

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

IN THE MATTER OF CANCELLED)
PERMITS 44505, 44506, 44507, 44508,)
AND 44510 FILED TO CHANGE THE POINTS)
OF DIVERSION AND PLACES OF USE OF)
WATERS PREVIOUSLY APPROPRIATED FROM)
THE UNDERGROUND WATERS WITHIN THE)
DIXIE VALLEY GROUNDWATER BASIN)
(128), CHURCHILL COUNTY, NEVADA.)

RULING
4806

GENERAL

I.

Applications 44505, 44506, 44507, 44508, and 44510 were filed on September 25, 1981, by Ben T. and Mary L. Bartlett, each to change the point of diversion and place of use of a portion of water previously appropriated under Permit 34303 from the underground waters of the Dixie Valley Groundwater Basin, Churchill County, Nevada. Permits 44505, 44506, 44507, 44508 and 44510 were each approved on July 31, 1985, for irrigation and domestic purposes. Permits 44505 and 44506 were issued at a diversion rate of 0.5 cubic-foot per second (cfs). Permit 44507 was issued at a diversion rate of 0.3 cfs, and Permits 44508 and 44510 were issued at a diversion rate of 0.2 cfs. The points of diversions are described as being located within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 9 (Permit 44505); NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9 (Permit 44506); SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9 (Permit 44507); SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 9 (Permit 44508); and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9 (Permit 44510), all in T.21N., R.35E., M.D.B.&M. The place of use under Permit 44505 is 64 acres within the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 9, T.21N., R.35E., M.D.B.&M. The places of use under Permits 44506, 44507, 44508, and 44510 are within the S $\frac{1}{2}$ of Section 9, less 64 acres removed from the W $\frac{1}{2}$ SE $\frac{1}{4}$ and the total combined acreage under Permit 34304, Certificate 11055, Permits 44506, 44507, 44508, 44509 and 44510 is limited to 243 acres and does not include the place of use covered under Permit 34303, Certificate 11222. The permit terms limit these

permits to a duty of 4.0 acre-feet per acre from any and all sources. The current owner of record in the office of the State Engineer of Permit 44505 is the United States of America and the owners of record in the office of the State Engineer of Permits 44506, 44507, 44508, and 44510 are Ben T. and Mary L. Bartlett.¹

II.

Under Permits 44505, 44506, 44507, 44508, and 44510, proofs of completion of work were first due to be filed in the office of the State Engineer on or before August 31, 1986, and the proofs of beneficial use and cultural map were first due to be filed on or before August 31, 1987. Three extensions of time were granted for filing the proof of completion of work, and two extensions of time were granted for filing the proof of beneficial use and cultural map under each permit. In addition, one extension of time was granted for filing the proof of beneficial use under a portion of Permit 34303, which is the underlying water right that forms the base right the subject permits seek to change. On August 12, 1998, Permits 44505, 44506, 44507, 44508, and 44510 were cancelled by the State Engineer for failure to file the proof of completion of work or proof of beneficial use of the waters. The United States of America, Department of the Navy ("NAS-Fallon"), timely petitioned the State Engineer for a public administrative hearing to review the cancellations pursuant to NRS § 533.395(2).¹

III.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on May 18, 1999, in

¹ File Nos. 44505, 44506, 44507, 44508, and 44510, official records in the office of the State Engineer.

Carson City, Nevada, before representatives of the office of the State Engineer regarding the petition for review of the cancellation of Permits 44505, 44506, 44507, 44508, and 44510.

FINDINGS OF FACT

I.

The NAS-Fallon was informed by letter dated June 14, 1988, that a complete chain of title would be required to be filed in the office of the State Engineer to allow the conveyance of all title and interest in the water rights that are the subject of this ruling.² By letter dated September 7, 1988, the NAS-Fallon indicated that the United States acquired the places of use of the subject permits in 1986.² When the subject permits were cancelled in 1998 the owner of the places of use of the subject permits was shown by the Churchill County Assessor to be the United States of America. The NAS-Fallon was informed by letter dated March 9, 1999, that deficiencies still existed that would not allow the State Engineer to convey title of the water rights under Permits 44506, 44507, 44508, and 44510 to the United States and that the necessary documents needed to be submitted by May 9, 1999.¹ The State Engineer finds that Permit 44505 has been assigned to show the United States of America as the owner of record; however, the NAS-Fallon has failed to comply with the requests of June 14, 1988, and March 9, 1999, to provide proper documentation to allow the conveyance of title under Permits 44506, 44507, 44508, and 44510.

