

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

IN THE MATTER OF CANCELLED PERMIT)
45376 FILED TO APPROPRIATE)
UNDERGROUND WATERS WITHIN THE)
CARSON VALLEY GROUNDWATER BASIN)
(105), DOUGLAS COUNTY, NEVADA.)

RULING

4489

GENERAL

I.

Application 45376 was filed by Bernard Furlan on February 23, 1982, to appropriate 0.1 cubic foot per second (cfs) of the underground waters of the Carson Valley Groundwater Basin, Douglas County, Nevada, for industrial and domestic purposes within the SW $\frac{1}{4}$ of Section 4, a portion of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, and a portion of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, all within T.13N., R.20E., M.D.B.&M.¹ The point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 4.¹

II.

Permit 45376 was approved on January 24, 1983, for 0.1 cfs, not to exceed 15.7 million gallons annually (mga). Under Permit 45376, Proof of Completion of Work was first due to be filed in the Office of the State Engineer on February 24, 1985, and Proof of Beneficial Use of the water was first due to be filed on February 24, 1988.¹

III.

Pursuant to a chain of title and by deed dated July 9, 1991, on October 25, 1993, the State Engineer assigned ownership of Permit 45376 to the Carson Valley Business Park Partners (hereinafter "CVBPP").¹

IV.

On July 3, 1996, the State Engineer denied CVBPP's Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use and cancelled Permit 45376.¹ As

¹File No. 45376, official records in the Office of the State Engineer.

provided pursuant to NRS 533.395, on July 26, 1996, the State Engineer received a written petition from CVBPP requesting review of the cancellation at a public hearing before the State Engineer.¹

V.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held before representatives of the Office of the State Engineer on October 23, 1996, at Carson City, Nevada.²

FINDINGS OF FACT

I.

In the first Application for Extension of Time for filing Proof of Completion of Work filed by the permittee it was stated that additional time of one year was needed to complete improvements and join with other owners in the area in a corporation to combine utilities and plan a water utility for the area, including the adjacent properties west and the Douglas County Airport.³ In the second Application for Extension of Time for filing Proof of Completion of Work it was stated that additional time of one year was needed because the preliminary engineering had

²Transcript, public administrative hearing before the State Engineer, October 23, 1996. (Hereinafter "Transcript".) On November 18, 1996, the State Engineer's Hearing Officer received a telephone call from Judge David Gamble wherein she was informed that the Judge had a case before him regarding the purchase of six acre-feet of water rights under Permit 45376. On the date of cancellation of the water right and the date of the administrative hearing in the matter of the cancellation of Permit 45376, the records of the State Engineer did not indicate a purchase and an assignment of any portion of this water right. The Hearing Officer then called legal counsel for CVBPP who was also not aware that any portion of the water right had been sold.

³Application for Extension of Time filed May 15, 1985.¹

been completed for the Airport Industrial Master Plan, but additional time was needed to allow for completion of the water system.⁴

In the third Application for Extension of Time for filing Proof of Completion of Work it was stated that additional time of one year was needed because the economy was slow for the computer industry resulting in delays in development of the Xebec factory on the property and additional time was needed to complete improvements.⁵ In the fourth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use it was stated that additional time of one year was needed because the continuing unreliability of the economy of the computer industry had resulted in slow development on the property, and because at that time a sewer system was being constructed as part of the airport development, and it was hopeful that the owners of water rights in the area could consolidate water under one utility.⁶

In the fifth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use it was stated that additional time of one year was needed because Toreson Industries, Inc. was working on an agreement with Douglas County, and additional time was needed to finalize the agreement and to prepare and process an application to change the point of diversion and place of use of the permit.⁷ In the sixth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use it was stated that additional time of one year was needed because Toreson Industries, Inc. was continuing to negotiate with Douglas County to transfer the water right to the

⁴Application for Extension of Time filed February 21, 1986.¹

⁵Application for Extension of Time filed February 6, 1987.¹

⁶Application for Extension of Time filed February 23, 1988.¹

⁷Application for Extension of Time filed March 20, 1989.¹

County in exchange for a will-serve letter on the permittee's airport property, that the agreement could not be finalized until after March 15, 1990, and additional time was needed as the permittee was seeking a party to assist in development of an industrial park on the permittee's property.⁸ The State Engineer finds that around 1989 the permittee began discussions with Douglas County regarding integrating Permit 45376 into Douglas County's water system planned for the area.

