

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

IN THE MATTER OF CANCELLED PERMITS)
40446 AND 41123 FILED TO CHANGE THE)
POINTS OF DIVERSION, PLACE AND/OR)
MANNER OF USE OF A PORTION OF THE)
UNDERGROUND WATERS PREVIOUSLY)
APPROPRIATED WITHIN DAYTON VALLEY)
GROUNDWATER BASIN (103),)
LYON COUNTY, NEVADA.)

RULING

4584

GENERAL

I.

Application 40446 was filed on February 1, 1980, by Gene S. and Delphine Minor ("Minors") to change the point of diversion, place and manner of use of 0.0669 cubic feet per second (cfs), 5.2555 million gallons annually (MGA), a portion of the waters previously appropriated under Certificate 8121, Permit 22516, from the underground waters of the Dayton Valley Groundwater Basin, Lyon County, Nevada. Permit 40446 was approved on September 27, 1984, for 0.0640 cfs, not to exceed 5.2555 MGA for quasi-municipal and domestic purposes to serve fourteen (14) subdivision lots within the E $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, T.16N., R.22E., M.D.B.&M. The point of diversion is described as being located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 8.¹

II.

Application 41123 was filed April 17, 1980, by Gene S. and Delphine Minor to change the point of diversion and place of use of a portion of the waters previously appropriated under Permit 27515. Permit 41123 was approved on September 27, 1984, for 0.09 cfs, not to exceed 5.2555 MGA for quasi-municipal and domestic purposes to serve fourteen (14) subdivision lots within the same place of use identified under Permit 40446. The point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 8. The total combined duty under Permits 40446 and 41123 shall not

¹ File No. 40446, official records in the office of the State Engineer.

exceed 5.2555 million gallons annually. The current owner of record of Permits 40446 and 41123 is the County of Lyon.^{1,2}

III.

Under the terms of Permits 40446 and 41123 proof of completion of work was first due to be filed in the office of the State Engineer on or before October 27, 1985. Nine extensions of time have been granted to complete the wells, well log, associated diversion works and file the proofs of completion under each permit. The proof of beneficial use under Permits 40446 and 41123 was originally due to be filed in the office of the State Engineer on or before October 27, 1987. Seven extensions of time have been granted to establish beneficial use of water and file proof of beneficial use under each permit. By notice dated February 26, 1997, Permits 40446 and 41123 were cancelled for failure to demonstrate good faith and reasonable diligence toward perfecting the water rights under the permits. The permittees timely petitioned the State Engineer for an administrative hearing to review the cancellation pursuant to NRS § 533.395(2).^{1,2}

IV.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held on September 18, 1997, in Carson City, Nevada, before representatives of the office of the State Engineer regarding the petition for review of the cancellation of Permits 40446 and 41123.³

FINDINGS OF FACT

I.

At the administrative hearing, the Minor family presented testimony in support of the fact that they were unable to perfect the waters of the subject permits for the original planned

² File No. 41123, official records in the office of the State Engineer.

³ Exhibit No. 1, public administrative hearing before the State Engineer, September 18, 1997.

subdivision project as it was not economically feasible as proposed.⁴ The applications for extension of time for filing proof of completion of work filed by the Minors in the years 1985 and 1986 stated that more time was needed to determine if the subject water rights might be turned over to the State of Nevada in exchange for the right to drill individual domestic wells to serve the fourteen lots.⁵ These extensions of time were granted in part in reliance on that proposal.

On January 7, 1988, the permits were cancelled for failure to comply with the terms of each permit. However, the permits were reinstated in March 1988.^{1,2}

A "Tentative Feasibility Map, Arrowhead Estate", revised June 3, 1978, was prepared by Wm. Michael Donovan, Jr., Water Rights Surveyor #514, (the "Donovan Map"), indicating the 14 lots to be served under Permits 40446 and 41123.¹ No further action was taken on the proposed 14 lot subdivision and the permittees testified that in 1984 they never went to Lyon county or requested the 14 lot subdivision be approved.⁶ The State Engineer finds that no substantial activity ever took place to put the waters to beneficial use under the original plan proposed under the permits.

II.

