

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

IN THE MATTER OF CANCELLED )  
PERMIT 51304 FILED TO CHANGE THE )  
MANNER OF USE AND PLACE OF USE )  
OF WATERS PREVIOUSLY APPROPRIATED )  
FROM SARATOGA HOT SPRINGS A SURFACE )  
WATER SOURCE WITHIN THE CARSON )  
VALLEY HYDROGRAPHIC BASIN (105), )  
DOUGLAS COUNTY, NEVADA. )

RULING

# 4789

GENERAL

I.

Application 51304 was filed on September 16, 1987, by John V. Arroyo to change the place and manner of use of 1.0 cubic foot per second (cfs) of water previously appropriated under Permit 35604 for quasi-municipal and domestic purposes from Saratoga Hot Springs a surface water source within the Carson Valley Hydrographic Basin, Douglas County, Nevada. The proposed point of diversion is described as being located within the SE¼ SW¼ of Section 21, T.14N., R.20E., M.D.B.&M. The proposed place of use was described as being within the W½ of Section 28, and portions of the E½ of Section 29, T.14N., R.20E., M.D.B.&M. The current owner of record in the office of the State Engineer is the Dolores C. Arroyo Saratoga Springs Revocable 1995 Trust ("Trust")<sup>1</sup>.

II.

Application 51304 was approved by the State Engineer on February 26, 1988. When Application 51304 was filed it indicated that the time required to construct the works of diversion would be two years and the time required to complete the application of water would be five years. The Proof of

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<sup>1</sup> File No. 51304, official records in the office of the State Engineer.

Completion of Work under Permit 51304 was first due to be filed in the office of the State Engineer on or before March 26, 1989, and the Proof of Beneficial Use and Cultural Map were due to be filed on or before March 26, 1990. After multiple extensions of time, the Proof of Completion of Work was filed on March 25, 1994. Seven extensions of time have been granted by the State Engineer to file the Proof of Beneficial Use and Cultural Map under Permit 51304. Additionally, six extensions of time were granted for filing the Proof of Beneficial Use and Cultural Map under Permit 35604, which is the base water right for the change allowed under Permit 51304.

### III.

By notice dated July 1, 1998, Permit 51304 was cancelled for failure to demonstrate good faith and due diligence toward perfecting the water right under the subject permit in that the record lacked evidence that reasonable progress had been made to comply with the beneficial use requirements under Permit 51304 or that the owner may be expected to comply within a reasonable period of time. The State Engineer found that the permittee had not provided any evidence that it had secured access to the point of diversion or that negotiations were in progress to secure that access or that it would secure that access within a reasonable amount of time. Therefore, it was uncertain or impossible for the permittee to establish beneficial use under Permit 51304 within a reasonable period of time.

The permittee timely petitioned the State Engineer for a public administrative hearing to review the cancellation of the permit pursuant to Nevada Revised Statute § 533.395(2).<sup>1</sup>

IV.

After all parties of interest were duly noticed by certified mail, a public administrative hearing was held on April 14, 1999, at Carson City, Nevada, before representatives of the office of the State Engineer.<sup>2</sup>

FINDINGS OF FACT

I.

The use of the subject water right was to be in conjunction with other water rights owned by the permittee for the development of Saratoga Springs Estates, a 541-unit subdivision in the Johnson Lane Area of Douglas County, Nevada. Saratoga Springs Estates is a Planned Unit Development that was approved by Douglas County on May 19, 1988, which is to include an 18-hole golf course, park, country club, and health spa.<sup>1</sup> The development of the Saratoga Springs Estates is to be done in ten phases as described in a Development Agreement dated February 8, 1990, entered into by Joseph H. Arroyo, a predecessor to the current owner of record, and Douglas County.<sup>1</sup> Permit 51304 is for the waters from Saratoga Hot Springs with said water to be used for the golf course, country club, and health spa facilities which are to be completed as per the time line of the Development Agreement.<sup>1</sup> The Development Agreement provides that prior to the recording of Phase 4 of the project, the developer shall either have completed construction of an eighteen hole golf course, or posted a letter of credit, or other security acceptable to Douglas County in the

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<sup>2</sup> Transcript, public administrative hearing before the State Engineer, April 14, 1999. (Hereinafter "Transcript".)

amount of \$2.5 million dollars to ensure completion of said golf course.<sup>1</sup> Testimony was provided at the administrative hearing that the golf course has not been built, but the works of diversion have been designed on Saratoga Springs even though they have not been constructed. However, further testimony indicated, if "the golf course does not go in, what comes out of that is an open space requirement within that area that will require some enhancement to show open space areas, that this water would be subject of [sic]."<sup>3</sup>

Testimony was provided that Phase 3 of the development has had a final map recorded and homes are being built there now.<sup>4</sup> Furthermore, that a tentative map for Phase 4 has been prepared and it could be another six months before Phase 4 goes into the ground and they are negotiating with Douglas County to determine whether the open space is to be a golf course or a park system.<sup>5</sup> The State Engineer finds that no evidence was provided at the administrative hearing that the development agreement has been modified, that a golf course has been constructed or any letter of credit or security has been posted to ensure completion of the golf course.