II.

In the seventh Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use it was stated that additional time of one year was needed because Toreson Industries, Inc. needed time to develop the property, and was engaged in negotiations for further development of the property.⁹ On August 6, 1991, the State Engineer, while granting the Application for Extension of Time through February 24, 1992, informed the permittee that additional extensions of time would be reviewed to determine progress toward completion of the diversion work and establishment of beneficial use of the water, and that unless good faith and reasonable diligence were shown, further requests for extensions of time would be denied.¹

In the eighth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use, now filed by CVBPP, it was stated that additional time of five years was needed because the new owner had filed a tentative map for commercial development, and time was needed to complete the map process and ultimately deed the water right to Douglas County for the County providing water service.¹⁰ The tentative map for the phased development of the Carson Valley Business Park was approved

⁸Application for Extension of Time filed February 26, 1990.¹

⁹Application for Extension of Time filed March 29, 1991.¹

¹⁰Application for Extension of Time filed May 22, 1992.¹

on July 16, 1992, and approval of the tentative map required completion and dedication of a water system and water rights to Douglas County.¹¹

On February 24, 1993, CVBPP filed a ninth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use stating that additional time of one year was needed because the engineer needed time to obtain the final map, improvement drawing approval, and make application to change the point of diversion to an existing well in the Douglas County Airport water system to enable utilization of the water.¹ While the request for extension of time was granted through February 24, 1994, the State Engineer informed the CVBPP that additional extensions of time would be reviewed to determine progress toward completion of the diversion work and establishment of beneficial use of the water, and that unless good faith and reasonable diligence were shown, further requests for extensions of time would be denied.¹

The final map for Phase I of the business park was approved by Douglas County in or around September 1993.¹ The place of use under Permit 45376 is within the SW $\frac{1}{4}$ of Section 4, a portion of the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, and a portion of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, all within T.13N., R.20E., M.D.B.&M.¹ The land identified as Phase I of the Carson Valley Business Park is located within the NW $\frac{1}{4}$ of Section 4, and a portion of the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 5, T.13N., R.20E., M.D.B.&M.¹ The State Engineer finds that the place of use under Permit 45376 is not the same as the land identified as Phase I of the Carson Valley Business Park. However, the State Engineer

¹¹File No. 45376, official records of the Office of the State Engineer, Exhibit 1 at p. 4, item 8 attached to October 4, 1996, letter to State Engineer "Conditions of Approval"; Transcript, p. 21, 32 - 33.

further finds that most of the place of use under Permit 45376 is within the total boundaries of the tentative map for the Carson Valley Business Park.¹²

III.

By letter dated March 12, 1992, the State Engineer recommended conditional approval of the tentative map for the Carson Valley Business Park; however, the State Engineer indicated before any final map would be signed that water service commitment had to be determined.¹³ By letter dated June 4, 1993, the State Engineer approved Subdivision Review No. 4155F-1 for Phase I of the Carson Valley Business Park wherein it was indicated that Douglas County would serve water to Phase I under a Douglas County's permit identified as Permit 52958.¹⁴ The State Engineer finds that neither the tentative map nor Phase I of the Carson Valley Business Park was approved with the water supply being identified as Permit 45376; however, the tentative map conditions did require dedication of water rights to Douglas County.

IV.

On March 10, 1994, CVBPP filed a tenth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use stating that additional time of five years was needed because the engineer required more time to complete the process and file an application to change the point of diversion to an existing well in the Douglas County Airport water system to enable utilization of the water, and that the well to be used had not yet been designated by Douglas County.¹ While the request for extension of time was granted through February 24, 1995, the State Engineer informed the CVBPP that the State Engineer found that the

¹²Official records of the Office of the State Engineer.

