineer finds that Permits 56708 and 56709 were issued subject to the terms and conditions imposed on Permit 46124 and that it is the responsibility of the holder of these change permits to comply with these original conditions.

#### VII.

The filing of Permits 56708 and 56709 were timely protested by Washoe County. These protests were overruled by State Engineer's Ruling No. 3892, which was issued on June 26, 1992. Subsequently, this decision by the State Engineer was appealed through the proper judicial channels, beginning a period of litigation that did not conclude until the withdrawal of the protestant's appeal in 1997.<sup>2</sup> The applications for extensions of time that were submitted during the period of time when the State Engineer's decision was being appealed, referenced the judicial review as the reason they were unable to proceed with the development of Permits 56708 and 56709.<sup>1,2</sup> The State Engineer finds that some uncertainty regarding the ultimate fate of Permits 56708 and 56709 existed from the filing of the protestant's appeal of State Engineer's Ruling No. 3892, to the dismissal of the appeal on August 19, 1997, and that this uncertainty contributed to some extent to the approval of extensions of time that occurred during this period. The State Engineer finds that the legal uncertainties present during the period of litigation were removed with the dismissal of the protestant's appeal in August 1997.

#### VIII.

The conclusion of the protestant's legal challenge in August 1997 was followed by the submittal of an application for extension of time on December 2, 1997, in which the permittees stated that they were prepared to proceed with the completion of the works necessary to place the subject rights to beneficial use. The permittees requested one additional year within which to comply with the permit terms. In response, the State Engineer granted the permittees' request by extending the deadline for submitting the proof of completion and the proof of beneficial use to November 2, 1998. As was the case, in previous extensions, the permittees were advised that no

further extensions would be granted beyond this point except for good cause shown. The permittees' expectation to proceed with the construction of the proposed well was not realized within this one-year extension, with additional extensions requested in 1998 and 1999. These applications for extension of time to file the proof of completion and the proof of beneficial use made no mention of any progress contributing to the completion of the well, but did contain references to the past litigation that was resolved in 1997.

The seriousness of the State Engineer's concern over the mounting number of extensions of time is underscored by the warning that was contained in the letter that was sent by certified mail to the permittees on March 30, 2000. In no uncertain terms, the permittees were put on notice that unless substantial progress was made or significant mitigating circumstances exist, future applications for extension of time may be denied.<sup>1,2</sup> A properly endorsed receipt for the certified mailing was received in the Office of the State Engineer signifying that the permittees had been properly noticed at their correct addresses of record. The State Engineer finds that the March 30, 2000, letter defines a set of criteria that must be met before any consideration can be given to extending the proof deadline an additional year.

#### IX.

When the deadline for filing the proof of completion and the proof of beneficial use was extended to November 2, 2001, it marked the ninth time that this date had been moved forward under Permits 56708 and 56709. If the entire abrogation tree is considered, the period of extensions for the filing of the proof of completion under Permits 46124, 56708 and 56079 increases to fourteen years. During this time period, a succession of owners have received written warnings from the Office of the State Engineer advising them of the need to maintain an acceptable level of progress in drilling and equipping the proposed well. Similar warnings have also been issued regarding the failure to attain any degree of beneficial use of the water. While the past and present owners have been involved in protests and appeals, which may have delayed their projects, these obstacles were ultimately resolved in the permittees' favor. Despite past assurances by the permittees that they were prepared to move forward with the project, the State Engineer finds that there exists an unequal balance between the amount of additional time that the permittees have been allowed to develop their water rights and the minimal results they have achieved and presented to the State Engineer.

X.

Every water right application that is accepted for filing within the Office of the State Engineer is assigned a serial number under which a file is created to receive any information relevant to the application. Contained within this record is information specific to the owners of record, their designated agents and the addresses in which these parties can be noticed. It is the water right holder's responsibility to maintain a current and correct mailing address with the State Engineer, in addition to following the proper procedure for transferring ownership. Accordingly, by final notices dated November 6, 2001, and December 14, 2001, Raymond D. May and Gary L. Tope and their agents were advised by the Office of the State Engineer of the need to file the proof of completion and the proof of beneficial use on or before November 2, 2001. All parties were also advised that if the subject proofs or applications for extension of time were not received within thirty days from the date of the notice Permits 56708 and 56709 would be subject to cancellation. Signed receipts for the letters mailed to Raymond D. Tope and Gary Tope and their agents Barry Fitzpatrick and Rob Anderson were received in the Office of the State Engineer signifying that all parties had been properly noticed of the need to submit the required documents as well as the penalty that would follow if they failed to do so. These final notices failed to initiate a timely response from any of the noticed parties within thirty days, which resulted in the cancellation of Permits 56708 and 56709 on January 25, 2002.