## II.

At the administrative hearing, an agent for the permittee presented testimony that the inability to perfect the waters of the subject permit was due to the circumstances surrounding the

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<sup>3</sup> Transcript, pp. 6-7.

<sup>4</sup> Transcript, pp. 8-9.

<sup>5</sup> Transcript, pp. 8-9.

planning and phasing process of the project as well as litigation concerning Phase 3 with Douglas County.<sup>6</sup>

Records of the Douglas County Assessor indicate that the point of diversion under Application 51304 is on private land held in the name of Dangberg Holdings Nevada, LLC. However, testimony presented at the hearing indicated that the point of diversion is within a right-of-way held by Douglas County for an extension of Vicky Lane.<sup>7</sup> The Application for Extension of Time for filing Proof of Beneficial Use filed on May 21, 1997, included a proposed easement from Saratoga Hot Springs to the project site.<sup>1</sup> The extension indicated that the proposed easement would be submitted to Douglas County for its review and approval at the appropriate time along with an encroachment permit application for construction of the pipeline to the place of use. The State Engineer finds the permittee has not taken any steps toward negotiation nor proven any resolution as to access with Dangberg Holdings Nevada, LLC to the point of diversion. The State Engineer finds the permittee did not provide sufficient evidence that Douglas County actually owns or has accepted for dedication an easement as the property where the point of diversion is located or that any negotiations or resolution as to an easement to the point of diversion have taken place or been resolved with Douglas County. The State Engineer finds that the permittee does not have access to the site or a right-of-way easement in order to enable it to put the subject water right to beneficial use

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<sup>6</sup> Transcript, pp. 4-10.

<sup>7</sup> Transcript, pp. 11-12.

demonstrating a lack of good faith and reasonable diligence in that regard towards placing the water to beneficial use.

III.

The approval of the initial or underlying water right of the subject permit occurred in 1979. Six requests for extensions of time to submit Proof of Beneficial Use were granted under the original appropriation. Permit 51304 was granted in 1988 and seven extensions of time have been granted under Permit 51304 for proving beneficial use of the water. By letter dated February 8, 1996, the State Engineer put the permittee on notice that he found the permittee may not be proceeding in good faith and with reasonable diligence to show use of the water from Saratoga Hot Springs under Permit 51304. By letter dated August 29, 1996, the State Engineer requested that the permittee indicate how it planned to go to beneficial use with the water under Permit 51304 since it does not own or have access to the lands on which Saratoga Hot Spring rises and flows.<sup>1</sup> By letter dated September 26, 1996, the permittee indicated it intended to enter into an agreement with Dangberg Holdings for an easement across its land to utilize the right and would begin that process.<sup>1</sup> By letter dated April 30, 1997, the State Engineer again requested the permittee explain any progress it had made in obtaining an easement to access the land on which the point of diversion is located. In its 1997 application for extension of time, the permittee merely provided a copy of a proposed easement to be submitted to Douglas County. The State Engineer finds since 1996 the State Engineer has apprised the permittee that the issue of

access to the point of diversion was under consideration as to further extensions of time. The State Engineer finds the permittee has not demonstrated good faith and reasonable diligence as to the resolution of this issue.

IV.

The application for requesting additional time to submit the Proof of Beneficial Use and Cultural Map filed in the office of the State Engineer on May 21, 1997, provides there is extensive analysis taking place by Douglas County of the water systems in the north end of Carson Valley that includes the system serving Saratoga Springs Estates.<sup>1</sup> Further, that development of the subdivision project was dependent upon its ability to receive will-serve letters from Douglas County. Evidence in the record and the testimony received at the public administrative hearing indicates that the use of water under the subject permit was to be primarily for the future needs of the golf course and spa facilities or for enhancement of open space requirements that were being negotiated with Douglas County.<sup>8</sup> The State Engineer finds the permittee was on notice for over a year prior to that time that the access issue was to be considered in any further extensions of time requested and that this issue is separate and distinct from dedication of water rights to Douglas County and will-serve letters. The State Engineer further finds that the holding of water right for an extended period of time with no definite time schedule or plan in which beneficial use is to occur

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<sup>8</sup> Transcript, p. 7.

does not demonstrate reasonable diligence in perfecting said water right.