The applications for extensions of time for filing proof of completion of work and proof of beneficial use filed in 1989 were not timely filed and the subject permits were cancelled on May 11, 1989. The permittees testified that late in the 1980's they came up with the idea of relinquishing or dedicating the water rights to

⁴ Transcript, pp. 13-15, public administrative hearing before the State Engineer, September 18, 1997.

⁵ Exhibit No. 4, public administrative hearing before the State Engineer, September 18, 1997.

⁶ Transcript, pp. 13-15, public administrative hearing before the State Engineer, September 18, 1997.

the state in order to parcel the land.⁷ The State Engineer finds that the permits were reinstated in 1989 based on the understanding that the permittees were presently in negotiations with Lyon County to exchange these water rights for water service or that the permits would be withdrawn in favor of individual domestic wells.

III.

The applications for extensions of time for filing the proof of completion of work and the proof of beneficial use filed in the office of the State Engineer in 1990, 1991 and 1992 gave essentially the same reasons as given in the 1989 applications for extensions of time, i.e., that the permittees planned to exchange these permits for the right to hookup to Lyon County's water system. In June 1993, Applications 58954 and 59855 were filed by the Minors to change the points of diversion and places of use of the waters under Permits 41123 and 40446. The proposed manner of use under Applications 58954 and 58955 was to serve a portion of 44 proposed dwellings and windbreaks within the same place of use identified under Permits 40446 and 41123.

In October 1993, applications for extensions of time for filing proofs of completion of work and proofs of beneficial use were filed under Permits 40446 and 41123. In addition, an agreement and deed between the Minors and Lyon County was also received and filed in the office of the State Engineer. The requests for extensions of time stated that more time was necessary due to the pending change applications that propose to change Permits 40446 and 41123 into Lyon County's water system.^{1,2}

The dedication agreement filed in the office of the State Engineer in 1993, was executed on July 16, 1992, between the Minors and Lyon County, and provides for transferring ownership of Permits 40446 and 41123 and Applications 58954 and 58955 to Lyon County.¹ The agreement indicates that the permits are to be reserved for

⁷ Transcript, p. 16, public administrative hearing before the State Engineer, September 18, 1997.

future development of land which is to be designated by the Minors and which is presently within the existing service area or to be subsequently annexed into the service area of Dayton Utilities. Testimony provided at the administrative hearing indicates that the permittees now wish to concentrate their efforts on another location or on a project yet to be determined sometime in the future.⁸ The Minors testified that in ranching this type of project is something that gets put on the back burner.⁹ The State Engineer finds that the permittee abandoned the original project envisioned under the permits and for over ten years has been trying to come up with a project pursuant to which these permitted waters would be placed to beneficial use, but to date cannot identify any specific project pursuant to which these waters would be placed to beneficial use.

IV.

A review of the Donovan Map and the Lyon County Assessor's maps reveals that after Applications 40446 and 41123 were filed, Lyon County recorded a total of fourteen parcels within the place of use of Permits 40446 and 41123 and that a portion of a remaining fifteenth parcel is within the place of use of the subject permits. Testimony indicated that fifteen lots have been created with eight lots containing single family dwellings that have drilled individual domestic wells. The State Engineer finds that parceling of lands within the described place of use has occurred without going through the subdivision review process, there has been no dedication of the subject water rights to serve those individual domestic wells and during the course of the parceling process the

⁸ Transcript, pp. 21-28, public administrative hearing before the State Engineer, September 18, 1997.

⁹ Transcript, p. 36, public administrative hearing before the State Engineer, September 18, 1997.

permittees were still trying to figure out something to do with the subject water rights.¹⁰

V.

The current permittee, Lyon County, acquired title to the subject water rights by a deed filed in the office of the State Engineer on October 7, 1993.¹ The applications for extensions of time to submit the proofs of completion of work and the proofs of beneficial use filed in 1993, 1994 and 1995 indicate the additional time was necessary for the purpose of processing the change applications.

The State Engineer finds that the filing of an application to change an existing right is insufficient cause to grant an extension of time without any evidence of an expectation to complete the project and establish beneficial use within a reasonable period of time. The State Engineer further finds that reserving the water rights under Permits 40446 and 41123 without reasonable progress to establish beneficial use as demonstrated by repeatedly filing for extensions of time, followed by filing applications to change the water rights does not demonstrate reasonable diligence in actually placing these waters to beneficial use.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹¹

II.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise¹² and beneficial use is

¹⁰ Transcript, p. 34, public administrative hearing before the State Engineer, September 18, 1997.

