

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

ORDER OF CANCELLATION OF

MUNICIPAL GROUND WATER TRANSFER PERMIT A-10592

WATER DIVISION 1-E

CASE NO. 011-08CC

Background

Municipal ground water transfer permit A-10592 is a permit issued May 10, 1965, under the provisions of the Municipal and Rural Domestic Ground Water Transfers Permit Act (the Act), Neb. Rev. Stat. §§ 46-638 through 46-656, to withdraw a maximum of 5,300,000 gallons per day from eleven wells which were constructed prior to the permit application. Ten of the wells were not registered at the time the permit was granted, and were never registered after the permit was granted. The eleven wells were located in the following described sections of land: NW¼ of Section 31 and NW¼ and NE¼ of Section 32 and SW¼ of Section 34 all in Township 14 North, Range 55 West of the 6<sup>th</sup> P.M.; SW¼ of Section 28 and SE¼, SW¼, and NW¼ of Section 29, and NE¼ of Section 30 all in Township 15 North, Range 55 West of the 6<sup>th</sup> P.M., in Kimball County, Nebraska. According to the Department of Natural Resources (Department) records, permit A-10592 is held by the City of Kimball, Nebraska, for municipal uses in the City of Kimball.

On October 3, 2008, the Department issued a Notice of Preliminary Determination of Nonuse of Municipal Ground Water Transfer Permit A-10592 to the City of Kimball. The Notice was published on the Department's website beginning that date, and was delivered by certified mail to the City of Kimball.

The City of Kimball timely filed a contest of the Preliminary Determination of Nonuse, pleading that virtually all possible legal excuses for nonuse apply. A hearing on the matter was conducted May 6, 2009, under Department Case Number 011-08CC, and a record was made of the hearing.

At the hearing, the City stipulated that no wells within the geographic area designated for wells appurtenant to A-10592 have been used by the City within the last five years. It did not present any evidence or argument for any of the legally permissible reasons for non-use described in § 46-229.04. Nevertheless, the City made two arguments in its defense. They are paraphrased as:

1) It argued that its use of other wells, located outside the geographic area described for the wellfield in A-10592 but delivering water to Kimball, should be considered a beneficial use for the purposes of retaining A-10592 as a post hoc "modification" of the permit and that such modification expanding the wellfield boundaries is allowed under the words of § 46-644.

2) It argued that the City intended that new wells drilled subsequent to approval of A-10592 are "replacements" for the wells identified in A-10592 that were abandoned. The City argues that without the Department correcting this belief, it therefore is entitled to rely upon its belief that the wells are replacement wells, regardless of the wells locations, for the purpose of compliance of beneficial use of A-10592.

Testimony was taken from two witnesses for Kimball as to the City's intent. Thirty-one exhibits were offered by the City and were admitted into evidence, including the original permit application, map of wells identified for use under the permit, the order granting the permit, well abandonment filings, beneficial use reports subsequently filed by the City, and the Department's information that was the basis for the preliminary determination on nonuse notice (Exhibit 11). Judicial notice was taken of the entire Municipal and Rural Domestic Ground Water Transfers Permit Act.

#### Finding of Facts

The Director, being fully advised in the matter, now FINDS:

1. The City contends that the Department knew that the City had decommissioned its wells within the approved well field area, and knew that the City's newer wells were replacements for the older permitted wells. It then argues that it may therefore rely upon its understanding of what wells are included for meeting the beneficial use requirement under A-10592. City witnesses testified as to their beliefs confirming this contention, under objection by the Department as to its relevance. The entire record is reviewed for evidence presented on point.

The permit approval for A-10592 (Exhibit 7) was issued in 1965 for unregistered wells existing at that time. The Approval shows that the City was required to file in the office of the Department on or before January 31 of each year a report that included the designations of any wells under the permit which were abandoned, and the location and description of any replacement wells installed during the preceding period.

Exhibit 17 indicates that in 1986 the City was notified that three of their registered wells were not included under the permit, and states that all wells used under the permit must be registered. Exhibit 16 shows notices of eleven well abandonments for unregistered "municipal" wells during June 1998, filed in the Department in 1998. Exhibit 26 shows the City's annual report for 1998 (filed in January 1999), which does not indicate abandonment of any wells under the permit for 1998. The annual reports that were submitted (Exhibits 18 through 27) indicate nothing to show either abandoned wells or new wells were reported to the Department until 2005. The 2005 through 2007 reports (Exhibits 18-20) do show three well registration numbers for wells located in areas not included in the original permit as being used under the permit, but do not identify them as "replacement" wells. The Department had previously told the City in 1986 that two of those three wells were not included under the permit (Exhibit 17). On February 12, 2007, as shown by Exhibit 15, the Department again notified the City that the wells currently being used were not included under the permit. The water well registrations for the wells that the City currently uses (Exhibits 2-4) either make no mention that the wells are replacement wells, or specifically states that they are not replacement wells.

The record includes Exhibit 31, the ground water management area rules of the South Platte Natural Resources District (SPNRD), and Exhibit 32, the Integrated Management Plan of SPNRD and the Department. In both documents, replacement well is defined as "any well that is used for the same purpose as the original well and is operating in accordance with ... any applicable permit from the Department." To the extent the City wells are not operating in accordance with the permit, they may not be replacement wells.

