

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

IN THE MATTER OF THE REVIEW OF THE)
CANCELLED PORTION OF PERMIT 26358)
APPROPRIATED FROM THE UNDERGROUND)
WATERS OF PAHRUMP VALLEY, NYE)
COUNTY, NEVADA.)

RULING ON REMAND

4134

GENERAL

I.

Application 26358 was filed on October 11, 1971, by Paul B. Simkins, to change the manner and place of use of 3.0 cubic feet per second (cfs) of underground water, appropriated under Permit 11842, Certificate 4663. The proposed manner of use was quasi-municipal, to serve approximately 204 metered residential lots, six commercial lots and a recreational park located in the S $\frac{1}{2}$ SE $\frac{1}{4}$ Section 22, N $\frac{1}{2}$ NW $\frac{1}{4}$ Section 27, and a portion of SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 22, all in T.19S., R.53E., M.D.B.&M. The point of diversion is located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 22, T.19S., R.53E., M.D.B.&M. On July 24, 1972, Permit 26358 was approved for 2.625 cfs, but not to exceed 665 acre feet annually (AFA).¹ The owner of record of Permit 26358 was Desert Irrigation at the time of the Public Administrative Hearing held before the State Engineer. At the present time the owner of record is Desert Utilities.²

II.

Proof of beneficial use of the water appropriated under Permit 26358 was first due to be filed with the State Engineer on February 24, 1977.² Prior to 1992, fourteen extensions of time were granted by the State Engineer to put the amount of water appropriated under Permit 26358 to beneficial use and to file proof of such beneficial use with the State Engineer. On June 11, 1992, the State Engineer,

¹ Exhibit No. 2, Public Administrative Hearing before the State Engineer, December 16, 1992.

² File No. 26358, official records in the Office of the State Engineer.

granted an extension of time on a portion of the water appropriated (298.15 AFA) under Permit 26358 (enough water to serve 226 residential lots, and a nine acre recreational park), and cancelled the remaining portion of Permit 26358 (366.85 AFA) covering the excess water appropriated under Permit 26358. The State Engineer based his decision on the fact that the excess water had not been committed to a specific purpose since approval of the permit over twenty years earlier, nor did the record provide evidence that satisfactory progress had been made to establish beneficial use of the excess water. The State Engineer found that the permittee had not shown good cause to support granting an extension of time for the uncommitted 366.85 AFA, as provided under NRS 533.410 and that the permittee had not proceeded in good faith and with reasonable diligence as provided under NRS 533.395(1).³

III.

On December 6, 1991, Application 56986 was filed by Desert Irrigation to change the point of diversion and place of use of the uncommitted portion of Permit 26358. The new proposed point of diversion was from an underground source located in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 13, T.20S., R.53E., M.D.B.&M. The new proposed place of use was located in the NW $\frac{1}{4}$ of said Section 13. Application 56986 became ready for action on March 22, 1992.⁴ No action was taken on Application 56986, pending review and resolution of the cancellation issue regarding the portion of Permit 26358 never committed to a specific use.

Desert Irrigation appealed the State Engineer's June 11, 1992, decision and on September 10, 1992, the Honorable John P. Davis, District Judge for the Fifth Judicial District, entered a Stipulation and Order in which the State Engineer was required to

³ Exhibit No. 5, Public Administrative Hearing before the State Engineer, December 16, 1992.

⁴ File No. 56986, official records in the Office of the State Engineer.

hold a hearing regarding the cancellation of the portion of the water rights under Permit 26358 and regarding Application 56986.⁵ Thus, on December 16, 1992, a public administrative hearing was held before the State Engineer.⁶ At the hearing Desert Irrigation presented evidence of its good faith, due diligence and efforts to put the water to beneficial use at Allen Estates.⁷

IV.

Based on the evidence in the record, the State Engineer concluded that: The portion of Permit 26358 that was cancelled on June 11, 1992, amounting to 366.85 AFA, was uncommitted to any propose from 1972 to 1992; the permittee had failed to proceed in good faith and with reasonable diligence toward placing this uncommitted water to beneficial use; and that the State Engineer rightfully cancelled the portion of Permit 26358 as it related to the uncommitted water.⁸ Ruling #4035 affirmed the State Engineer's earlier decision that the remaining portion of Permit 26358, 298.15 AFA, appropriated to serve the Allen Estates Subdivision remained in good standing, and thus, the fifteenth request for extension of time for filing proof of beneficial use on that amount of water was granted. The State Engineer also affirmed his cancellation of a portion of Permit 26358 regarding the excess water appropriated under Permit 26358, as that had never been committed to a specific purpose for twenty years, concluding that the permittee had not proceeded in good faith and with reasonable diligence in placing the uncommitted water to beneficial use.

⁵ Exhibit No. 4, Public Administrative Hearing before the State Engineer, December 16, 1992.

⁶ Exhibit No. 1, Public Administrative Hearing before the State Engineer, December 16, 1992.

