

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

IN THE MATTER OF CANCELLED PERMIT)
4952 FILED TO APPROPRIATE THE)
PUBLIC WATERS WITHIN THE PAHRUMP)
VALLEY GROUNDWATER BASIN (162),)
NYE COUNTY, NEVADA.)

RULING
4651

GENERAL

I.

Application 4952 was filed by William E. Beck on March 11, 1918, to appropriate 3/20 cubic feet per second (cfs) of the waters of Crystal Spring located within the Pahrump Valley Groundwater Basin, Nye County, Nevada, for irrigation and stockwatering purposes within the NE¼ SW¼ of Section 36, T.17S., R.53E., and the NE¼ of Section 2, T.18S., R.53E., M.D.B. & M.¹ The application indicated that 3 acres of land was to be irrigated in the NE¼ SW¼ of Section 36, T.17S., R.53E., and 2 acres of land was to be irrigated in NE¼ of Section 2, T.18S., R.53E., M.D.B. & M. and that Crystal Springs was to be Mr. Beck's home ranch. The point of diversion is described as being located within the NE¼ SW¼ of Section 36, T.17S., R.53E., M.D.B. & M.¹

II.

Permit 4952 was cancelled by the State Engineer on July 17, 1997, on the grounds that the point of diversion (Crystal Spring) is not located within the NE¼ SW¼ as stated on the application. Petitions for review of the cancellation were timely filed by Mr. Robert Owens and Mr. William Glasier.

III.

After all parties of interest were duly noticed by certified mail,² a public administrative hearing was held regarding to the

¹ File No. 4952, official records in the office of the State Engineer.

² Exhibit No. 1, public administrative hearing before the State Engineer, June 10, 1998.

cancellation of Permit 4952 on June 10, 1998, in Las Vegas, Nevada, before representatives of the office of the State Engineer.³

FINDINGS OF FACT

I.

The State Engineer finds that Permit 4952 was approved on November 8, 1918, for 0.05 cfs. Under the terms of Permit 4952, Proof of Completion of Work was due to be filed in the office of the State Engineer before May 8, 1919, and Proof of Beneficial Use of the water was due to be filed on or before October 8, 1919.⁴ Proof of Completion of Work was filed on March 25, 1919.

II.

Nevada law requires that all applications for permits shall be accompanied or followed by such maps and drawings and such other data as may be prescribed by the state engineer and such accompanying data shall be considered as part of the application.⁵ By letter dated March 8, 1919, the State Engineer informed the applicant, Mr. Beck, that a map in support of Application 4952 was required to be filed by May 8, 1919.⁶ By letter dated May 10, 1919, the State Engineer informed Mr. Beck that the map had not been timely filed and if said map was not filed within 30 days Permit 4952 would be subject to cancellation. By letter dated June 9, 1919, the State Engineer informed Mr. Beck that the sketch he filed as a map did not conform to the regulations for maps to be filed under applications and returned said sketch to Mr. Beck. On August 13, 1919, Mr. Beck filed the map identified as hearing Exhibit No. 3. However, by letter dated September 11, 1919, the

³ Transcript, public administrative hearing before the State Engineer, June 10, 1998.

⁴ Exhibit No. 2, public administrative hearing before the State Engineer, June 10, 1998.

⁵ NRS § 533.350.

⁶ Exhibit No. 4, public administrative hearing before the State Engineer, June 10, 1998.

State Engineer again returned the map to Mr. Beck indicating it also needed further corrections, i.e., identification of the boundaries of each area of culture, ditch lines and laterals by which the irrigation was accomplished. The State Engineer finds that no acceptable map was ever filed with the application and Mr. Beck never complied with the requirements for the filing of an accurate map.

III.

On November 10, 1919, Mr. Beck filed Proof of Beneficial Use of the waters, and in that proof Mr. Beck indicated he had watered six acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.17S., R.53E., M.D.B.&M.⁷ The State Engineer finds that Permit 4952 did not authorize the irrigation of six acres of irrigation in that section of land, but rather only authorized the irrigation of three acres in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.17S., R.53E., M.D.B.&M.

IV.

