

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

IN THE MATTER OF CANCELLED PERMITS)
29065, 29066, 29067 AND 31208 FILED)
TO APPROPRIATE UNDERGROUND WATERS)
WITHIN BUENA VISTA VALLEY GROUNDWATER)
BASIN (129), PERSHING COUNTY, NEVADA.)

RULING

#4566

GENERAL

I.

Application 29065 was filed on December 18, 1974, by Jim and Leona Ferrara to appropriate the underground waters of the Buena Vista Valley Groundwater Basin, Pershing County, Nevada. Permit 29065 was approved on July 18, 1975, for 6.0 cubic feet per second (cfs) for irrigation and domestic purposes. The point of diversion is located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, T.30N., R35E., M.D.B.&M. The current owner of record under Permit 29065 is Allan Bergendahl.¹

II.

Application 29066 was filed on December 18, 1974, by Jim and Leona Ferrara to appropriate the underground waters of the Buena Vista Valley Groundwater Basin, Pershing County, Nevada. Permit 29066 was approved on July 18, 1975, for 6.0 cfs for irrigation and domestic purposes. The point of diversion is located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T.30N., R35E., M.D.B.&M. The current owner of record under Permit 29066 is Allan Bergendahl.²

III.

Application 29067 was filed on December 18, 1974, by Jim and Leona Ferrara to appropriate the underground waters of the Buena Vista Valley Groundwater Basin, Pershing County, Nevada. Permit 29067 was approved on July 18, 1975, for 6.0 cfs for irrigation and domestic purposes. The point of diversion is located within the

¹ File No. 29065, official records in the office of the State Engineer.

² File No. 29066, official records in the office of the State Engineer.

SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T.30N., R35E., M.D.B.&M. The current owner of record under Permit 29067 is Allan Bergendahl.³

IV.

Application 31208 was filed on March 21, 1977, by Robert Don and Ruth E. Knight to change the point of diversion of the waters previously appropriated under Permit 29063. Permit 31208 was approved October 5, 1977, for irrigation and domestic purposes. The point of diversion is located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T.30N., R.35E., M.D.B.&M. The place of use of Permits 29065, 29066, 29067 and 31208 is 1,920 acres within Sections 27, 28, W $\frac{1}{2}$ of Section 26, W $\frac{1}{2}$ Section of 34, T.30N., R.35E., M.D.B.&M., at a duty not to exceed 4.0 acre-feet per acre from any and all sources for a combined total duty not to exceed 7,680 acre feet annually. The current owner of record under Permit 31208 is Allan Bergendahl.⁴

V.

Proof of beneficial use and cultural map were first due to be filed in the office of the State Engineer on or before February 18, 1980, under Permits 29065, 29066, 29067 and 31208. Twelve extensions of time had been granted to establish beneficial use of water and file the proof of beneficial use and cultural map under each permit. By notice dated July 28, 1992, Permits 29065, 29066, 29067 and 31208 were cancelled. The permittee timely petitioned the State Engineer for an administrative hearing to review the cancellation pursuant to NRS § 533.395(2).^{1,2,3,4}

VI.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held on August 14, 1997, in Carson City, Nevada, before representatives of the office of the

³ File No. 29067, official records in the office of the State Engineer.

⁴ File No. 31208, official records in the office of the State Engineer.

State Engineer regarding the petition for review of the cancellation of Permits 29065, 29066, 29067 and 31208.

FINDINGS OF FACT

I.

At the administrative hearing, the permittee's representative presented evidence and testimony in support of the fact that the permittee was unable to perfect the waters of the subject permits due to not having control of the lands to which the water rights are appurtenant. This inability by the permittee to put the water to beneficial use was due to the fact that the subject property had been sold and the permittee merely held a deed of trust on the property. A time line describing the transactions associated with the subject permits was submitted into evidence.⁵ Permittee, Allan Bergendahl acquired title to the land and subject water rights pursuant to a deed filed in the office of the State Engineer on April 14, 1981, executed on July 14, 1978, between Robert Don and Ruth E. Knight and Allan Bergendahl.⁶ The requests for extension of time to submit the proof of beneficial use and cultural map filed from 1981 through 1986 indicate a very slow progression from completion of the works of diversion to putting in fields ready for the application of irrigation waters. In February of 1986 Arroyo Properties gained control of the land and water under a contract of sale.⁷ The State Engineer finds that the sale of the land to Arroyo Properties and the fact that the permittee of record was not the actual person developing the land is irrelevant to the issue of placing the water to beneficial use. The purchaser and the

⁵ Exhibit No. 11, public administrative hearing before the State Engineer, August 14, 1997.

⁶ Deed filed in the office of the State Engineer on April 14, 1981, under Permit 21247.

⁷ Exhibit No. 11, public administrative hearing before the State Engineer, August 14, 1997.

permittee still were governed by the permit terms for placing the water to beneficial use.

II.

The concept of due diligence and the related concept of the doctrine of relation back are common law doctrines applicable to appropriative water rights in Nevada.

Due diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking'. The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and 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 world a *bona fide* intention to complete it within a reasonable time.⁸

The State Engineer finds that Arroyo properties made efforts to and did irrigate a significant portion of the permitted place of use by using wheel lines, center pivots and flood irrigation practices demonstrating good faith and due diligence in putting the entire quantity permitted to beneficial use.⁹

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁰

II.

The State Engineer concludes that Arroyo Properties, Inc. on behalf of the permittee demonstrated good faith and due diligence in placing the waters to beneficial use.

⁸ Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 543-546 (1869).

⁹ Transcript, pp. 57-63, and Exhibit No. 6, p. 29, public administrative hearing before the State Engineer, August 14, 1997.

¹⁰ NRS Chapters 533 and 534.

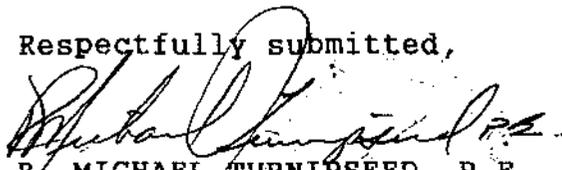
III.

The State Engineer concludes that good cause exists for rescinding the cancellation of Permits 29065, 29066, 29067 and 31208.

RULING

The permittee has 30 days from the date of this ruling to file applications for extensions of time on Permits 29065, 29066, 29067 and 31208. If the applications for extensions of time are timely filed, the cancellation of 7,680 acre-feet total combined duty portion of Permits 29065, 29066, 29067 and 31208 will be rescinded and the 7,680 acre-feet portion of the permits reinstated with a new priority date of August 11, 1992. If the applications for extensions of time are not timely filed the cancellation will not be rescinded and no further notice will be given. The use of the waters under Permits 29065, 29066, 29057 and 31208 is restricted to the original points of diversion and place of use as set forth in Permits 29065, 29066, 29067 and 31208. The applications for extensions of time must include a full description of the irrigation plan, the time frames in which the water will go to beneficial use and any progress made toward actual beneficial use of the waters.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/ab

Dated this 22nd day of
September, 1997.