

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

IN THE MATTER OF APPLICATION 62330 )  
FILED TO CHANGE THE POINT OF )  
DIVERSION AND PLACE OF USE OF THE )  
PUBLIC WATERS OF AN UNDERGROUND )  
SOURCE PREVIOUSLY APPROPRIATED )  
UNDER PERMIT 54311 WITHIN THE )  
IMLAY AREA HYDROGRAPHIC BASIN )  
(72), PERSHING COUNTY, NEVADA. )

**RULING**

**# 5832**

**GENERAL**

**I.**

Application 62330 was filed on July 29, 1996, by Roger Wagner to change the point of diversion and place of use of 0.6684 cubic feet per second (cfs) of the underground waters previously appropriated under Permit 54311. The proposed and existing manner of use remains unchanged and is for mining, milling and domestic purposes. The existing point of diversion is described as being located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 30, T.32N., R.34E., M.D.B.&M. The existing place of use is described as being located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 30, T.32N., R.34E., M.D.B.&M. The proposed place of use is located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T.32N., R.34E., M.D.B.&M. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 19, T.32N., R.34E., M.D.B.&M.<sup>1</sup>

**II.**

Permit 54311 was granted on June 26, 1990, to William W. Dale & Gladys E. Dale and William W. Dale & Associates, Inc. for mining, milling and domestic purposes. The current owner of record is Roger L. Wagner. The point of diversion is described as being from a well located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 30, T.32N., R.34E., M.D.B.&M. The place of use is described as being located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 30, T.32N., R.34E., M.D.B.&M.<sup>2</sup>

<sup>1</sup> File No. 62330, official records in the Office of the State Engineer.

<sup>2</sup> File No. 54311, official records in the Office of the State Engineer.

### III.

Permit 38360 was granted on August 1, 1980, and Certificate 11912 was issued on July 23, 1987 to William W. Dale., for mining, milling and domestic purposes. On March 8, 1994, ownership of Permit 38360, Certificate 11912 was assigned to show Imperial Milling, Inc. as the current owner of record of 0.14 cfs, with a duty of 4.3 million gallons seasonally, for mining and milling purposes. The point of diversion is from an unnamed spring source through a pond, pump and pipeline described as being located within the NE¼ NW¼ of Section 30, T.32N., R.34E., M.D.B.&M. The place of use is described as being located within Section 30, T.32N., R.34E., M.D.B.&M.<sup>3</sup>

#### FINDINGS OF FACT

##### I.

By assignment of ownership letter, dated April 17, 1996, the Division of Water Resources assigned Permit 54311 from William W. Dale & Gladys E. Dale and William W. Dale & Associates, Inc. and Imperial Milling Inc. to show Roger L. Wagner as the current owner of record of 0.6684 cfs, with a duty of 4.3 million gallons annually, supplemental to Permit 38360. Application 62330 proposes to change the point of diversion and place of use of existing Permit 54311.<sup>1,2</sup> The State Engineer finds that the Applicant was notified that Permit 54311 was supplemental to Permit 38360, Certificate 11912.

In correspondence received December 16, 1997, William Kalkbrenner, identified as President of Imperial Milling Inc., referenced Permit 54311 and change Application 62330, and questioned the assignment to Roger L. Wagner. The letter indicated that the pond Permit 38360 should stay intact and that the well was used for make-up water and should not be allowed to be moved to another section. Subsequent correspondence dated December 10, 1998, and January 13, 1999, from Paul A. Richards, Esq. (Richards) by Ivy Bryan-Pulido (Bryan-Pulido) mentioned trespass issues, signature issues and assignment issues. The letter also requested, "that nothing be done on the well #54311 because of the bankruptcy status of IMI." By letter dated February 17, 1999, Richards and Bryan-Polido were notified that the Division of Water Resources would not act on Application 62330 until the bankruptcy issue and apparent title dispute were resolved. On June 13, 2002, the Division of Water Resources sent correspondence to Richards and Bryan-Polido

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<sup>3</sup> File No. 38360, official records in the Office of the State Engineer.

requesting an update on the disposition of the bankruptcy issues within sixty days of the date of the letter. On July 16, 2002, William Kalkbrenner advised the Division of Water Resources that the bankruptcy issue had been dismissed in federal bankruptcy court. The letter again questioned the assignment of Permit 54311 to Roger L. Wagner.<sup>1,2</sup> The State Engineer finds that the bankruptcy issue, regarding Imperial Milling Inc. ownership of supplemental Permit 38360, Certificate 11912, has been resolved. The State Engineer finds that Imperial Milling Inc., the current owner of record of supplemental pond Permit 38360, Certificate 11912, expressed additional concern regarding use by Roger L. Wagner.

## II.

On December 22, 2003, final notice on previously appropriated Permit 54311 was sent to multiple addresses for Roger L. Wagner, Imperial Milling Inc. and their respective agents. While one addressed to Roger L. Wagner was returned by the U.S. Postal Service as unclaimed, a properly endorsed receipt was received for both Roger L. Wagner and the remaining parties and addresses. To date, no current application for extension of time, proof of completion of work, proof of beneficial use or associated filing fees have been received for Permit 54311 as a result of that notice. Permit terms required that these items be timely submitted to avoid permit cancellation for failure to comply with the terms of the permit.<sup>1,2</sup> The State Engineer finds that the Applicant was properly noticed of filing requirements. The State Engineer finds a lack of interest in maintaining the good standing of previously appropriated Permit 54311. The State Engineer further finds that previously appropriated Permit 54311 is subject to cancellation review for failure to comply with the terms of the permit per NRS § 533.380.