² File No. 44505, official records in the office of the State Engineer.

II.

Following the acquisition of land in Dixie Valley, the NAS-Fallon indicated it intended to put the subject waters to beneficial use through an agricultural leasing program as part of a natural resource management plan.³ A lease was to be for a period of ten years, however, the lessee was required to put water to beneficial use within three years.⁴ NAS-Fallon submitted into evidence a timeline covering the years 1987 through 1998 which describes various actions and expenditures concerning the water-righted lands in Dixie Valley.⁵ The last lease awarded ran from 1993 through 1996.⁶ At the administrative hearing, representatives of the NAS-Fallon presented evidence and testimony indicating its inability to perfect the water rights was due to not having a lessee with the necessary capital to complete the work.⁷ The last lease was awarded in 1997, but the lessee could not be bonded as was required as part of the lease award.⁸ The State Engineer finds that the NAS-Fallon is the responsible party for compliance with the permit terms not a lessee.

III.

A witness for NAS-Fallon testified that he is familiar with the lands and the water wells under the subject permits.⁹ The testimony appears to indicate the wells have been drilled¹⁰ and evidence was provided that in 1997 the Navy replaced pumps and

³ Transcript, pp. 12-15, public administrative hearing before the State Engineer. (Hereinafter "Transcript".)

⁴ Transcript, p. 17, and File No. 34303, official records in the office of the State Engineer.

⁵ Exhibit No. 11, public administrative hearing before the State Engineer, May 18, 1999. (Hereinafter "Exhibit".)

⁶ Transcript, p. 18, and Exhibit No. 11.

⁷ Transcript, pp. 13, and 20-21.

⁸ Transcript, p. 13, and Exhibit No. 11.

⁹ Transcript, p. 14.

engines in a few wells,¹¹ however, the capital outlay involved in restoring the relevant grounds to agricultural production would likely be three quarters of a million to one million dollars and there have been problems finding lessees with the necessary capital.¹² Further testimony indicates that application of the natural resource plan is dependent on having a lessee actually make the improvements and develop the grounds, and while there have been a series of leases the lessees have not completed the work.¹³ No evidence was provided that the NAS-Fallon has expended any funds toward putting the relevant lands into agricultural production. The State Engineer finds that no substantial evidence was provided to demonstrate that proof of completion of the works of diversion was anywhere close to being filed in the office of the State Engineer, or that any significant steps have been taken by the NAS-Fallon to put these lands into production. Therefore, the State Engineer finds the NAS-Fallon has not demonstrated good faith and due diligence in perfecting these water rights.

IV.

Churchill County and NAS-Fallon have been discussing options for the water rights owned by the NAS-Fallon within Dixie Valley as part of a countywide effort to secure additional water resources.¹⁴ Evidence provides that in 1996 Churchill County indicated an interest in acquiring a portion of the NAS-Fallon's water rights in Dixie Valley and the most recent applications for extensions of time were based on future use of the waters by Churchill County.¹⁵ However, these discussions have not come to

¹⁰ Transcript, p. 10.

¹¹ Exhibit No. 11.

¹² Transcript, pp. 13, 21.

¹³ Transcript, pp. 12-13.

¹⁴ Transcript, pp. 22-28.

¹⁵ Exhibit No. 11.

fruition. A possibility under consideration is a lease option to tie up the water rights with subleases allowing irrigation until the County needs the water for its municipal use.¹⁶ The State Engineer finds the NAS-Fallon demonstrated an intent to abandon the project as expressed by the terms of the permits and is looking to transfer the permits to an undefined municipal project at an undetermined time and place of use. The State Engineer finds that the holding of a water right by a permittee for future use with no definite plan as to when the waters will go to beneficial use does not demonstrate good faith and due diligence in placing said water to beneficial use.

v.

The concept of due diligence is a common law doctrine applicable to appropriative water rights in Nevada. The concept of due diligence is defined to be the steady application to business of any kind of a constant effort to accomplish any undertaking. The law does not require any unusual or extraordinary efforts, but only that which is usual or ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs.¹⁷ Nevada Revised Statute § 533.380(1)(b) requires the State Engineer to set a time when approving a permit for completion of the application of water to beneficial use that must not exceed ten years. The original applications stated that beneficial use would occur within three years. The statute provides that for good cause shown the State

¹⁶ Transcript, pp. 23-28.

¹⁷ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 546 (1869).