V.

When change Application 51304 was filed the applicant estimated five years to put the water to beneficial use. This permit has been sold and traded many times yet no water under the subject permit has ever been beneficially used. Nineteen years have passed since the original permit was granted. The Dolores C. Arroyo Saratoga Springs Revocable 1995 Trust acquired title on September 11, 1996.<sup>1</sup> Nevada Revised Statute § 533.380(1)(b) provides that if either a final subdivision map is recorded pursuant to chapter 278 of the Nevada Revised Statute or a plan for development of a project has been approved by a local government pursuant to chapter 278 of the Nevada Revised Statutes, or a plan for a planned unit development has been recorded pursuant to chapter 278A of the Nevada Revised Statute the State Engineer must not give the permittee less than five years in which to complete the application of the water to its intended beneficial use. Permit 51304 was approved on February 26, 1988, but as set forth in the Development Agreement for Saratoga Springs Estate the Planned Unit Development was not approved by Douglas County until May 19, 1988. Therefore, the State Engineer finds this permittee did not fall under the five year provision of Nevada Revised Statute § 533.380(1)(b).

VI.

Nevada Revised Statute § 533.380(3) provides that the State Engineer may for good cause shown extend the time within which the

water must be applied to the beneficial use under any permit issued by him, but the application for extension of time must be accompanied by proof and evidence of reasonable diligence within which the permittee is pursuing perfection of the appropriation. The statute further provides that the State Engineer shall not grant an extension of time unless he determines from the proof and evidence submitted that the permittee is proceeding in good faith and with reasonable diligence to perfect the appropriation. Failure to provide that proof and evidence is prima facie evidence that the holder is not proceeding in good faith and reasonable diligence to perfect the appropriation.

The State Engineer finds the permittee did not provide the State Engineer with any proof or evidence of any attempts at or resolution of the issue regarding it having no access to the point of diversion.

#### VII.

Nevada Revised Statute § 533.380(6) provides, for the purposes of that section, that 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. Further, when a project or integrated system is comprised of several features, work on one feature of the project may be considered in finding reasonable diligence has been shown in the development of water rights for all features of the entire project or system. While this statute provides that work that has taken place as to Phases 1, 2 and 3 of the Saratoga Springs Estates may be considered as to development of the whole

project, the statute is not a mandatory directive, but rather leaves the State Engineer with discretion.

This case is a perfect example of where that discretion is needed. This water right was applied for from Saratoga Hot Springs to develop the golf course and spa portion of this development. Testimony was now provided that the golf course may never be completed. In fact, the golf course was to be built or funded prior to Phase 4 progressing, yet evidence was provided that Phase 4 is progressing without any accompanying evidence that a golf course has been built or the funding set aside. Nor was any evidence provided as to any resolution of the central issue that the permittee has no access to the point of diversion. The State Engineer finds the permittee has not proceeded with good faith and reasonable diligence under all the facts and circumstances to resolve the access issue and work progressing as to other phases of the project does not rise to a level of sufficient diligence as to perfection of the water right under this application.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>9</sup>

##### II.

The base water right which supported change Application 51304 had six extensions of time for filing proof of beneficial use before Permit 51304 was granted. The State Engineer concludes

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<sup>9</sup> NRS Chapter 533.

that when a new owner accepts assignment of a water right permit, it comes with all the 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 or files for change of point of diversion, place or manner of use of that right does not mean that the previous permit history is removed.

III.

Nevada Revised Statute § 533.380(3) provides that the State Engineer may, for good cause shown, extend the time within which the 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 application must accompany any application for an extension of time for filing proof of beneficial use.<sup>10</sup> For the purposes of Nevada Revised Statutes § 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.<sup>11</sup> The State Engineer concludes that there has been no beneficial use of the waters for the manner and within the place of use granted under Permit 51304 since the inception of the water right and the permittee is not proceeding in good faith and with reasonable diligence to perfect the permit.

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<sup>10</sup> NRS § 533.380(3)(b).

<sup>11</sup> NRS § 533.380(6).

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 State Engineer concludes the permittee was given ample time to make progress towards proving beneficial use of the waters under the terms of Permit 51304.

RULING

The cancellation of 160 acre-feet annually under Permit 51304 is hereby affirmed.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/RKM/cl

Dated this 14th day of  
September, 1999.