

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

IN THE MATTER OF PERMITS 49186 AND )  
49189 FILED TO CHANGE THE POINT OF )  
DIVERSION OF A PORTION OF THE )  
PUBLIC WATERS OF AN UNDERGROUND )  
SOURCE PREVIOUSLY APPROPRIATED )  
UNDER PERMIT 39042 WITHIN THE )  
DIAMOND VALLEY HYDROGRAPHIC )  
BASIN (153), EUREKA COUNTY, )  
NEVADA. )

**RULING**

**# 5748**

**GENERAL**

**I.**

Permit 49186 was filed on July 12, 1985, by Robert E. Burnham and later permitted on January 8, 1986, to change the point of diversion of 0.29 cubic feet per second (cfs), not to exceed 68.64 acre-feet annually (afa), that being a portion of water previously appropriated under Permit 39042. The manner of use is for irrigation purposes. The original place of use is 17.16 acres of land described as being located within the N½ SW¼ of Section 29, T.23N., R.54E., M.D.B.&M. The proposed point of diversion is described as being located within the SW¼ NW¼ of said Section 29. On October 18, 1996, Permit 49186 was partially abrogated by Permit 59812. As a result, the diversion rate and duty remaining under Permit 49816 was reduced to 0.145 cfs and 34.32 afa, respectively. In addition, the amount of acreage was reduced from 17.16 acres to 8.85 acres.<sup>1</sup>

**II.**

Permit 49189 was filed on July 12, 1985, by Robert E. Burnham and later permitted on January 8, 1986, to change the point of diversion of 0.15 cfs, not to exceed 34.32 afa, that being a portion of water previously appropriated under Permit 39042. The manner of use is for the irrigation of 8.58 acres of land described as being located within the SE¼ SW¼ of Section 29, T.23N., R.54E., M.D.B.&M. The point of diversion is described as being located within the SE¼ SW¼ of said Section 29.<sup>2</sup>

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<sup>1</sup> File No. 49186, official records in the Office of the State Engineer.

<sup>2</sup> File No. 49189, official records in the Office of the State Engineer.

### III.

Permits 49186 and 49189 irrigate separate places of use consisting of corner areas of a pivot irrigation system in the amount of 8.58 acres for each permit. The total duty available under each permit is not to exceed 34.32 afa.<sup>1,2</sup>

### FINDINGS OF FACT

#### I.

The approval of Permits 49186 and 49189 carried with it a set of permit terms, which required the submittal of separate proofs, each of which was assigned a specific deadline. The filing of these proofs signifies that the permittee had completed one phase of the perfection of the water right, and was prepared to move forward to the next phase. In the case of Permits 49186 and 49189, two separate proofs were required for each permit, these being the Proof of Completion of Work and the Proof of Beneficial Use. The first proof relates to the construction and completion of the works of diversion necessary to capture and distribute the water appropriated under the permit. Once the works of diversion have been properly constructed, an appropriation of water can occur in the manner set forth in the permit. When Permits 49186 and 49189 were issued, the Permittee was assigned a deadline of February 8, 1987, to file the Proof of Completion of Work. The Permittee was unable to meet this deadline and instead chose to file for extensions of time. The deadline was twice extended for the maximum of one year to February 8, 1989. In 1989, a review of the permit files indicates that the Proof of Completion of Work associated with Permits 49186 and 49189 were both filed in a timely manner.<sup>3</sup>

The next required proof is the Proof of Beneficial Use and supporting cultural map. This proof relates to the actual use of water for its intended purpose in the manner set forth in the permit. When Permits 49186 and 49189 were issued, the Permittee was assigned a deadline of February 8, 1989, to file the Proof of Beneficial Use. The Permittee was unable to meet this deadline and instead chose to file for extensions of time.

The deadline was extended sixteen times for the maximum of one year to February 8, 2005.

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<sup>3</sup> File Nos. 49186 and 49189, official records in the Office of the State Engineer.

During this sixteen-year period, the State Engineer's office expressed concern over the apparent lack of progress toward placing the water to beneficial use in several letters to the Permittee, culminating in the following letter.<sup>4</sup>

This letter is in reference to the Applications for Extension of Time you submitted on January 27, 2004 for Permits 49186 and 49189, on behalf of Robert E. Burnham.

A review of our records indicates the following history of extensions of time granted to date:

Permits 49186 and 49189 were permitted on January 8, 1986 for irrigation purposes. The Proofs of Completion were filed on April 4, 1989. Fifteen extensions of time have been granted for the filing of the Proofs of Beneficial Use and Cultural Maps.

In addition, Permit 39042, which is the base right for Permits 49186 and 49189, was permitted on August 5, 1980. The Proof of Completion was filed on March 19, 1982. Two extensions of time, abrogating Permit 35192, were granted for the filing of the proof of Beneficial Use and Cultural Map.

Also, the Division of Water Resources has sent three previous letters to the owner of this right, on May 6, 1992, on August 12, 1993, and on July 3, 1997, documenting the lack of progress toward the filing of the proof of Beneficial Use.

