

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

IN THE MATTER OF THE CANCELLATION)
OF PERMIT 55372, PAHRUMP VALLEY)
GROUNDWATER BASIN (162), NYE)
COUNTY, NEVADA.)

RULING

4579

GENERAL

I.

Application 55372 was filed on October 12, 1990, to appropriate 0.212 cubic foot per second (cfs), not to exceed 45 acre feet annually (afa), of the underground waters of the Pahrump Valley Groundwater Basin, Nye County, Nevada, for irrigation and domestic purposes within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M.¹ The proposed point of diversion was described as being located within NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.

II.

Permit 55372 was granted on September 30, 1991, to appropriate 0.212 cfs, not to exceed 45 afa of water, for the irrigation of nine acres and domestic purposes within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M.¹ Permit 55372 was approved pursuant to the provisions of State Engineer's Order No. 955² to replace the portion of Permit 23840, Certificate 8549, forfeited under State Engineer's Ruling No. 3661.³ Under the terms of Permit 55372, the permittee was to file in the office of the State Engineer Proof of Completion of the Work of diversion on or before October 30, 1992, and Proof of Beneficial Use of the waters on or before October 30, 1993.¹

¹ File No. 55372, official records in the office of the State Engineer; Exhibit No. 2, public administrative hearing before the State Engineer, September 9, 1997.

² State Engineer's Order No. 955, dated October 26, 1987, official records in the office of the State Engineer.

³ State Engineer's Ruling No. 3661, dated December 27, 1989, official records in the office of the State Engineer.

III.

On November 3, 1992, the State Engineer sent notice that the permittee had failed to comply with the permit terms in that Proof of Completion of Work had not been timely filed.⁴ On November 25, 1992, Barbara Thein, Executrix of the Estate of John E. Thein, Jr. filed an Application for Extension of Time for filing Proof of Completion of Work. The State Engineer granted the request for extension of time through October 30, 1993.

On November 3, 1993, the State Engineer sent notice to the Estate of John E. Thein, Jr. that it had failed to comply with the permit terms as neither Proof of Completion of Work nor Proof of Beneficial Use of the waters had been timely filed.⁴ On November 30, 1993, Barbara Thein, Executrix of the Estate of John E. Thein, Jr. filed an Application for Extension of Time for filing Proof of Completion of Work and Proof of Beneficial Use of the water stating that the funds necessary to complete the work were not available to the estate at that time.⁴ The State Engineer granted the request for extension of time through October 23, 1994. Proof of Completion of Work was filed on October 5, 1994.⁴

IV.

Ownership of Permit 55372 was assigned by the State Engineer to Mr. Richard Aley on July 27, 1995, by deed dated September 23, 1994.⁵ On September 30, 1994, Richard Aley filed an Application for Extension of Time for filing Proof of Beneficial Use of the water stating that he needed an extension of time to transfer water to the Central Nevada Utilities Company ("CNUC") to service an 8 acre mobile home park (Autumnwood Estates) and 2 commercial

⁴ Exhibit No. 5, public administrative hearing before the State Engineer, September 9, 1997.

⁵ File No. 55372, official records in the office of the State Engineer; Exhibit No. 3, public administrative hearing before the State Engineer, September 9, 1997.

properties in the CNUC service area.⁴ The State Engineer granted the request for extension of time through October 30, 1995.

On November 2, 1995, the State Engineer sent notice that the permittee had failed to comply with the permit terms in that Proof of Beneficial Use of the water had not been timely filed.⁴ On October 30, 1995, Richard Aley filed an Application for Extension of Time for filing Proof of Beneficial Use of the water stating that he needed an extension of time to plant a crop and keep an accurate measurement of the water use.⁴ The State Engineer granted the request for extension of time through October 30, 1996.

V.

On May 6, 1996, Tsunehiro and Ethel S. Matsuda filed change Application 62102 to change the point of diversion, place and manner of use of 0.0471 cfs, not to exceed 10 afa, a portion of the waters appropriated under Permit 55372.⁶ Nothing in the record at that time indicated any ownership interest of the Matsudas in Permit 55372.

VI.

On October 29, 1996, Richard Aley filed an Application for Extension of Time for filing Proof of Beneficial Use of the water stating that he needed an extension of time as he had planted winter grass for irrigation.⁴ The check which accompanied the application for extension of time was returned by the bank about November 8, 1996, marked as "Non Sufficient Funds." On December 16, 1996, the State Engineer cancelled Permit 55372.⁷ The State Engineer found that a reasonable period of time had passed in which to establish beneficial use of the water; that the last extension of time was granted in 1995 relying upon the commitment to establish beneficial use of the waters by irrigating during the

⁶ File No. 62102, official records in the office of the State Engineer.