Engineer may extend the time in which the diversion works must be completed or the water applied to its intended beneficial use.¹⁸

Representatives for NAS-Fallon had no estimate of time for putting the subject waters to beneficial use since it is dependent upon awarding a bid to a competent lessee. There is no lessee to use the subject water rights within the described places of use, and the testimony which indicated looking towards municipal use in Churchill County as a means of perfecting the waters contradicted any intent of the NAS-Fallon to go to beneficial use under the terms of the permits. These permits were approved in 1985 and the NAS-Fallon indicates it came into ownership of the permits in 1986. The permits were cancelled in 1998, therefore, more than 12 years had passed since proof of completion of the works of diversion was first due to be filed in the office of the State Engineer. The NAS-Fallon has continually relied on others to place these waters to beneficial use and those other persons or entities have not brought any project to completion. The State Engineer finds the NAS-Fallon has provided no evidence of its efforts to actually place these waters to beneficial use and its reliance on others fails to demonstrate due diligence or good faith in placing these waters to beneficial use within a reasonable amount of time.

CONCLUSIONS

I.

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

¹⁸ NRS § 533.380(3).

¹⁹ NRS Chapters 533 and 534.

II.

Nevada Revised Statute § 533.380(3) provides that the State Engineer may for good cause shown extend the time within which construction of the work must be completed or water must be applied to a beneficial use under any permit issued by him. Proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the appropriation must accompany any application for an extension of time for filing proof of completion of work and proof of beneficial use.²⁰ For the purposes of NRS § 533.380, the measure of reasonable diligence is the steady application of effort to perfect the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances.²¹

The NAS-Fallon failed to present evidence manifesting its intent to place the waters under these permits to beneficial use in a timely manner, but rather only provided evidence that it is in essence relying on others to do so. Its evidence indicated substantial capital outlays are necessary, however, it has only had wells tested for discharge rates, replaced a few pumps and engines, and installed some fencing.²² No evidence was provided as to when it might file proof of completion of the works of diversion or when proof of beneficial use of the waters could be expected. The NAS-Fallon did not provide sufficient evidence showing its steady application of effort to perfect the appropriation in a reasonably expedient and efficient manner under the circumstances. The State Engineer concludes the permittee is the responsible party to substantially comply with the terms of

²⁰ NRS § 533.380(3)(b).

²¹ NRS § 533.380(6).

²² Exhibit No. 11.

the subject permits and the reliance on lessees does not demonstrate good faith and reasonable diligence in placing said water to beneficial use.

III.

The NAS-Fallon has indicated an intent to possibly discontinue the project as envisioned under Permits 44505, 44506, 44507, 44508, and 44510 and transfer the permits to a municipality to hold the water rights for a future use without going to beneficial use in the foreseeable future. The State Engineer concludes the NAS-Fallon has indicated an intent to abandon the project as envisioned under the terms of the permits, or at least an intent to continue to look to some other entity or person to prove beneficial use of the water. This fails to demonstrate its good faith and reasonable diligence in perfecting the subject water rights.

IV.

The NAS-Fallon has failed to submit the necessary documents to complete the chain of title for Permits 44506, 44507, 44508, and 44510 into the name of the United States. Therefore, the State Engineer concludes that the failure to comply with the applicable statutes concerning conveyances demonstrates a lack of due diligence. The State Engineer further concludes that the owners of record in the office of the State Engineer under Permits 44506, 44507, 44508, and 44510 are Ben T. and Mary L. Bartlett, and since the Bartletts have sold the land they have no ability to put the waters to beneficial use under the permits.

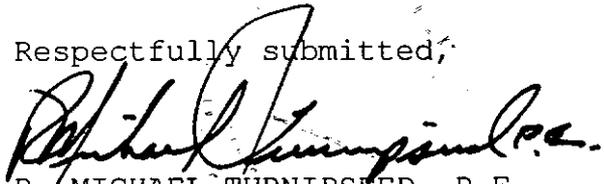
RULING

The cancellation of Permits 44505, 44506, 44507, 44508, and 44510 is hereby affirmed. Any water well constructed and any exploratory or production hole drilled under Permits 44505, 44506,

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44507, 44508, and 44510 must be plugged within sixty (60) days of the date of this ruling in compliance with the latest revision of the Nevada Division of Water Resources "Regulations for Water Well and Related Drilling." A well is not required to be plugged when another valid water right utilizes the well or when the well is utilized for domestic purposes in compliance with Nevada Water Law.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/cl

Dated this 16th day of
November, 1999.