¹³Exhibit No. 1, public administrative hearing before the State Engineer, October 23, 1996, (hereinafter "Exhibit No. 1").

¹⁴Exhibit No. 2.

owner was not proceeding with good faith and reasonable diligence as required under NRS 533.395(1) in the perfection of Permit 45376.¹ However, on the basis that the State Engineer believes the owner should be informed of extension of time conditions before a request for extension of time is denied, the State Engineer granted the Application for Extension of Time.¹ The State Engineer finds that since 1989 permittees of record had been stating the water right represented by Permit 45376 would be dedicated to Douglas County for incorporation into the County's water system for use in the Carson Valley Business Park, but that by 1996 the permittee had failed to file any said dedication or file a change application to move the point of diversion or place of use to the County's water system.

V.

On March 21, 1995, CVBPP filed an eleventh Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use stating that additional time of one year was needed because the owner's efforts and financial resources had been concentrated on constructing the street and buried utility improvements; therefore, the owner had not had the time and resources available to complete the well.¹ The State Engineer finds that the request for extension of time was granted through February 24, 1996. The State Engineer further finds that the testimony and evidence indicates that the CVBPP never intended to construct a well, but rather to use a County well that was part of the Airport water system.¹⁵

VI.

On March 27, 1996, CVBPP filed a twelfth Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use stating that additional time of one year was needed in that Permit 45376 was to be dedicated to Douglas County

¹⁵Transcript, p. 30.

for connection to the Airport water system, and that at the time of dedication an application to change the point of diversion would be filed.¹ By letter dated July 3, 1996, the State Engineer found that a reasonable period of time had passed in which to construct and equip the well and to establish beneficial use under the permit, to select a suitable well site, to confirm a service agreement with Douglas County, and to file an application to change the point of diversion and place of use of Permit 45376. The State Engineer further found that the record demonstrated that no change application had been filed nor had a tentative map been submitted for a project to be served under Permit 45376. The State Engineer found that the record lacked evidence of a specific plan to be completed within a reasonably definite period of time in which Permit 45376 would be dedicated to Douglas County, or in which beneficial use under Permit 45376 would otherwise be established, and that the owner had not shown good cause for granting an extension of time and cancelled Permit 45376.

Several basic problems underlie proving completion of work and proving beneficial use under Permit 45376. First, when Douglas County originally made the agreement with Toreson Industries for the development of the property at issue the developer was required to participate in the Airport water system expansion.¹⁶ Second, Carson Valley Business Park Partners did not identify in either the tentative map or the final map for Phase I of the development Permit 45376 as the water source to be used to support the development.¹ However, the conditions of approval of the tentative map for the business park, which includes most of the place of use under Permit 45376, required dedication of a water right to Douglas County to serve the project.

¹⁶Transcript, p. 28.

The State Engineer finds there seems to be a lack of understanding in the requirements for proving proof of completion and proof of beneficial use of water rights. Permit 45376 was approved for industrial and domestic use, not municipal or quasi-municipal use; therefore, the provisions of NRS 533.380(4) do not apply. The permittee appears to have believed that once the tentative map was approved under Douglas County's permit, it was not required to actively pursue proving beneficial use of the water under Permit 45376 in a timely manner. Proving beneficial use of the waters is a statutory requirement under Nevada water law.¹⁷ The State Engineer finds that since 1983 no specific plan of development had been identified in the records of the Office of the State Engineer in which Permit 45376 was used as the water source.

VII.