⁷ Exhibit No. 6, public administrative hearing before the State Engineer, September 9, 1997.

previous one year extension of time; that continually requesting additional extensions of time demonstrated a lack of ability or commitment to complete placement of the waters to the permitted beneficial use within a reasonable time; that the pending change application was insufficient cause to grant the extension of time; and, that the owner had not shown good cause to grant the extension of time.

VII.

By letter received December 24, 1996, Mr. Tsunehiro Matsuda petitioned for review of the cancellation of Permit 55372 pursuant to provisions of NRS § 533.395.¹

VIII.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held in Las Vegas, Nevada, on September 9, 1997, before a representative of the office of the State Engineer regarding to the cancellation of Permit 55372.⁸

FINDINGS OF FACT

I.

The State Engineer finds that no petition for review of the cancellation of the 0.165 cfs, not to exceed 35 afa, portion of Permit 55372 held by Richard Aley was filed; therefore, the cancellation of that portion was final after the expiration of the 60 day petition period set forth in NRS § 533.395.

II.

The State Engineer finds that the intent of State Engineer's Order No. 955 was to provide the opportunity for replacement in kind of certain forfeited irrigation rights as specified by the Order. The State Engineer further finds that the intent of State Engineer's Order No. 955 was that water had to be placed back to beneficial use within the two year time frame set forth under the permit terms.

⁸ Transcript, public administrative hearing before the State Engineer, September 9, 1997.

III.

The State Engineer finds that no evidence or testimony was provided at the administrative hearing which demonstrated good faith and reasonable diligence toward perfecting the water right at the permitted place of use for the permitted purpose.⁹ In fact, the petitioner had no evidence at all regarding use of the water at the permitted place of use for the permitted purpose. The State Engineer further finds that the filing of an application to change the point of diversion, place and manner of use does not demonstrate the good faith and reasonable diligence required for demonstrating beneficial use under the replacement right for irrigation at the permitted place of use.

CONCLUSIONS OF LAW

I.

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

II.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise¹¹ and beneficial use is the basis, the measure and the limit of the right to the use of water.

III.

A permit to appropriate water grants to the permittee the right to develop a certain amount of water from a particular source for a certain purpose to be used at a definite location.¹² In the perfection of a water right a permittee is generally allowed under the law sufficient time after the date of approval of the

⁹ Transcript, public administrative hearing before the State Engineer, September 9, 1997.

¹⁰ NRS Chapters 533 and 534.

¹¹ NRS § 533.030 and 533.035.

¹² NRS § 533.330 and 533.335.

application to complete application of the water to beneficial use.¹³ Nevada water law provides that the State Engineer may for good cause shown extend the time within which the water is to be placed to beneficial use. The State Engineer shall not grant an extension of time unless proof and evidence is submitted that shows the permittee is proceeding in good faith and with reasonable diligence to perfect the permit.¹⁴

The intent of the extension of time provision under Nevada law is to provide the opportunity for the permittee to resolve temporary adverse conditions, which prevent compliance with the proof of completion of work and proof of beneficial use requirements set forth on the permit. When Application 55372 was filed, it was filed under the replacement provisions of State Engineer's Order No. 955. Order 955 allowed landowners of forfeited water rights in Pahrump Valley the opportunity to protect their land values as irrigated land and landowners who refiled under the provisions of Order No. 955 where given two years to prove beneficial use of the waters under the terms of the permit at the permitted place of use and for the permitted irrigation purpose.

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 55372 and no evidence was provided at the administrative hearing which demonstrated the good faith or

¹³ NRS § 533.380.

¹⁴ NRS § 533.380.

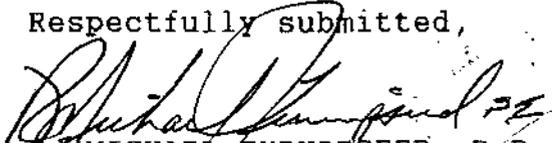
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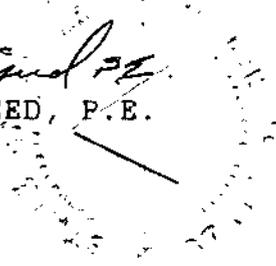
reasonable diligence toward perfecting this replacement irrigation right which would warrant modifying or rescinding the cancellation.

RULING

The cancellation of Permit 55372 is hereby affirmed.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/SJT/ab

Dated this 29th day of
October, 1997.