

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

4035

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 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 is Desert Irrigation.²

II.

The proof of beneficial use was first due on February 24, 1977.² Fifteen extensions of time had been granted until June 11, 1992, when the State Engineer granted an extension of time for a portion of Permit 26358 (298.15 AFA) and cancelled the remaining portion of Permit 26358 (366.85 AFA). In the letter cancelling a portion of Permit 26358, dated June 11, 1992, the State Engineer stated that the quantity of water committed to serve 226 residential lots, and a nine acre recreational park was 298.15 AFA.

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.

The remaining 366.85 AFA had not been committed to a specific purpose since the approval of Permit 26358, twenty years ago. The State Engineer stated that the record lacks evidence that there has been satisfactory progress to establish beneficial use for the 366.85 AFA. The State Engineer found that the permittee had not shown good cause to grant 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 proposed point of diversion is 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 proposed place of use is located in the NW $\frac{1}{4}$ of said Section 13. Application 56986 became ready for action on March 22, 1992.⁴ No action has been taken on Application 56986, pending the outcome of the cancellation of a portion of Permit 26358.

IV.

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 hold a hearing regarding the cancellation of portion of water rights under Permit 26358 and regarding Application 56986.⁵

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.

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

V.

On December 16, 1992, a Public Administrative Hearing before the State Engineer was held to consider the cancelled portion of Permit 26358.⁶

FINDINGS OF FACT

I.

At the hearing, the owner of record presented evidence and testimony regarding the work that has been progressing on the Allen Estates Subdivision from 1972, when Permit 26358 was approved, up to the present time. The work involved approval of the subdivision, expansion of the subdivision, construction and updating of water service lines, connection of new homes as they were completed, and as late as 1992, construction of a new 30,000 gallon water tank.⁷ The State Engineer finds that there has been satisfactory progress toward establishing beneficial use of the water necessary to serve the Allen Estates Subdivision. That quantity of water is calculated to be 298.15 AFA.⁸

II.

The evidence and testimony regarding the progress made over the years applied only to the development of Allen Estates. In the fifteen requests for extension of time, the owner of record never mentioned any other water commitment beyond that which was required for Allen Estates.² The State Engineer finds that there is no evidence or testimony on the record showing that the quantity of

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

⁷ Exhibits 9, 10 and Transcript, pp. 19-60, Public Administrative Hearing before the State Engineer, December 16, 1992.

⁸ 298.15 AFA is the quantity of water to serve 226 residential/commercial units at 1.12 AFA per unit plus a 9 acre park at 5 AFA per acre.

water beyond that which was required for Allen Estates, had ever been committed to any purpose.

III.

At the hearing, the Permittee referred to five case studies⁹, in which the State Engineer granted extensions of time and did not cancel any portion of the water rights. The permittee claims that the same situation occurs with Permit 26358, only that in this instance, the State Engineer cancelled a portion of the water right. After close examination of the five case studies, it is clear that they are not similar to the Permit 26358 situation. In all of the case studies, extensions of time were granted because all of the water was committed to a specific use. Change applications were approved that expanded the place of use to contiguous property, as the community grew and new subdivisions were approved, or incorporated the place of use into the Central Nevada Utilities Company service area. Application 56986 attempts to change the place of use of the uncommitted portion of Permit 26358, to a yet to be approved subdivision, six miles away, and not within the service area as approved by the State Public Services Commission.¹⁰ The State Engineer finds that the conditions regarding Permit 26358 are not similar to the five case studies and that the action taken on Permit 26358 is not inconsistent with the actions taken in the five case studies.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the subject matter.¹¹

II.

⁹ Exhibits 20-24, Public Administrative Hearing before the State Engineer, December 16, 1992.

¹⁰ Supplemental Exhibit B and Transcript p. 77, Public Administrative Hearing before the State Engineer, December 16, 1992.

¹¹ NRS 533 and 534.

If, in the State Engineer's judgement, the holder of a permit is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the State Engineer shall cancel the permit.¹²

III.

The State Engineer may, after receiving and considering evidence regarding a cancelled permit, affirm, modify, or rescind the cancellation.¹³

IV.

The State Engineer concludes that the portion of Permit 26358 that was cancelled on June 11, 1992, amounting to 366.85 AFA, was uncommitted to any purpose from 1972 to 1992. The State Engineer also concludes that the permittee has failed to proceed in good faith and with reasonable diligence toward placing this uncommitted water to beneficial use. The State Engineer rightfully cancelled this portion of Permit 26358.

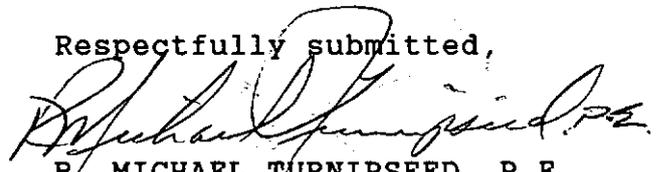
V.

The remaining portion of Permit 26358, amounting to 298.15 AFA remains in good standing to serve the Allen Estates Subdivision.

RULING

The cancellation of a portion of Permit 26358 is hereby affirmed.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 23rd day of
August, 1993.

¹² NRS 533.395(1).

¹³ NRS 533.395(2).