By letter dated March 6, 1929, the State Engineer again wrote to Mr. Beck indicating to him that it was not clear according to the cultural map how the six acres of land were irrigated and that Mr. Beck needed to inform the State Engineer as to how the three springs identified on the August 1919 map were used to irrigate the land.⁸ Evidence in the permit file indicates that the March 6, 1929, letter to Mr. Beck was returned to the State Engineer with no forwarding address.⁹ The State Engineer finds that the requirements for filing proof of beneficial use which include accurate cultural mapping have never been complied with and no certificate was ever issued under the permit.

⁷ Exhibit No. 4 and Transcript, p. 13, public administrative hearing before the State Engineer, June 10, 1998.

⁸ Exhibit No. 4, public administrative hearing before the State Engineer, June 10, 1998.

⁹ Exhibit No. 4, letters dated March 6, 1929, and October 9, 1945, public administrative hearing before the State Engineer, June 10, 1998.

V.

Testimony provided at the public administrative hearing indicates that Crystal Spring is actually three separate springs that are identified as Crystal Spring.¹⁰ At the heart of this matter there appears to be an underlying problem with Permit 4952, that being that while the application and a land patent both describe the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.17S., R.53E., M.D.B.& M., evidence in the permit file and testimony presented at the public administrative hearing and as summarized below indicate that the actual location of Crystal Spring and the place of use of the waters are in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, and not as filed for under Application 4952.

Evidence found in the permit file and testimony presented at the public administrative hearing indicate that Crystal Spring and the use of the waters therefrom is in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, and not in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.17S., R.53E., M.D.B.& M. as filed for under the application.¹¹ The map filed in August 1919 indicates a place of use in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36,¹² and evidence indicates that the land patented from the Federal Government under Patent No. 5671 was identified as the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.17S., R.53 E., M.D.B.& M. However, if the actual location of the springs and the place of use is in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, the public records of the Bureau of Land Management indicate that the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 36, T.17S., R.53E., M.D.B.& M. has never been patented and is still being held by the U.S. Government.

¹⁰ Transcript, p. 49, public administrative hearing before the State Engineer, June 10, 1998.

¹¹ Exhibit No. 4, letter dated October 16, 1945; Transcript, pp. 25-26, 35, public administrative hearing before the State Engineer, June 10, 1998.

¹² Exhibit No. 3, public administrative hearing before the State Engineer, June 10, 1998.

The evidence indicates that in the 1940's interested persons were aware of this problem and the State Engineer informed people inquiring as to the following:

The U.S. Land Office at Carson City advised us that the NW¼ SW¼ is open government land and the State Land Office advised us that the NE¼ SW¼ was patented to Theodore A. Johnson on May 19, 1906, both forties being in Section 36, T. 17S., R. 53E., M.D.B. & M. With this information you can go over the records in the Nye County Recorders Office and follow up the chain of title of the patented land to the end that perhaps some typographical error may be found and the matter cleared up, in which case if it definitely found that Mr. Herman Jones owns the patented forty acre tract then the matter can be taken up with the grazing service for an exchange of the two forties after which an application for permission to change the point of diversion and place of use of water under permit No. 4952 will be in order.¹³

The State Engineer finds that since the 1940's no one has ever cleared up the problems associated with the described location of the patented 40 acre parcel or the problems associated with Permit 4952 describing the wrong location for the point of diversion or place of use of the waters under the permit.

VI.

In Nevada, water may be appropriated for beneficial use as provided under the law and not otherwise and beneficial use is the basis, the measure and the limit of the right to the use of water.¹⁴ 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.¹⁵ In the perfection of a water right a permittee is generally allowed under the law sufficient time after the date of approval of the application to complete application of the water to beneficial use,

¹³ Exhibit No. 4, letter dated October 22, 1945, public administrative hearing before the State Engineer, June 10, 1998.

¹⁴ NRS § 533.030 and 533.035.

¹⁵ NRS § 533.330 and 533.335, 533.340.

and file proof of said use as authorized under the permit.¹⁶ The State Engineer finds that in nearly 80 years the problems associated with this permit have not been resolved, and no one has demonstrated proof of beneficial use of the waters as filed for under the application. The application and map filed indicate that water was to be applied to the NE¼ SW¼ of Section 36 and no sufficient paperwork has ever been filed to adequately document proof of beneficial use of the waters at that location.

VII.

The State Engineer finds that good faith and due diligence have not been demonstrated as to placing water to beneficial use on the NE¼ SW¼ of Section 36 as it appears that location has never been the place where water was used, and water use at the NW¼ SW¼ of Section 36 has never been authorized under Permit 4952.