## III.

On April 28, 2005, Division of Water Resources sent notice to Roger L. Wagner at his current address of record, requesting the submission of an application to change supplemental Permit 38360 and to update owner of record title to Roger Wagner. The Applicant was warned that failure to respond within 60 days could result in denial of the application. The U.S. Postal Service returned both letters to the Office of the State Engineer stamped "Not deliverable as addressed, unable to forward."<sup>4</sup>

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<sup>4</sup> File No. 62330, official records in the Office of the State Engineer.

On October 26 and 27, 2005, the Division of Water Resources conducted an informal inventory of groundwater use for mining and milling operations located within the Imlay Hydrographic Basin. Mining activity near the site for Permit 54311 was noted; however, the permitted point of diversion was not found. The field investigation noted that project water use was from a series of pond and trenches excavated near the channel of Imlay Canyon. On January 5, 2006, the Division of Water Resources sent notice to Roger L. Wagner, William Kalkbrenner and agents at current addresses of record, again requesting the submission of an application to change supplemental Permit 38360 and to update its owner of record title to Roger Wagner. The Applicant was warned that failure to respond within 30 days could result in denial of the application. The properly signed green certified mail receipt was returned to the Office of the State Engineer for the mailings to Roger L. Wagner, John H. Milton and William Kalkbrenner. The U.S. Postal Service returned the remaining letters to the Office of the State Engineer stamped Not deliverable, unable to forward," "Refused" or "Unclaimed".<sup>1,2</sup>

On February 10, 2006, as outlined by office memorandum, a telephone call from M. Coleen Wagner, described as the wife of Roger Wagner, notified the Office of the State Engineer that Roger Wagner was deceased. She also requested additional time be authorized to submit a response to the January 5, 2006, letter. Mrs. Wagner also reiterated this issue by letter received February 21, 2006, and by fax received February 13, 2006. On April 11, 2006, a six-month postponement of further action was granted to M. Coleen Wagner; however, all interested parties were again notified by certified mail to submit an application to change supplemental Permit 38360 and to update its title to Roger Wagner, as soon as possible. While several mailings were returned by the U.S. Postal Service as unclaimed, properly endorsed receipts were received for the remaining addresses and parties, including M. Coleen Wagner, William Kalkbrenner and agents.<sup>1,2</sup>

Despite a total time period of over a year since the original postponement request, the items necessary to process Application 62330 have still not been submitted, nor has additional postponement time been requested.<sup>1,2</sup> The State Engineer finds that the six-month postponement for Application 62330 has expired. The State Engineer finds ample postponement of time was granted to submit the necessary items to allow the processing of Application 62330, and that over a year has passed since the initial postponement request. The State Engineer finds that no additional postponement has been requested.

The State Engineer further finds that no more postponements of action shall be granted for Application 62330. The State Engineer finds that it is the responsibility of the Applicant, its agent, or its successor in interest, to keep this office informed of a current mailing address. The State Engineer further finds that all interested parties were properly noticed. The State Engineer finds that the Applicant was properly notified of the request for additional information regarding the submission of items necessary to process Application 62330 and failed to comply, despite postponement and multiple notifications of the interested parties.

V.

Per office memorandum dated April 19, 2006, by telephone, William Kalkbrenner supplied an additional address for himself and notified the Division of Water Resources he was sending written concerns regarding the issuance of Application 62330. By letter received on May 15, 2006, William Kalkbrenner again outlined his concerns regarding the issuance of Application 62330.<sup>1,2</sup> The State Engineer finds that the owner of record of supplemental pond Permit 38360, Certificate 11912, has expressed continued concern regarding both the assignment of Permit 54311 to Roger L. Wagner and the proposed utilization of Application 62330 by Roger L. Wagner.<sup>1,2</sup> The State Engineer finds that Imperial Milling Inc. does not show any intent to allow Roger L. Wagner use of supplemental pond Permit 38360, Certificate 11912.

**CONCLUSIONS**

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>5</sup>

II.

Before either approving or rejecting an application, the State Engineer may require such additional information as will enable him to properly guard the public interest.<sup>6</sup>

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<sup>5</sup> NRS chapters 533 and 534.

<sup>6</sup> NRS § 533.375.

### III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:<sup>7</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

### IV.

Since supplemental rights were involved, the Applicant was properly notified of the requirement to submit additional information to the Office of the State Engineer and has failed to do so. The State Engineer concludes that despite several notifications, to date, the information necessary to process Application 62330 has not been received from the Applicant or any of the interested parties. The State Engineer concludes it would threaten to prove detrimental to the public interest to issue a permit under these circumstances.

### V.

The State Engineer finds that the failure to submit the necessary statutory proofs for previously appropriated Permit 54311, from November 10, 1998, to present, indicate a lack of interest in maintaining the good standing of existing Permit 54311. The State Engineer concludes that under this circumstance it would threaten to prove detrimental to the public interest to issue a permit to change existing appropriated right 54311.

### VI.

The State Engineer concludes that the owner of record for supplemental Permit 38360, Certificate 11912, will not currently authorize the use by Roger L. Wagner. The State Engineer concludes that under this circumstance it would threaten to prove detrimental to the public interest to issue a permit for Application 62330.

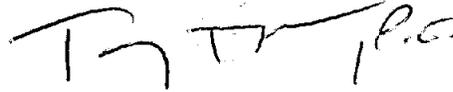
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<sup>7</sup> NRS § 533.370(5).

**RULING**

Application 62330 is hereby denied on the grounds its issuance would threaten to prove detrimental to the public interest.

Respectfully submitted,



TRACY TAYLOR, P.E.  
State Engineer

TT/DJL/jm

Dated this 10th day of

April, 2008.