¹¹ NRS Chapters 533 and 534.

¹² NRS § 533.030 and 533.035.

the basis, the measure and the limit of the right to the use of water.

III.

A permit to appropriate grants to the permittee the right to develop a certain amount of water from a particular source for a certain purpose to be used at a definite location.¹³ In the perfection of a water right, permittees are generally allowed, under the law, sufficient time after the date of approval of the application to complete application of the water to beneficial use.¹⁴ Nevada water law provides that the State Engineer may for good cause shown extend the time within which the water is to be placed to beneficial use. The State Engineer shall not grant an extension of time unless proof and evidence is submitted that shows the permittee is proceeding in good faith and with reasonable diligence to perfect the application.¹⁵

The intent of the extension of time provision under Nevada law is to provide the opportunity for the permittee to resolve temporary adverse conditions which prevent compliance with the proof of completion of works and proof of beneficial use requirements set forth in the permit. When Applications 40446 and 41123 were filed it was estimated that two years would be needed to complete the diversion works and five years to prove beneficial use of the waters under the permits. More than thirteen years have passed since Permits 40446 and 41123 were approved.

The concept of good faith and reasonable diligence is placing water to beneficial use is applicable to water rights in Nevada. Due diligence is defined as the steady application to business of any kind, a constant effort to accomplish the undertaking. The law does not require any unusual or extraordinary efforts, but only

¹³ NRS § 533.330 and 533.335.

¹⁴ NRS § 533.380.

¹⁵ NRS § 533.380.

that which is usual, ordinary or reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose of labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs, such assiduity in the prosecution of the enterprise as will manifest to the work a bona fide intention to complete it within a reasonable time.¹⁶ Nevada Revised Statute § 533.380(1)(b) requires that the application of the water to its intended beneficial use must be made within ten years after the date of the approval of the permit. The State Engineer may for good cause shown extend the time in which the diversion works must be completed and the water applied to its intended beneficial use.¹⁷

The State Engineer concludes that the permittee abandoned its 14 lot subdivision in the 1980's, in the late 1980's came up with a new idea for a large lot subdivision with dedication of the water rights for individual domestic wells, but then parceled portions of the place of use to avoid the dedication requirement. The State Engineer concludes that the permittees to date have no specific plans for placing these waters to beneficial use and have not demonstrated reasonable diligence to warrant any further extensions of time.

IV.

To ensure and maintain the integrity and equity of the appropriation process, it is essential that the process must not be improperly applied to reserve the water resource without beneficial use of the water or to retain a water right without reasonable progress to comply with the beneficial use requirements. The appropriative system of water rights found under Nevada law is known as a "use it or lose it system" which does not allow for a

¹⁶ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 524, 543-544 (1869).

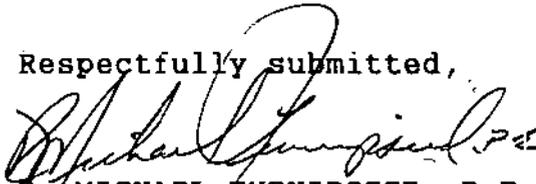
¹⁷ NRS § 533.380(3); 533.390(2); 533.395(1).

person holding a water right to sit on that right in anticipation that some time in the future there may be some use for the water. Permits 40446 and 41123 were granted to furnish water to a 14 lot subdivision. No final subdivision map was ever approved by Lyon County for the project originally proposed. The original permittees do not have a project currently in progress in which to apply the subject water rights; therefore, there is no evidence of any steady application of effort to place these waters to beneficial use. The State Engineer concludes the permittees were given ample time to make progress towards development of the project envisioned under Permits 40446 and 41123 and ample time to prove beneficial use of the waters under Permits 40446 and 41123.

RULING

The cancellation of Permits 40446 and 41123 is hereby affirmed on the grounds that the permittees have not demonstrated reasonable diligence to perfect the appropriations.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/ab

Dated this 2nd day of
December, 1997.