

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

IN THE MATTER OF THE CANCELLATION OF)
PERMIT 1975 FILED TO APPROPRIATE THE)
PUBLIC WATERS OF THE REESE RIVER AND ITS)
TRIBUTARIES OF THE UPPER REESE RIVER)
VALLEY GROUNDWATER BASIN (056), LANDER)
COUNTY, NEVADA.)

RULING

4665

GENERAL

I.

Application 1975 was filed on March 8, 1911, by Patrick Walsh to appropriate 3,000 acre-feet annually (afa) of the flood waters of the Reese River and its tributaries within the Upper Reese River Valley, Lander County, Nevada, for irrigation purposes within the NW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 3 and the N $\frac{1}{2}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 4, T.16N., R.42E., M.D.B. & M., and the S $\frac{1}{2}$ SE $\frac{1}{4}$, of Section 33 and the SW $\frac{1}{4}$ of Section 34, T.17N., R.42E., M.D.B. & M. The waters were to be stored in a reservoir located within the S $\frac{1}{2}$ of Section 26, T.16N., R.41E., M.D.B. & M.¹

II.

A permit was granted under Application 1975 on September 7, 1911, to appropriate 3,000 afa of the flood waters of the Reese River and its tributaries to be impounded in a reservoir for the irrigation of 1,000 acres within the place of use described above.

¹ File No. 1975, official records in the office of the State Engineer.

Under the terms of Permit 1975, the permittee was to file Proof of Commencement of Work in the office of the State Engineer on or before June 1, 1912, and was to file Proof of Beneficial Use of the waters on or before October 16, 1916.

On April 24, 1917, an application for extension of time to file the Proof of Completion of Work and the Proof of Beneficial Use was filed in the office of the State Engineer. The application for extension of time stated that after expenditures for excavation work it was determined that the original foundation was not suitable and it became necessary to locate a more feasible site for the impoundment at a point some distance downstream of the original site.¹ A new dam was constructed downstream, and owing to the fact that certain changes in the original application would be necessary, a request was made for additional time to complete the works of diversion and for the submittal of the Proof of Completion of Work and the Proof of Beneficial Use.¹ The State Engineer granted the requested extension of time to July 1, 1921, in which to complete the works of diversion, and to August 1, 1921, in which to file in the office of the State Engineer the

Proof of Completion of Work and to November 15, 1921, for filing the Proof of Beneficial Use.

On September 1, 1922, the office of the State Engineer sent a final notice giving the permittee 30 days to comply with the terms of the permit or submit a request for extension of time for submittal of the required proofs. The Proof of Completion of Work was received and filed in the office of the State Engineer on October 1, 1922.¹ On September 29, 1922, the Proof of Beneficial Use was filed; however, on November 17, 1922, it was returned to the permittee for more information.¹ An amended Proof of Beneficial Use was received in the office of the State Engineer on November 22, 1922; however, it noted that conditions had required moving the storage site.¹ The cover letter which accompanied the Proof of Beneficial Use stated that an amended Proof of Beneficial Use would be submitted when a map could be prepared, and requested additional time to submit the required cultural map. On November 23, 1922, the State Engineer replied that the Proof of Beneficial Use had been received and filed in his office with the understanding that on or before May 1, 1923, an amended Proof of Beneficial Use would be filed and accompanied by a cultural map.

Two additional extensions of time to file the Proof of Beneficial Use and cultural map were granted by the State Engineer. On December 1, 1923, an amended Proof of Beneficial Use was filed in the office of the State Engineer. The cover letter that accompanied the filing indicated that the required cultural map would be forthcoming, as would an application to change the point of diversion and place of use in order to have the records agree with the Proof of Beneficial Use filed. On December 14, 1923, the cultural map was returned by the State Engineer for corrections with a cover letter stating that the Proof of Beneficial Use would be held until he was advised whether to file it as a preliminary Proof of Beneficial Use with an amended Proof of Beneficial Use to be filed when the cultural map was corrected and filed. A reply was received and filed on January 7, 1924, requesting that the Proof of Beneficial use be filed as preliminary. On January 10, 1924, a request for extension of time to submit the cultural map was filed in the office of the State Engineer.

By letter dated January 17, 1924, the State Engineer requested that the permittee's agent come to Carson City in order

to try to resolve the conflicts surrounding Permit 1975. By letter dated April 2, 1924, the State Engineer informed the permittee's agent that the permittee had until May 1, 1924, to file an amended Proof of Beneficial Use. Additional extensions of time were requested and subsequently granted by the State Engineer to file the cultural map and Proof of Beneficial Use up to and including June 1, 1925.

III.

By letter dated April 17, 1995, the State Engineer cancelled Permit 1975.

IV.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held on May 13, 1998, in Carson City, Nevada, before representatives of the State Engineer regarding a petition for review of the cancellation of Permit 1975.

FINDINGS OF FACT

I.

The State Engineer finds that a dam was constructed and water placed to beneficial use; however, the dam was constructed several

miles downstream from the point authorized under Permit 1975. The State Engineer finds that from 1925 to the cancellation of the permit in 1995 the permittee and his successors used the water, but never completed the necessary corrections in the records of the State Engineer as to the actual location of the dam. The State Engineer finds that the State Engineer in 1925 accepted the Proof of Beneficial Use filed as a preliminary proof, but recognized there were corrections that needed to be made. The State Engineer further finds that Permit 1975 was cancelled since the permittee never had the corrections made to indicate exactly where the dam is actually located.