VIII.

The State Engineer finds that the evidence and testimony indicate that the land actually settled by the Mr. Beck where water was used was the NW¼ SW¼ of Section 36, T.17S., R.53E., and not the NE¼ SW¼ of Section 36. However, the State Engineer is not the appropriate authority to resolve the issue of whether the land patented in the NE¼ SW¼ of Section 36 was misidentified back in the early 1900's. His authority extends to the filing and issuance of water rights and the regulation of those water rights pursuant to State law.

IX.

In reviewing the cancellation of water right pursuant to a petition for review of said cancellation, the State Engineer's focus is whether proof and evidence is submitted that shows the permittee is proceeding in good faith and with reasonable diligence to perfect the application as filed.¹⁷ If said evidence is provided, the State Engineer may reinstate a cancelled permit with

¹⁶ NRS § 533.380.

¹⁷ NRS § 533.380.

a loss of priority date being the penalty under law,¹⁸ and the State Engineer may, for good cause shown, extend the time within which the water is to be placed to beneficial use and the filing requirements for proof of beneficial use be met. 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 beneficial use requirements set forth on the permit. Proof of beneficial use of the waters as filed for under Application 4952 was first due to be filed in the office of the State Engineer in 1919. Prior to the cancellation of Permit 4952, 78 years had passed without the filing requirements being met and 52 years had passed since the problems associated with the misidentified point of diversion and place of use had been pointed out by the State Engineer.

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. Permit 4952 was granted in 1918 to establish use of water in the NE¼ SW¼ of Section 36 and no satisfactory filing of proof of beneficial use of the waters as applied for was ever filed in the office of the State Engineer. The State Engineer finds that in light of the problems with the misidentified point of diversion and place of use even if proof of beneficial use were filed no certificate could be issued under the permit as the point of diversion and place of use of any waters is not as identified under the permit.

X.

The State Engineer finds that the lands in the NE¼ SW¼ of Section 36, T.17S., R.53E., comprise a narrow canyon where the

¹⁸ NRS § 533.395(3).

waters under Permit 4952 have never been applied to beneficial use.¹⁹

XI.

The State Engineer finds that even if he were to rescind the cancellation of Permit 4952 and reinstate the permit it would no longer have a 1918 priority date, but rather its priority date would be 1997.²⁰

CONCLUSIONS

I.

The State Engineer has jurisdiction over the persons and the subject matter of this action and determination.²¹

II.

NRS § 533.380(3) provides that the State Engineer may, for good cause shown, extend the time within which construction work must be completed, or water must be applied to a beneficial use under any permit issued by him. Any application for an extension of time for filing proof of completion of work and proof of beneficial use must be accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application as it was filed.²² For the purposes of NRS § 533.380, the measure of 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.²³

¹⁹ Exhibit No. 4, letter dated October 16, 1945; Transcript, p. 23, public administrative hearing before the State Engineer, June 10, 1998.

²⁰ NRS § 533.395.

²¹ NRS Chapter 533.

²² NRS § 533.380(3)(b).

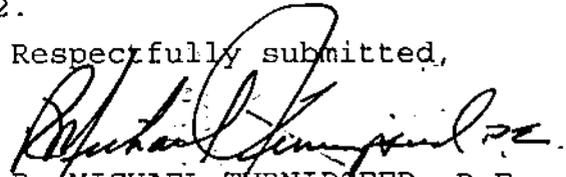
²³ NRS § 533.380(6).

The State Engineer concludes that since the approval of the Application 4952 in 1918 the evidence indicates that water was never applied to the NE¼ SW¼ of Section 36 as that is not the correct location of Crystal Spring or the place of use where water was actually used. The State Engineer concludes no timely request for extension of time was ever filed for the filing of proof of beneficial use and no evidence was provided at the administrative hearing to show that good faith and reasonable diligence were shown as to applying water to the location filed for under Application 4952, and Application 4952 was not permitted for the use of water on the NW¼ SW¼ of Section 36.

RULING

The cancellation of the Permit 4952 is hereby upheld on the grounds that no evidence was provided showing that good faith and reasonable diligence were exercised in applying water to the place of use identified under Permit 4952.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 28th day of
July, 1998.