Evidence provided at the public administrative hearing showed that since 1989, and particularly since the approval of the tentative map for the business park in 1992, indicates that the water rights represented by Permit 45376 were to be dedicated to Douglas County for inclusion in the Airport water system for use in the Carson Valley Business Park. However, the tentative map was not signed off using Permit 45376, but rather Douglas County's Permit 52958, and dedication of Permit 45376 to Douglas County had not taken place prior to the hearing on the cancellation. Evidence was also provided that the CVBPP have been somewhat confined in making progress towards filing Proof of Completion and Proof of Beneficial Use of the waters due to the planning of a regional water system for the Douglas Airport area, due to Douglas County's unwillingness to accept dedication of Permit 45376 until plans for

¹⁷NRS 533.380.

the Airport water system were complete, due to slow progress towards completion of the Douglas County Master Plan, and due to planning for flooding problems in the area of the business park.¹⁸

The evidence indicated that a major transportation arterial route originally went through the business park project; however, after the tentative map was approved, but before a final map was processed, Douglas County decided to change the location of the route.¹⁹ The State Engineer finds these problems have been interrelated with moving towards proof of completion of work and proof of beneficial use of the waters under Permit 45376 for the area of the business park since the signing of the tentative map.

VIII.

Douglas County has indicated, in other extensions of time it has filed regarding its permits, that it needs time to plan for the consolidation and growth of the Mountain View/Airport water system pursuant to the Master Plan adopted on April 18, 1996.²⁰ Evidence was provided that Douglas County has implemented a Water Rights Management Plan to identify County owned permits, permit status, points of diversion and places of use.²¹ The County indicated that the Water Rights Management Plan would be completed within two years at which time it would begin the process of filing change applications and proof of beneficial use on most of its water rights.

At the public administrative hearing testimony was provided that a new engineering firm was hired in February 1996²² and began to work on the project and the related issue of dedication of the

¹⁸Transcript, pp. 19, 22 - 23, 26 - 28, 32, 34 - 35, 43 - 44.

¹⁹Transcript pp. 43 - 44.

²⁰Exhibit No. 5.

²¹Exhibit No. 5.

²²Transcript, p. 19.

water right to Douglas County for inclusion in the Airport water system, and the issue of filing a change application to change the point of diversion to a well designated by Douglas County.²³ The evidence indicates that Douglas County now wants CVBPP to dedicate Permit 45376 to cover the development of Phase I of the business park,²⁴ and the permittee was ready to file an abstract of title dedicating the water right to Douglas County, and an application to change the place of use to the entire business park and the Douglas County designated point of diversion as soon as it was signed by Douglas County.²⁵ The Hearing Officer left the record open for a period of 30 days for the filing of the change application and the abstract of title of dedication of the water right to Douglas County.²⁶

On November 18, 1996, CVBPP filed a water rights quitclaim deed whereby it conveyed Permit 45376 to Douglas County,¹ and change Application 62593 was filed by Douglas County to change the point of diversion and place of use of the total quantity of water under Permit 45376.²⁷ However, as previously indicated on November 18, 1996, the State Engineer's Hearing Officer was also informed that a six acre foot portion of Permit 45376 had been sold. On December 22, 1996, Douglas County filed amended change Application 62593 to change the point of diversion, place and manner of use of 0.0875 cfs, not to exceed 13.74 mga, a portion of Permit 45376. The State Engineer finds that the CVBPP timely filed the dedication to Douglas County and the required change application.

²³ Transcript, pp. 19 - 20, 22 - 23, 49 - 50.

²⁴ Transcript, p. 51.

²⁵ Transcript, p. 55.

²⁶ Transcript, pp. 62 - 63.

²⁷ File No. 62593, official records in the Office of the State Engineer.

The State Engineer finds that the record demonstrates that Douglas County would not designate the point of diversion in which to move this water right until October 15, 1996, as it did not have a plan for the water system in the area.²⁸ The State Engineer further finds that the tentative map for the business park was approved using Douglas County water right permit numbers; however, the tentative map conditions require dedication of a water right to Douglas County. The State Engineer finds that development of the business park has been slowed due to the Douglas County's master plan process, flood planning issues, and Airport water system issues. However, the State Engineer further finds based on the fact that the business park has completed one phase of development and is progressing towards the second phase of development, that the tentative map conditions require dedication of water rights for further phased development, that the permittee has shown good faith and reasonable diligence in placing the water to beneficial use in the business park as a whole.