⁷ Transcript pp. 20-27, 33-62, Public Administrative Hearing before the State Engineer, December 16, 1992.

⁸ State Engineer's Ruling #4035, dated August 23, 1993.

V.

Desert Irrigation appealed Ruling #4035, and on March 8, 1994, the Honorable John P. Davis, District Judge, Fifth Judicial District Court, issued his ruling wherein he concluded that substantial evidence sustained the decision of the State Engineer and found that the State Engineer's rulings were not capricious. However, the Court remanded the matter to the State Engineer for an amended order addressing the provisions of NRS 533.380(4).⁹

FINDINGS OF FACT

I.

A full and complete Public Administrative Hearing was held before the State Engineer on December 16, 1992 and a complete record of evidence and testimony was taken regarding the cancelled portion of Permit 26358.⁶ In addition, administrative notice was taken of certain records in the Office of the State Engineer.¹⁰ The State Engineer finds that a full and complete record was developed and additional hearings are not required.

II.

In considering the Permittee's application for extension of time, the State Engineer must weigh the effort made toward perfecting the water right, under the terms and conditions of the specific permit. The State Engineer must determine if the permittee has proceeded in good faith and with reasonable diligence in placing the water to beneficial use for the purpose, and on the land, for which the right was acquired. In this case, in deciding whether to grant the request for extension of time of the full amount of water appropriated under Permit 26358, the Permittee felt that the State Engineer should have considered change Application 56986, which sought to place the water to beneficial use on a

⁹ Desert Irrigation, Ltd. v. State of Nevada and R. Michael Turnipseed, Case No. 12662, Fifth Judicial District Court.

¹⁰ Transcript p. 7, Public Administrative Hearing before the State Engineer, December 16, 1992.

different parcel,¹¹ located about six miles away and outside the place of use of Permit 26358.⁴ This 160 acre parcel was not within the service area Desert Irrigation as authorized by the Nevada Public Service Commission.¹² The State Engineer finds that the 160 acre parcel is not a part of the place of use permitted under Permit 26358 and should not be considered in taking action on the application for extension of time filed under Permit 26358.

III.

The State Engineer has previously found that satisfactory progress toward establishing beneficial use of 298.15 AFA of water has been made on Allen Estates Subdivision.⁸ Over a period of time, financing was obtained, roads were built, water lines, water tanks, pumps, and hydrants were installed, lots were sold and developed, houses were connected to the water system, and all required approvals from governmental agencies were obtained.¹³ The State Engineer finds that the Permittee has shown good cause for not having put the 298.15 AFA of water to beneficial use under Permit 26358.

The remaining 366.85 AFA of water has never been committed to any use on the Allen Estates Subdivision, under Permit 26358. The State Engineer finds that no progress has ever been made toward putting the 366.85 AFA of water to beneficial use under Permit 26358. The State Engineer further finds that the Permittee has not shown good cause for not having made application of this water to beneficial use.

¹¹ Permittee's Supplemental Points and Authorities, filed as a post-hearing brief to the Public Administrative Hearing before the State Engineer, December 16, 1992.

¹² Supplemental Hearing Exhibit B, Public Administrative Hearing before the State Engineer, December 16, 1992.

¹³ Transcript pp. 24-42, Public Administrative Hearing before the State Engineer, December 16, 1992.

IV.

When Application 26358 was filed in 1971, 204 individual residential lots, six commercial lots, and an 8.81 acre recreational park were contemplated for the Allen Estates Subdivision.¹⁴ Over the years, the plan has changed so that now, Allen Estates is a subdivision composed of 226 residential and commercial parcels and a nine acre recreational park,³ all within the place of use of Permit 26358.² The State Engineer considered the water service to all 226 parcels (@ 1.12 AF per lot) and the nine acre park (@ 5 AF per acre) in calculating the figure of 298.15 AFA needed to serve the Allen Estates Subdivision after full build-out. The State Engineer finds that the number of parcels which are contained in the area being served by Desert Irrigation were properly considered in granting the extension of time for 298.15 AFA of water under Permit 26358.

The 160 acre parcel that the Permittee would like to be considered, is not part of the place of use under Permit 26358. There is no evidence on the record that the Permittee has attempted to obtain approval from the Nevada Public Service Commission to expand its service area to include the 160 acre parcel as required under NRS 704.815. The State Engineer finds that the 1200 anticipated lots on the 160 acre parcel must not be considered in taking action on the request for extension of time filed under Permit 26358.

V.

Over the years, Desert Irrigation has made significant capital improvements to the water system serving Allen Estates Subdivision.¹³ Mr. Reagan Morin, President of Allen Estates, has spent in the neighborhood of \$250,000.00,¹⁵ during a period of time

¹⁴ Exhibit No. 2, Public Administrative Hearing before the State Engineer, December 16, 1992.

¹⁵ Transcript p. 42, Public Administrative Hearing before the State Engineer, December 16, 1992.

when Desert Irrigation and Allen Estates were experiencing difficult financial times.

