

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

IN THE MATTER OF CANCELLED )  
PERMIT 73072 FILED TO APPROPRIATE )  
UNDERGROUND WATER WITHIN THE )  
PAHRUMP VALLEY HYDROGRAPHIC )  
BASIN (162), NYE COUNTY, NEVADA. )

**RULING**

**# 6251**

**GENERAL**

**I.**

Application 73072 was filed on July 20, 2005, to change the point of diversion and place of use of a portion of Permit 29538, Certificate 9692. The point of diversion is described as being located within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.21S., R.54E., M.D.B.&M. The place of use is described as being located within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 33 and the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 34, T.21S., R.54 E., M.D.B.&M. The existing point of diversion is described as being located within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 1, T.21S., R.53E., M.D.B.&M. The existing place of use is described as being 9.6 acres located within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 1, T.21S., R.53E. M.D.B.&M., of which, 5 acres was to be removed from cultivation. The manner of use stated on change Application 73072 is irrigation and domestic use, and the amount of water to be changed by the application is 25.0 acre-feet. Under Section 15 in the "remarks" of the application, the Applicant stated that the "water will be used for crop irrigation & domestic purpose."<sup>1</sup>

**II.**

Permit 73072 was granted on April 11, 2006. The Permit required that Proof of Completion of Work be filed on or before January 16, 2007, and that Proof of Application of Water to Beneficial Use be filed on or before January 16, 2008.<sup>2</sup>

**III.**

On January 22, 2007, the Permittee was notified that pursuant to Nevada Revised Statute (NRS) § 533.390 the Proof of Completion of work had not been timely filed. The

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<sup>1</sup>Exhibit No. 1, Public Administrative Hearing before the State Engineer, September 24, 2013, official records in the Office of the State Engineer. Hereinafter, the exhibits and transcript will be referred to only by the exhibit number or transcript page.

<sup>2</sup>Exhibit Nos. 2 and 34 *and see, e.g.*, NRS § 533.380.

Permittee was advised it had 30 days to file the proof or seek an extension of time.<sup>3</sup> The Permittee's agent filed an Application for Extension of Time ("First Request for Extension") within 30 days.<sup>4</sup> The extension was granted and the deadline for the Proof of Completion of Work was extended to January 16, 2008.<sup>5</sup>

#### IV.

On January 24, 2008, the Permittee was notified that pursuant to NRS § 533.390 and § 533.410 the Proof of Completion of Work and Proof of Beneficial Use had not been timely filed, and was advised he had 30 days to file the proofs or seek an extension of time.<sup>6</sup> The Permittee's agent filed an Application for Extension of Time ("Second Request for Extension") within 30 days.<sup>7</sup> The extension was granted and the deadline for both proofs was extended to January 16, 2009.<sup>8</sup>

#### V.

On January 30, 2009, the Permittee was notified that pursuant to NRS § 533.390 and NRS § 533.410 the Proof of Completion of Work and Proof of Beneficial Use had not been timely filed and was advised it had 30 days to file the proofs or seek an extension of time.<sup>9</sup> The Permittee's agent filed an Application for Extension of Time ("Third Request for Extension") within 30 days.<sup>10</sup> The extension was granted and the deadline for the proofs was extended to January 16, 2010.<sup>11</sup>

#### VI.

On January 20, 2010, the Permittee was notified that pursuant to NRS § 533.390 and NRS § 533.410 the Proof of Completion of Work and Proof of Beneficial Use had not been timely filed and was advised it had 30 days to file the proofs or seek an extension of time.<sup>12</sup> The Permittee filed an Application for Extension of Time ("Fourth Request for

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<sup>3</sup> Exhibit No. 4.

<sup>4</sup> Exhibit No. 6.

<sup>5</sup> Exhibit No. 7.

<sup>6</sup> Exhibit No. 8.

<sup>7</sup> Exhibit No. 9.

<sup>8</sup> Exhibit No. 10.

<sup>9</sup> Exhibit No. 11.

<sup>10</sup> Exhibit No. 13.

<sup>11</sup> Exhibit No. 14.

<sup>12</sup> Exhibit No. 15.

