

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

IN THE MATTER OF APPLICATIONS)
FOR EXTENSION OF TIME FOR)
PERMITS 62497, 62498 AND 62499)
WITHIN THE JARBIDGE RIVER AREA)
HYROGRAPHIC BASIN (39), ELKO)
COUNTY, NEVADA.)

RULING

5713

GENERAL

I.

Application 62497 was filed on October 4, 1996, by Nevada Oil and Mining Company to change the place of use of 0.1 cubic feet per second (cfs), not to exceed 72.4 acre-feet annually (afa), of water previously appropriated under Permit 57204. The source of water is described as Starlight Portal, an underground source. The proposed manner and place of use is for irrigation and domestic purposes within the S½ S½ of Section 9, portions of W½ of Section 15, portions of Section 16, portions of Section 21, and portions of W½ of Section 22, T.46N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 21, T.46N., R.58E., M.D.B.&M.¹

II.

Application 62498 was filed on October 4, 1996, by Nevada Oil and Mining Company to change the place of use of 0.1 cfs, not to exceed 72.4 afa, of water previously appropriated under Permit 57205. The source of water is described as Dinky Spring, a surface water source. The proposed manner and place of use is for irrigation and domestic purposes within the S½ S½ of Section 9, portions of the W½ of Section 15, portions of Section 16, portions of Section 21, and portions of the W½ of Section 22, T.46N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 21, T.46N., R.58E., M.D.B.&M.²

III.

Application 62499 was filed on October 4, 1996, by Nevada Oil and Mining Company to change the place of use of 0.4 cfs, not to exceed 290 afa, of water previously appropriated under

¹ File No. 62497, official records in the Office of the State Engineer.

² File No. 62498, official records in the Office of the State Engineer.

Permit 57206. The source of water is described as Creek Spring, a surface water source. The proposed manner and place of use is for irrigation and domestic purposes within the S½ S½ of Section 9, portions of the W½ of Section 15, portions of Section 16, portions of Section 21, and portions of the W½ of Section 22, T.46N., R.58E., M.D.B.&M. The proposed point of diversion is described as being located within the NE¼ NE¼ of Section 21, T.46N., R.58E., M.D.B.&M.³

IV.

Applications 62497, 62498 and 62499 were permitted on August 13, 1998, and the applicant has filed extensions of time for the filing of the required Proofs of Beneficial Use. These extensions of time were protested by John Bernt on the following grounds:^{1,2,3}

Nevada Oil and Mining Company has also submitted applications no. 57204 through 57206 which were later changed to applications no. 62497 through 62499. These applications claim beneficial use of waters from the Bourne Creek drainage for irrigation purposes. The suggestion that there has been beneficial use of water has no merit: Nevada Oil and Mining Company has terraced an otherwise grass-covered southerly-exposed slope above the town of Jarbidge and planted non-native species of trees. The alleged beneficial use of the waters is solely for irrigation of these stunted trees which have consistently been killed by exposure on a hill-side where not even native tree species will grow. The trees and bushes do not have any commercial or aesthetic value. There has never been *any* beneficial use of water associated with the cited three applications. Any request for an extension of time to demonstrate proof of beneficial use should be denied.

V.

An administrative hearing was held on September 22, 2005, to receive evidence and testimony regarding extensions of time filed by the applicant for Permits 62497, 62498 and 62499.⁴

FINDINGS OF FACT

I.

The water for this irrigation project first came into existence with the approval of Permits 57204, 57205 and 57206 on April 7, 1993. The State Engineer issued Permits 57204, 57205 and 57206 with the condition that the proof of completion is filed by May 7, 1994, and the proof of

³ File No. 62499, official records in the Office of the State Engineer.

⁴ Transcript and Exhibits, public administrative hearing before the State Engineer, September 22, 2005. Hereinafter the transcript will be referred to by page number and the exhibits by exhibit number.

beneficial use is filed by May 7, 1997. An examination of the files show that the proof of completion of work was timely filed June 2, 1994; however, the proof of beneficial use date could not be met by the applicant and extensions of time were filed and approved in 1997 and 1998.⁵

In October of 1996, the applicant filed three change applications on Permits 57204, 57205 and 57206 for the purposes of expanding the place of use of the project. Change Applications 62497, 62498 and 62499 were permitted on August 13, 1998, and were issued with a set of limitations and conditions. One of the conditions of the permits is the filing of an affidavit showing proof of beneficial use. The proof of beneficial use was first due on May 7, 2000. The applicant was unable to meet that deadline and has opted to file annual extensions of time from May 7, 2000, to May 7, 2006.^{1,2,3}

The State Engineer finds that the applicant has filed for two extensions on the original permits and an additional six extensions on the change permits and that the project has spanned a time period of just over twelve years, from April 7, 1993, to present.

II.

An administrative hearing was held on September 22, 2005, to receive evidence and testimony regarding the extensions of time filed by the applicant for Permits 62497, 62498 and 62499.