II.

In the records of the State Engineer, John Hancock Mutual Life Insurance Company is the owner of record of Permit 1975. The State Engineer finds that while Mr. Jim Champie testified he purchased the property and appurtenances he has never completed the statutory process for having said water right assigned to him in the records of the State Engineer, and needs to complete said assignment.

III.

At the administrative hearing, Mr. Jim Champie presented testimony in support of the fact that the dam was constructed and exists today.² Mr. Champie is the current owner of the lands to which the subject waters are appurtenant. Mr. Champie testified that he is and has been familiar with the area since about 1969, and has seen the dam impound the flood waters of the Reese River several times and has subsequently beneficially used those stored waters for irrigation purposes.³ Mr. Champie identified the location of the existing dam, built in 1915, as being located within Section 34, T.17N., R.42E. M.D.B. & M.⁴ The State Engineer finds that the location of the actual dam is not at the permitted site; however, the dam has been in existence since 1915.

² Transcript, p. 21, public administrative hearing before the State Engineer, May 13, 1998.

³ Transcript, p. 24, public administrative hearing before the State Engineer, May 13, 1998.

⁴ Transcript, pp. 21 and 22, public administrative hearing before the State Engineer, May 13, 1998.

IV.

A certificate was not issued under Permit 1975 due to the discrepancies between the Proof of Beneficial Use and the cultural map relative to the original permitted dam site and the place of use. The actions to rectify the situation as originally proposed by the predecessors of the current owner did not come to fruition. The period of time that has passed since the proposal to file a change application was tendered is approximately 74 years. During this period of time the ownership of the subject cancelled water right has been conveyed ten different times.⁵ The file does not reflect an inquiry by any of the previous owners as to why there was not a certificate issued on the subject cancelled permit.¹ Mr. Champie testified that when he purchased the property and the appurtenances, which included the listing of the subject cancelled permit, he did not know there were any pending actions of concern, only that it was referred to as Permit 1975.⁶ The first time Mr. Champie became aware of any pending action was upon receipt of the

⁵ Exhibit No. 4, public administrative hearing before the State Engineer, May 13, 1998.

⁶ Transcript, p. 27, public administrative hearing before the State Engineer, May 13, 1998.

cancellation notice.⁷ The State Engineer finds that to bring about a culmination of the appropriative process, in this instance, cancellation of the permit was deemed the appropriate method. However, this is not a standard cancellation of a permit, but was rather a procedure used to effectuate correction of the records to match the Proof of Beneficial Use filed.

v.

Proof of Beneficial use was filed in 1923.⁸ The filing of the other required proofs demonstrates that the permittee substantially complied with the terms and conditions of the permit. These filings demonstrate that the permittee was acting in good faith and with due diligence to perfect the appropriation and that the permittee did actually place the water to beneficial use.

The testimony indicates that water has been used to the present time. However, several basic problems underlie proving beneficial use under Permit 1975. First, when the original permittee determined that the original site of the dam was unsuitable and

⁷ Exhibit No. 2, public administrative hearing before the State Engineer, May 13, 1998.

⁸ Exhibit No. 6, public administrative hearing before the State Engineer, May 13, 1998.

subsequently constructed the dam downstream a change application should have been filed with the office of the State Engineer as was proposed in 1917. The statutory provisions providing for the opportunity to file a change application have been available since 1907.⁹ Second, the waters that have been impounded are the flood waters of the Reese River, and even though they are the same waters that would have been impounded if the dam were constructed at the permitted site, they were never diverted and impounded at the permitted point of diversion nor were they applied to the permitted place of use. The State Engineer finds that the records in his office do not reflect a change application ever being filed. The impounding and the use of the water has been occurring since the appropriation was granted by the State Engineer without the benefit of a correct permit. In reviewing the record, noting that there were numerous extensions of time granted and considering the extensive period of time that has lapsed from the last correspondence concerning the issues of perfection of the waters, the State Engineer finds that permittee has substantially complied with the terms of the permit.

⁹ NRS § 533.325 and 533.345.

CONCLUSIONS

I.

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

II.

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.¹¹

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.¹² 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

¹⁰ NRS Chapter 533.

¹¹ NRS § 533.330 and 533.335.

¹² NRS § 533.380.

submitted that shows the permittee is proceeding in good faith and with reasonable diligence to perfect the application.¹³

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 requirements set forth in the permit. The construction of the dam was commenced and completed, albeit not in the permitted location, and has impounded the flood waters of the Reese River and its tributaries, and subsequently irrigated lands that are under control of Mr. Champie. The State Engineer concludes that the permittee has proceeded with good faith and due diligence.

RULING

The permittee has 30 days from the date of this ruling to file in the office of the State Engineer an application requesting extension of time for filing the Proof of Beneficial Use, and cultural map under Permit 1975, accompanied by the statutory filing fee. If the application for extension of time and statutory filing fee is timely filed in the office of the State Engineer, the cancellation of Permit 1975 will be rescinded and

¹³ NRS § 533.380.

the 3,000 afa reinstated without loss in priority date only for the purpose of allowing a change application to be filed in the office of the State Engineer to correct the point of diversion. Failure to timely file the application for extension of time and statutory filing fee will result in the affirmation of the cancellation. If the rescission is granted, an application to change must be filed in the office of the State Engineer accompanied by the statutory filing fee no later than 90 days from the date of rescission.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/RKM/cl

Dated this 2nd day of
October, 1998.