Extension") within 30 days.<sup>13</sup> The extension of time was granted and the deadline for filing the proofs was extended to January 16, 2011.<sup>14</sup>

#### VII.

On January 5, 2011, the Permittee filed an Application for Extension of Time ("Fifth Request for Extension") for the Proof of Completion of Work and Proof of Beneficial Use.<sup>15</sup> The extension of time was granted and the deadline for filing the proofs was extended to January 16, 2012.<sup>16</sup>

#### VIII.

On January 10, 2012, the Permittee filed an Application for Extension of Time ("Sixth Request for Extension") for the Proof of Completion of Work and Proof of Beneficial Use.<sup>17</sup> The extension of time was granted and the deadline for filing the proofs was extended to January 16, 2013.<sup>18</sup>

#### IX.

In January 2013, the Permittee filed an Application for Extension of Time ("Seventh Request for Extension"), citing the depressed economy.<sup>19</sup> In response to the Seventh Request for Extension, the State Engineer's Office requested Western Best submit evidence pursuant to NRS § 533.395(1) that demonstrated that it was proceeding in good faith with reasonable diligence to perfect the appropriation.<sup>20</sup> The State Engineer's Office informed the Permittee that NRS § 533.380(6) defined reasonable diligence as "the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances." Specifically, the Office reiterated that Permit 73072 was for the irrigation of 5.0 acres and requested documentation describing actions or progress made during the prior year to put the water to beneficial use under the permitted manner of use.

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<sup>13</sup> Exhibit No. 17.

<sup>14</sup> Exhibit No. 18.

<sup>15</sup> Exhibit No. 19.

<sup>16</sup> Exhibit No. 20.

<sup>17</sup> Exhibit No. 21.

<sup>18</sup> Exhibit No. 22.

<sup>19</sup> Exhibit No. 26, p. 3.

<sup>20</sup> Exhibit No. 23.

Stephen Turner, agent for Permittee, provided a response.<sup>21</sup> Although the response pointed to money spent on preliminary road drawings and contact with property owners along the frontage for a subdivision project, the Permittee did not submit any evidence that the water was put to beneficial use for the permitted manner of use of irrigation.<sup>21</sup>

### X.

After considering the Permittee's response, the State Engineer determined that the Permittee was not proceeding in good faith and reasonable diligence toward perfecting the water right for the authorized manner of use and denied the Seventh Request for Extension pursuant to NRS § 533.380(3).<sup>22</sup> The State Engineer also cancelled the permit pursuant to NRS § 533.395 effective May 16, 2013.<sup>24</sup> The Permittee timely petitioned the State Engineer for a hearing to review the cancellation pursuant to NRS § 533.395(2).<sup>23</sup>

### FINDINGS OF FACT

#### I.

The State Engineer finds that a hearing was held on September 24, 2013, before the Division of Water Resources in the matter of a Petition for Review of Cancelled Permit No. 73072. Representing Petitioner Western Best, Ltd. ("Petitioner") were Kenneth Green, Managing Partner of Western Best, and Stephen Turner, agent for Petitioner. Based upon the evidence, testimony and arguments of the parties, the State Engineer makes the following findings of fact, conclusions of law and ruling.

#### II.

The administrative hearing opened with testimony by Mr. Turner, a licensed water right surveyor, who described initial work on the property including boundary surveys, preparation of topographic maps, preliminary design drawings and work toward attaining right-of-ways.<sup>24</sup> During a period of economic slowdown during the last several years, Mr. Turner stated that engineering has been held in abeyance, but some work has been done to reconfigure the property and preparation of cost estimates.<sup>24</sup>

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<sup>21</sup> Exhibit No. 25.

<sup>22</sup> Exhibit No. 26.

<sup>23</sup> Exhibit No. 28.

<sup>24</sup> Transcript at pp. 13-14.

Mr. Green then testified as to the activity which he believed met the “good faith” and “reasonable diligence” standards required by Nevada water law. Mr. Green described acquisition of the property and water rights, the plan for the project, and the eventual economic slowdown which brought the project to a virtual standstill between the years 2008-2012.<sup>25</sup>

The State Engineer confirmed that Petitioner’s project consisted of a residential subdivision, not an irrigation project.<sup>26</sup> When questioned directly why Petitioner was pursuing a subdivision project when the permitted right was for irrigation, Mr. Turner admitted that Petitioner has known since the time the permit was issued that it was for irrigation, yet there was no intention to change it to quasi-municipal use until the rights were turned over to a water purveyor with a completed subdivision plan.<sup>27</sup> Mr. Turner stated this was a “customary practice” in Pahrump.<sup>28</sup>

Mr. Turner stated that initially, when the permit was issued in 2006, there was a thought as to an irrigation project, but no serious consideration of an irrigation project had occurred; instead, Petitioner had changed his plan to put the water to use for a residential subdivision.<sup>29</sup> Mr. Turner’s written response to the State Engineer on March 11, 2013, likewise admitted that there was no intention to prove up an irrigation right and Petitioner’s “long range” plan was to acquire sufficient water rights and to change the manner of use of all rights at such time a residential subdivision plan was complete; however, Mr. Turner then went on to state in the written response that engineering for the project was currently being given a “low priority.” The written response paralleled the testimony at the hearing that Petitioner admitted knowledge that the permitted right was for irrigation, yet conceded that there was no intention of proving up the water right on an irrigation project, and still, Petitioner had no present intention to change the manner of use.