IX.

On November 22, 1996, Application 62616 was filed by Richard Seaman to change the point of diversion, place and manner of use of a 0.0125 cfs, not to exceed 1.96 mga (6 acre foot), a portion of the water previously appropriated under Permit 45376.²⁹ An abstract of title was also filed by Richard Seaman, along with a grant, bargain and sale deed dated November 19, 1996, which shows that Mr. Seaman did not acquire ownership of the 1.96 mga portion of Permit 45376 until after the July 3, 1996, date of cancellation of Permit 45376, and after the October 23, 1996, date of the hearing on the cancellation of the permit.

²⁸ Transcript, pp. 24 - 31.

²⁹ File No. 62616, official records in the Office of the State Engineer.

The State Engineer finds that Mr. Seaman did not own the water right at the time the State Engineer cancelled Permit 45376. The State Engineer finds that a person cannot purchase a water right after the date the water right has been cancelled and resurrect that water right to active status. Therefore, Mr. Seaman had no legal right to notice or participation in the hearing on Permit 45376. The State Engineer also finds that the filing of the change application to move the water right to another location outside of the business park did not comply with the conditions of reinstatement of the water right, which was to finalize dedication of the water right, as required by the tentative map conditions, to Douglas County for inclusion in the Airport water system.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the persons and of the subject matter of this action and determination.³⁰

II.

The State Engineer concludes that when a new owner accepts assignment of a water right permit that permit comes with all the conditions and extensions previously granted by the State Engineer as a part of the history of the water right. Just because a new person accepts ownership of the water right does not mean that person starts anew in the extension of time process.

III.

NRS 533.380(3) provides that the State Engineer may, for good cause shown, extend the time within which construction work must be completed, or water must be applied to a beneficial use under any permit issued by him. Any application for an extension of time for filing proof of completion of work and proof of beneficial use must be accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the

³⁰NRS Chapters 533 and 534.

application.³¹ For the purposes of NRS 533.380, the measure of 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.³²

Since the approval of the tentative map in 1992, and the assignment of ownership of Permit 45376 to CVBPP in 1993, the efforts at dedicating the water right to Douglas County, as required pursuant to the tentative map approval conditions, have been stymied by Douglas County's Master Plan process, flooding issues, and a lack of an overall plan for the Airport water system. The State Engineer concludes that the permittee provided sufficient evidence at the public administrative hearing to demonstrate its good faith efforts at developing the business park, dedicating the water rights to Douglas County and moving towards proving beneficial use of the 13.74 mga portion of the water right it owns under Permit 45376. The State Engineer further concludes that no good faith or reasonable diligence toward perfection of the 1.96 mga portion of the water right purchased by Richard Seaman by deed dated after the date of the cancellation of the permit, and after the date of the public administrative hearing was shown.

RULING

The cancellation of the 13.74 mga portion of Permit 45376 owned by the Carson Valley Business Park Partners/Douglas County is hereby rescinded. The new priority date of that portion of Permit 45376 is July 26, 1996. As the water right under Permit 45376 must be kept active while it goes through the change application process, Douglas County has 30 days from the date of this ruling to file a new Application for Extension of time for filing Proof of

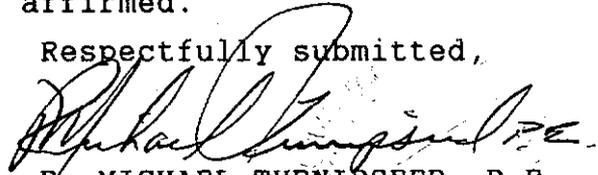
³¹NRS 533.380(3)(b).

³²NRS 533.380(6).

Ruling
Page 15

Completion and Proof of Beneficial Use under Permit 45376 with the appropriate filing fee. The cancellation of the remaining 1.96 mga portion of Permit 45376 is hereby affirmed.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 22nd day of
January, 1997.