In view of the above extensions granted, the State Engineer finds that the owner is not proceeding in good faith and with reasonable diligence as required under Nevada Revised Statutes (NRS) 533.395(1). Therefore,

***Further requests for Extension of Time will be denied.***

Enclosed is the standard notice granting the requested extensions of time.

The State Engineer finds that the permittee was placed on notice regarding the lack of progress toward placing the water to beneficial use on four separate occasions in 1992, 1993, 1997 and 2004. The State Engineer further finds that February 8, 2005, is the final date for filing the Proof of Beneficial Use under Permits 49186 and 49189 and no further extensions of time will be allowed.

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<sup>4</sup> See, Letters to applicant regarding applications for extension of time for Permits 49186 and 49189 from the Office of the State Engineer, May 6, 1992, August 12, 1993, July 3, 1997 and July 8, 2004, within File Nos. 49186 and 49189, official records in the Office of the State Engineer.

## II.

A review of the permit files shows that the Proof of Beneficial Use and supporting cultural map under each Permit were last due on Monday, March 14, 2005, as determined by the final certified notice dated February 10, 2005. The Proof of Beneficial Use under each permit was received in the Office of the State Engineer on February 24, 2005. Information provided on the Proof of Beneficial Use specified the exact location of each well and the irrigated place of use for each permit, and specified the map under Permit 49186 as the supporting cultural map required to illustrate each place of use.<sup>1,2</sup>

An informal field investigation was conducted to verify the information provided on the Proof of Beneficial Use forms. The investigation found in part, that there was no distribution system, there was an open well casing with no pump, totalizing meters were not installed as required by the terms of the permits, the place of use was described as being dry land crested wheat, and that groundwater was not being beneficially used to irrigate a crop as stated on the Proof of Beneficial Use forms.<sup>5</sup>

As a result of the investigation, the Office of the State Engineer rejected the Proof of Beneficial Use for each permit by letter dated October 19, 2005, citing the above discrepancies. The Proof of Beneficial Use was re-submitted on November 2, 2005, accompanied by a note stating that the investigator reviewed the property during the month of March when no irrigation takes place and suggested that the investigator review the wells used and irrigation system at the appropriate time or at his/her convenience.

A second informal field investigation was arranged on December 13, 2005. The investigator found in part that no hand-line sprinklers or main line distribution system were observed, there was no totalizing meter, actual use is dry land crested wheat grass, lands are not being irrigated by hand-line sprinklers, and groundwater is not being beneficially used to irrigate a crop as stated in proof.<sup>6</sup>

The State Engineer finds that the informal field investigations indicate that beneficial use of the water in accordance with the terms of the permits and as stated on the Proof of Beneficial Use forms has not occurred.

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<sup>5</sup> See, *Nevada Division of Water Resources Report of Field Investigation for Proof of Beneficial Use*, March 16, 2005, File Nos. 49186 and 49189, official records in the Office of the State Engineer.

<sup>6</sup> See, *Nevada Division of Water Resources Report of Field Investigation for Proof of Beneficial Use*, December 13, 2005, File Nos. 49186 and 49189, official records in the Office of the State Engineer.

### III.

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.<sup>7</sup> The Proof of Beneficial Use form is a deposition that provides necessary information regarding beneficial use of water in accordance with the terms of the permit. The Office of the State Engineer uses this information to determine whether a water right certificate may be issued and to determine the limit of the right to the use of water. A review of the Proof of Beneficial use forms for Permits 49186 and 49189 provides the following selected questions and answers:<sup>8</sup>

#### **For Permit 49186**

Question 5. Have you installed a measuring device at your point of diversion as required by the terms of your permit?

Answer. No [check box].

Question 5a. If water is metered, describe the meter including the make, model, serial number, and reading on the date of installation.

Answer. N/A

Question 5b. Give the actual meter readings for at least a twelve-consecutive-month period for which this proof is being filed as required by the terms of the permit.

Answer. N/A

Question 6. If the water is not metered, describe the measuring device, including the dimensions of the headgate, weir, or flume.

Answer. Acres of Land Irrigated

Question 7. What is the actual diversion rate that this system delivers water from this source.

Answer. 5.1 cfs

Question 8. Indicate by whom, when, and by what method the diversion rate on Question 7 was measured.

Answer. at wellhead on June 13, 1984 by Bruce L. Rice, SWRS P.O. Box 130, Smith, NV 89430 (see PBU filed under 46461)

Question 9. State dates, during any given year, between which water has been used beneficially.

Answer. Jan. 1 – Dec. 31

Question 14. By what method is the land irrigated?

Answer. Hand Lines

Question 15. If the place of use is irrigated by any other source, please describe.

Answer. No.

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<sup>7</sup> NRS § 533.035.

<sup>8</sup> See, *Proof of Application of Water to Beneficial Use*, filed February 24, 2005, and re-filed November 2, 2005, File Nos. 49186 and 49189, official records in the Office of the State Engineer.