Under the provisions of NRS § 533.395 (2), the holder of a water right permit that has been cancelled may, within sixty days of the cancellation, submit to the Office of the State Engineer a written petition requesting a review of the cancellation at a public hearing. The intent of the hearing is to allow the permittees to present additional information to support a rescission or modification of the original cancellation. A written petition requesting a review of the cancellation of Permits 56708 and 56709 was timely received in the State Engineer's office. Contained within the petition was an explanation that communication problems between the agent and the permittees had contributed to the failure to respond to the final notices. It was also the petitioner's contention that the notice to Raymond May was sent to an old address.<sup>1,2</sup> In response to this explanation, the State Engineer finds that Raymond May was sent final notice at his address of record and that any miscommunication between the permittees and their agent while unfortunate, is a private matter between these parties.

## XI.

In accordance with the provisions found under NRS § 533.395(2), a public hearing was held on May 1, 2002, in the matter of the review of cancelled Permits 56708 and 56709. This hearing was attended by Barry Fitzpatrick on behalf of the permittees and by Ray May, Jr., who were advised that any reinstatement of the subject cancelled permits would hinge upon the approval of the application for extensions of time that were to be submitted for filing immediately after the conclusion of the hearing.<sup>1,2</sup> A review of the extensions of time filed by the permittees' agent on May 1, 2002, finds the argument for an extension centers on the following contentions.<sup>1,2</sup>

1. Delays resulting from the 1992 litigation, which according to the permittees was concluded in 1998.
2. Additional time is required to complete an analysis of the quality and quantity of water available from the proposed point of diversion.
3. The parties are a party in a pending lawsuit regarding groundwater contamination.
4. Raymond May was unaware of the final notice due to the fact that it was not sent to his current valid address.

In response to these points the State Engineer finds the following

1. The 1992 litigation was concluded in August of 1997 after which the permittees were free from any obstacles it may have created.
2. The ten years that have passed since the approval of Permits 56708 and 56709 was sufficient time to perform any analysis of the water resource, even if the period of litigation is taken into consideration.
3. Using an event that may occur at some future time cannot be explanation for a lack of progress since 1985.
4. The Office of the State Engineer followed the proper noticing procedure, which is based on those addresses that have been supplied by the permittees or their agents. If Ray May was unaware of the final notice it is through no fault of the Office of the State Engineer.

## XII.

Based upon the information contained within the May 1, 2002, applications for extension of time, the State Engineer finds that it does not identify any degree of substantial progress or

significant mitigating circumstances associated with Permits 56708 and 56709; therefore, these extensions of time must be considered for denial.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>8</sup>

#### II.

The history of extensions of time associated with Permits 46124, 56708 and 56709 spans a period of time beginning in April 21, 1987, and concluding on November 2, 2001. During this time, successions of owners have failed to satisfy the basic requirement of drilling and equipping the proposed wells. The State Engineer concludes that there is no longer a reasonable expectation that the water rights granted under Permits 56708 and 56709 will ever be placed into beneficial use.

#### III.

The intent of the extension of time provision is to allow the permittee additional time to comply with the deadline for filing the proof of completion and proof of beneficial use. An extension of time can only be issued upon proof of good progress or the existence of significant mitigating circumstances. It is the permittees' responsibility to present the reason for which the extension is needed in a clear and complete manner. Extensions of time are issued on a finite basis with each additional annual request requiring evidence of a higher degree of progress. If in his judgment, the holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the permit, the State Engineer shall cancel the permit. The failure to provide the proof and evidence required for the completion of work and attainment of beneficial use is prima facie evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the appropriation.<sup>9</sup> The State Engineer concludes that the permittees' inability to achieve an acceptable level of progress in perfecting the water rights issued under Permits 56708 and 56709 qualifies these permits for cancellation.

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<sup>8</sup> NRS chapters 533 & 534; NRS § 533.395.

<sup>9</sup> NRS § 533.395(1)

IV.

The State Engineer concludes that the approval of additional extensions of time under Permits 56708 and 56709 would jeopardize the integrity of the permitting process by perpetuating the permittees' lack of reasonable progress and due diligence.

V.

The State Engineer concludes that the applications for extension of time that were submitted on May 1, 2002, must be denied and that this denial prevents a rescission of the State Engineer's January 25, 2002, cancellation of Permits 56708 and 56709.

**RULING**

The applications requesting an extension of time to file the proof of completion and the proof of beneficial use filed on May 1, 2002, under Permits 56708 and 56709 are hereby denied and Permits 56708 and 56709 remained cancelled in accordance with the State Engineer's January 25, 2002, cancellation.

Respectfully submitted,



HUGH RICCI, P.E.  
State Engineer

HR/MB/jm

Dated this 10th day of

July, 2002.