From 1993 to 2005, the applicant has made annual expenditures on the project totaling \$655,101.89.⁶ Approximately \$65,000 of additional expenditures was made in 2005 on engineering, labor and equipment.^{7,8}

As to the property itself, the applicant indicated that each year, beginning in 1991, trees have been planted and irrigated within the place of use.⁹ The trees are a variety of pine species that come from nursery stock. The project started with 900 trees irrigated from a drip irrigation system with 16,000 feet of piping. The system was not adequate to sufficiently water the trees on part of the property. As a result, every year a section of the drip system is dug out and

⁵ File Nos. 57204, 57205 and 57206, official records on file in the Office of the State Engineer.

⁶ Transcript, p. 37.

⁷ Transcript, pp. 38-41 and p. 86.

⁸ Exhibits 29 and 30.

⁹ Transcript, p.44.

replaced with four-inch pipe and Rainbird sprinklers. About 300 to 400 additional trees have been planted over the years to replace original trees that were unable to survive.¹⁰

The trees planted were described as bare-root trees approximately four to five inches high. The trees were planted in five landings cut with a dozer into the hillside.¹¹ It was estimated that where the drip system was in place, approximately 30% of the trees have died.¹² It was opined that the survival rate would increase with the change over from the drip irrigation system to the sprinkler system.¹³

Photographs of the project provided by the applicant show installation of water lines, sprinklers and planted trees. The trees vary in size with some trees as large as 12-foot in height. The project area appears to be a grass-covered slope above the town of Jarbidge into which terraces have been cut into the hillside to facilitate the planting of various pine species. Photograph #8 illustrates a typical terrace with sprinkler irrigation watering various pine tree species ranging in size from 1 to 12 feet in height.¹⁴

The State Engineer finds that the applicant has continuously installed in phases, water intake structures, water distribution pipelines and a drip irrigation system. Further, the applicant has planted about 1,300 trees and is in the process of converting from the drip irrigation system to a sprinkler irrigation system in a continuing expansion of the project.

III.

The law requires that the State Engineer shall not grant an extension of time unless it is determined that the applicant has submitted proof and evidence of proceeding in good faith and with reasonable diligence to perfect the application. The failure to provide the proof and evidence required is prima facie evidence that the holder is not proceeding with good faith and reasonable diligence to perfect the water right.¹⁵ In regards to an extension of time, 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.¹⁶

¹⁰ Transcript, pp. 63-64.

¹¹ Transcript, pp. 65-66.

¹² Transcript, p. 71.

¹³ Transcript, p. 74.

¹⁴ Exhibit 31.

¹⁵ NRS § 533.380 (3), (4).

¹⁶ NRS § 533.380 (4).

The protest indicates that the irrigation project has no commercial or aesthetic value and that no beneficial use has occurred under the subject permits. The protestant conceded that trees have been planted and replanted over the years with some trees dying and others as high as 9 feet tall. Water, at least occasionally, has been applied to some trees. However, the protestant's position is that this water use does not constitute a beneficial use of water and that there is no benefit to disturbing an otherwise undisturbed mountain side and planting trees that have no commercial or aesthetic value.¹⁷

The applicant testified that the trees have enhanced the overall value of his property and could serve a commercial purpose at some point in the future.¹⁸ The issue of aesthetic value is more abstract. The applicant believes that the trees enhance his property and the protestant sees the trees as disturbing the formerly bare hillside. Obviously, individuals can dispute the visual aesthetics of the tree-planting project, as beauty is in the eye of the beholder, but there is no provision in Nevada water law that requires irrigation permits result in commercial or aesthetic value only that the water be placed to beneficial use.

The State Engineer finds that the applicant is proceeding with good faith and reasonable diligence to perfect the water right permits.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁹

II.

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 application.²⁰ In regards to an extension of time, 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.²¹ Failure to provide the proof and evidence required is prima facie evidence that the holder is not proceeding with good faith and

¹⁷ Transcript, pp. 29-31.

¹⁸ Transcript, pp. 45, 46.

¹⁹ NRS chapters 533 and 534.

²⁰ NRS § 533.380 (3).

²¹ NRS § 533.380 (6).

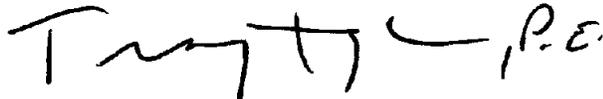
reasonable diligence to perfect the water right.²² The testimony and evidence show that the applicant has made a steady application of effort to perfect the water rights and is proceeding in good faith and with reasonable diligence to perfect the water rights.

The State Engineer concludes that the applicant has met the burden of proof for the issuance of additional extensions of time for the filing of the proof of beneficial use on Permits 62497, 62498 and 62499.

RULING

The request for extensions of time under Permits 62497, 62498 and 62499 are hereby granted to May 7, 2007, with the provision that no further extensions will be granted for filing of the proof of beneficial use and cultural map, except for good cause shown as provided under NRS 533.390 and 533.410.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/TW/jm

Dated this 5th day of
February, 2007.

²² NRS § 533.380 (3).