**For Permit 49189**

Question 5. Have you installed a measuring device at your point of diversion as required by the terms of your permit?

Answer. No [check box].

Question 5a. If water is metered, describe the meter including the make, model, serial number, and reading on the date of installation.

Answer. N/A

Question 5b. Give the actual meter readings for at least a twelve-consecutive-month period for which this proof is being filed as required by the terms of the permit.

Answer. N/A

Question 6. If the water is not metered, describe the measuring device, including the dimensions of the headgate, weir, or flume.

Answer. Acres of Land Irrigated

Question 7. What is the actual diversion rate that this system delivers water from this source.

Answer. 1520 G.P.M.

Question 8. Indicate by whom, when, and by what method the diversion rate on Question 7 was measured.

Answer. Plaskett Irrigation, James E Groth, 7-20-2000 see well log.

Question 9. State dates, during any given year, between which water has been used beneficially.

Answer. Jan. 1 – Dec. 31

Question 14. By what method is the land irrigated?

Answer. Hand Lines

Question 15. If the place of use is irrigated by any other source, please describe.

Answer. No.

A review of the answers provided on the Proof of Beneficial Use form and the information in the two informal field investigations raises some serious concerns regarding the beneficial use claimed and compliance with the terms of the permits.

The permit terms require that "... a totalizing meter must be installed and maintained in the discharge pipeline near the point of diversion and accurate measurements must be kept of the water placed to beneficial use."<sup>9</sup> It is clear from the above answers and two separate field investigations that a totalizing meter has not been installed and accurate measurements of water use have not occurred. The only measurement of water provided was a diversion rate measured in 1984 for Permit 49186 and a diversion rate measured in 2000 for Permit 49189.

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<sup>9</sup> Permit Nos. 49186 and 49189, official records in the Office of the State Engineer.

It was also stated that the place of use was irrigated by hand-lines from January 1 to December 31 of each year.<sup>10</sup> However, two separate field investigations failed to find any evidence of hand-lines or any other irrigation distribution system and no evidence of irrigation. In addition, it was noted that the well was an open casing with no visible pump.

The State Engineer finds that the information provided on the Proof of Beneficial Use forms is insufficient to establish the quantity of water placed to beneficial use over a consecutive twelve-month period under Permits 49186 and 49189 and the information is inconsistent with the findings of two separate informal field investigations. The State Engineer further finds that the permittee has failed to install a totalizing meter as required by the terms of Permits 49186 and 49189.

### **CONCLUSIONS**

#### **I.**

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

#### **II.**

The State Engineer concludes the following concerning the diversion works and distribution system for each Permit 49186 and 49189:<sup>1,2</sup>

- That the well was not operable on March 16, 2005;
- That no distribution system was observed on March 16, 2005 nor December 13, 2005;
- That the totalizing meter has not been installed and therefore, metered measurements of any water diverted for beneficial use under Permits 49186 and 49189 cannot be confirmed.

#### **III.**

The State Engineer concludes that the Proofs of Beneficial Use filed under Permits 49186 and 49189 do not contain sufficient information to establish any beneficial use of the water and two separate field investigations indicate no beneficial use of water; therefore, the Proofs of Beneficial Use are fatally flawed and must be rejected.

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<sup>10</sup> See, *Proof of Application of Water to Beneficial Use*, filed February 24, 2005 and re-filed November 2, 2005, File Nos. 49186 and 49189, official records in the Office of the State Engineer.

<sup>11</sup> NRS chapters 533 and 534.

IV.

The State Engineer shall not grant an extension of time unless he determines from the proof and evidence so submitted that the applicant is proceeding in good faith and with reasonable diligence to perfect the application.<sup>12</sup> In regards to an extension of time, 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>13</sup> Failure to provide the proof and evidence required is prima facie evidence that the holder is not proceeding with good faith and reasonable diligence to perfect the water right.<sup>14</sup>

The State Engineer found that the permittee has had sixteen extensions of time and was placed on notice regarding the lack of progress toward placing the water to beneficial use on four separate occasions in 1992, 1993, 1997 and 2004 and was ultimately informed that no further extensions of time for the filing of the Proof of Beneficial Use will be allowed on Permits 49186 and 49189.

The State Engineer concludes that the Proofs of Beneficial Use filed under Permits 49186 and 49189 must be rejected and no further extensions of time will be granted; therefore, Permits 49186 and 49189 are subject to cancellation.

**RULING**

The Proofs of Beneficial Use, received on November 2, 2005, are rejected. Permits 49186 and 49189 are hereby cancelled effective the date of this ruling.

Respectfully submitted,



TRACY TAYLOR, P.E.  
STATE ENGINEER

TT/TW/lt

Dated this 16th day of  
May, 2007.

<sup>12</sup> NRS § 533.380 (3).

<sup>13</sup> NRS § 533.380 (6).

<sup>14</sup> NRS § 533.380 (3).