Finally, in 1992, all of the lots in the Allen Estates Subdivision were sold, but additional time was needed to make a complete application of water to beneficial use under Permit 26358.¹⁶ There are some lots on which the owners have yet to build their homes. The building of homes is often dependent on the interest rates, the financial condition of the owner, the availability of loans in the area, and other economic factors. The State Engineer finds that the economic conditions of Allen Estates and those of the buyers of individual lots can add many years to achieving full build-out and beneficial use of the water under Permit 26358. Therefore, the State Engineer finds that economic conditions were considered in acting on the Permittee's application for extension of time.

VI.

There is no evidence on the record referring to delays in the development and subsequent water use within the Allen Estates Subdivision caused by unanticipated natural conditions. The State Engineer finds that there are no delays caused by unanticipated natural conditions.

VII.

The development of the Allen Estates Subdivision has been a lengthy process.¹⁷ NRS 533.380(1) requires the State Engineer to allow the holder of a quasi-municipal permit between five to ten years to put water to beneficial use. The State Engineer may, for good cause shown, extend the time within which water must be applied to beneficial use. The State Engineer had granted fourteen one-year extensions of time to establish beneficial use under

¹⁶ Exhibit No. 6, Public Administrative Hearing before the State Engineer, December 16, 1992.

¹⁷ Transcript pp 20-32, Public Administrative Hearing before the State Engineer, December 16, 1992.

Permit 26358.² In 1992, the Permittee stated on the request for extension of time form, that approximately five years are needed to complete the project. The State Engineer finds that the period of time contemplated for completing the development of Allen Estates Subdivision has varied over the years and has been considered in granting the extensions of time for a portion of Permit 26358.

CONCLUSIONS

I.

The State Engineer has jurisdiction over this matter.¹⁸

II.

The State Engineer shall, in determining whether to grant or deny an application for extension of time, consider, among other factors:¹⁹

- a. Whether the holder has shown good cause for not having made a complete application of the water to a beneficial use;
- b. The number of parcels and commercial or residential units which are contained in or planned for the land being developed or the area being served by the county, city, town, public water district or public water company;
- c. Any economic conditions which affect the ability of the holder to make a complete application of the water to a beneficial use;
- d. Any delays in the development of the land or the area being served by the county, city, town, public water district or public water company which were caused by unanticipated natural conditions; and
- e. The period contemplated in the:
 1. Plan for the development of a project approved by the local government pursuant to NRS 278.010 to 278.460; inclusive; or

¹⁸ NRS 533.

¹⁹ NRS 533.380(4).

2. Plan for the development of a planned unit development recorded pursuant to Chapter 278A of NRS, if any, for completing the development of the land.

III.

In granting the extension of time on a portion of Permit 26358, the State Engineer considered the effort made to perfect the water right on the Allen Estates Subdivision, the place of use of Permit 26358. The 160 acre parcel which the Permittee would like the State Engineer to consider is not within the place of use under Permit 26358. Therefore, the State Engineer concludes that the 160 acre parcel cannot be considered in determining whether to approve or deny the application for extension of time filed under Permit 26358.

IV.

The State Engineer concludes that the Permittee has shown good cause for not having made a complete application of water to beneficial use with respect to 298.15 AFA. However, the permittee has not shown good cause with respect to the excess water portion of Permit 26358, namely 366.85 AFA.

V.

Allen Estates was originally planned for 204 residential units, six commercial units, and an 8.81 acre recreational park. Now, Allen Estates is composed of 226 residential and commercial lots and a nine acre park, which will require, at full build-out, approximately 298.15 AFA of water. Progress has been made toward the application of water to beneficial use on the Allen Estates Subdivision, which is located within the place of use of Permit 26358. The 1200 lots which the Permittee hopes to create and develop on the 160 acre parcel are not contained in or planned for the land being served under Permit 26358.

VI.

The economic conditions of the Permittee, who was required to finance expensive capital improvements and those of the individual

lot owners caused delays in the ultimate build-out and water use on Allen Estates Subdivision. The State Engineer considered these economic conditions when the extension of time for 298.15 AFA of water was granted.

VII.

There were no unanticipated natural conditions that caused any delays in the development of Allen Estates Subdivision.

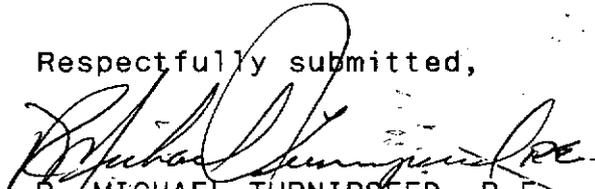
VIII.

Due to several factors, time period for completing the development of Allen Estates Subdivision has varied. The State Engineer concludes that the variable time period has been considered in granting the extension of time for 298.15 AFA of water under Permit 26358.

RULING

The cancellation of 366.85 AFA, a portion of Permit 26358, is hereby affirmed.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 8th day of
August, 1994.