None of the exhibits offered were contested. Therefore, the City's own exhibits dispute the contention that the Department knew that the City's newer wells were replacements for the older permitted wells. The Director therefore finds that no replacement wells for the purposes of administering the permit are identified from the record.

2. Ten of the wells identified in the permit as constituting the source of water for A-10592 were abandoned and decommissioned by 1998. The eleventh well identified and authorized for beneficial use by A-10592, was not used for system water for more than five years prior to the Notice of Preliminary Determination (Exhibits 11 and 15). These facts are supported by stipulations and testimony of the City.
3. There has been no beneficial use of ground water in accordance with A-10592 for more than five years. This fact is found based upon the stipulation stated on page 38 of the transcript, and weighing the preponderance of all the evidence presented.

The Director, being fully advised in the matter, now draws the following CONCLUSIONS OF LAW.

1. Pursuant to Neb. Rev. Stat. § 46-644, A-10592 is valid only as long as the water for which the permit was granted is used, and it may be revoked or modified using the same procedures for revocation or modification as for §§ 46-229.02 to 46-229.05, including nonuse for more than five years. Such procedures, including notice and hearing, were properly complied with by the Department.
2. Application for a permit under the Act requires a map showing locations of all water wells to be used for obtaining water subject to the permit (§ 46-639). Since a permit is valid only as long as the water for which the permit was granted is used (§ 46-644), it is concluded that beneficial use for the purpose of maintaining the validity of the permit is limited to water withdrawn from the identified geographic location from wells identified in the permit. The only exception would be if replacement wells, appropriately located for the limits of the permit, are identified in the permit file, and it is concluded that no appropriate "replacement wells" were identified. The facts therefore show that the wells now used by Kimball for their water supply are not within the geographic area included under the permit, cannot be found to be included under the permit, and cannot maintain the permit's validity.

3. The new wells drilled by the City do not now, nor did they when they were drilled, meet the statutory definitions of a replacement water well. Statute § 46-602(b) currently defines replacement well for purposes of registration and requires the original municipal well to be decommissioned within one year of the completion of the replacement water well. In 1998 when one of the City's new wells was registered (it was drilled in October 1986), the law in § 46-602(3) defined a replacement well for purposes of registration as a well which "(a) replaces an abandoned water well within three years of the last operation of the abandoned water well or replaced a water well that will not be used after construction of the new water well and the original water well will be decommissioned within one year of construction of the new water well ...." Since the notices of abandonment show the originally permitted wells were abandoned in 1998, the new well would not have met the statutory definition for a replacement well. The laws in effect in 1986 also required the original well to be abandoned prior to registration of a replacement well. Likewise, in 1978 when two of the City's current wells were constructed, § 46-602(4) required a replacement well to be constructed after abandonment of the original well. Therefore, the wells the City currently uses never have met the statutory definition of a replacement well.
4. The Act in § 46-640 requires notice of applications and a description of the lands upon which the well field is located. The purpose of such notice is so that people impacted (located in or near the area of the well field) may respond to the application. This conclusion is further supported by the fact that there is nothing in the Act regarding modifications to permits for enlargement of the well location area, and there is no evidence that the City of Kimball has requested any modification of their permit to allow for change in location of wells. There is no provision in the Act for constructive notice to supplant the Act's notice requirements. Any enlargement of the geographic boundaries for wells applicable to a permit's uses, as argued by the City at the hearing as a possible "modification" under § 46-644, would require satisfying § 46-640 and be tantamount to a new application. The City may choose to make a new application, but a new application will be considered on current facts.
5. The preponderance of the evidence presented on the hearing record does not support the contentions necessary for the City's reliance argument to succeed.
6. "Modification" as described in § 46-644 under the provisions of §§ 46-229.02 to 46-229.05 can only be a reduction in amount of the area of the well field, the number of wells, or the amount of water that may be withdrawn. Modification cannot be an expansion of a permit to allow a new area, additional wells, or greater amounts of withdrawal. To allow modifications that would expand or change a permit could cause injury to others. Assessment of potential injury to other users is the purpose of the Act's procedural requirements, as described herein.
7. No legally sufficient excuse for nonuse of A-10592, as identified in § 46-229.04, was offered at the hearing by the City of Kimball and the Department's Preliminary Determination of Nonuse is sustained.

ORDER

It is therefore ORDERED that municipal ground water transfer permit A-10592 is hereby CANCELLED in compliance with the terms of Neb. Rev. Stat. § 46-644.

This Order may be appealed by initiating proceedings in the Court of Appeals in the manner provided for by Neb. Rev. Stat. § 61-207.

DEPARTMENT OF NATURAL RESOURCES

August 25, 2009

  
Brian P. Dunnigan, P.E., Director

A copy of this Order was mailed on August 26, 2009, to Steven C. Smith, P.O. Box 1204, Scottsbluff, NE 69361-1204. A copy of this Order was posted on the Department's website. A copy of this Order was provided to the Department's field office in Bridgeport, Nebraska.