Mr. Turner also testified during the hearing that nothing had prevented Petitioner from filing a change application and that it could have been done.<sup>30</sup> As well, Mr. Turner

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<sup>25</sup> Transcript pp. 14:12 to 19:25.

<sup>26</sup> Transcript pp. 20:10 to 21:5.

<sup>27</sup> Transcript pp. 22:11-23:21.

<sup>28</sup> Transcript p. 22:1-4.

<sup>29</sup> Transcript pp. 22:20-23.

<sup>30</sup> Transcript pp. 25:11-12; 26:1, 20-21.

testified that if Petitioner's intention was only to "save" Permit 73072 as an irrigation right, then Petitioner could have drilled a well and been irrigating, but that would have been a waste of time, effort and water to go through that exercise when Petitioner's intention was to use it for residential purposes.<sup>31</sup>

As stated above, Petitioner pointed to the preliminary design work on a subdivision project as supporting the element of "reasonable diligence." Any lack of diligence, Petitioner asserts, is due to the economic conditions occurring since 2008. Mr. Green testified that due to economic conditions, he elected not to put any money into the project in 2009 and 2010.<sup>32</sup> In the two years following in 2011 and 2012, the amounts claimed to have been spent were several thousand dollars per year.<sup>18,20</sup>

The State Engineer finds that Petitioner was granted six extensions of time yet no work had ever commenced towards beneficially using the water of the irrigation right. The State Engineer finds that what Mr. Turner purports was customary in the Pahrump area regarding the point at which time the manner of use is changed for a subdivision is not the state of the law. Nevada Revised Statute § 533.325 requires that "any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated,<sup>33</sup> shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so." (Emphasis added). When filed by Petitioner, Application 73072 identified the manner of use as irrigation, the application was published with irrigation identified as the manner of use, and Permit 73072 was issued as an irrigation water right.<sup>34</sup>

The State Engineer finds the evidence overwhelming that Petitioner's failure to file for a change in the manner of use to a non-irrigation water right prior to undertaking work on the purported subdivision project was a deliberate decision, contrary to NRS § 533.325.

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<sup>31</sup> Transcript p. 24:3-10.

<sup>32</sup> Transcript p. 18:15-17; *and see also*, Question 5 of Exhibit Nos. 17 and 18.

<sup>33</sup> "[W]ater already appropriated" is defined by NRS § 533.324 includes water which has been permitted but not applied to the intended use before an application to change the place of diversion, manner of use or place of use is made.

<sup>34</sup> Exhibit Nos. 1 and 3 *and see* NRS § 533.335(4) (permit applications shall contain a description of the purpose for which the application is to be made); NRS § 533.330 (application shall be limited to one purpose and may include domestic use).

The State Engineer finds that as a licensed water right surveyor, Mr. Turner, is charged with knowing the state of law. That Petitioner relied on Mr. Turner as its agent does not excuse Petitioner's deliberate decision not to pursue a change application when the Petitioner has known nearly since the time it was granted the Permit in 2006 that it did not intend to perfect an irrigation right. Petitioner stated in its written response and during the hearing that its intention was to request a change in the manner of use *after* the subdivision project was planned and turned over to the County, not before.

The State Engineer finds that Petitioner's statement that it would have been a waste of time, effort and water to pursue perfection of an irrigation water right demonstrates the Petitioner's lack of good faith and reasonable diligence in putting the water to beneficial use, particularly where the Petitioner admitted that it could have, but did not, file a request to change the manner of use. The State Engineer finds the Petitioner was given a number of years during which a change application could have been filed, but failed to exercise the option provided by the water law.

In light of the foregoing findings, the State Engineer finds that the Petitioner did not present evidence during the administrative hearing that it acted in good faith or reasonable diligence toward perfecting the water right for the manner of use authorized under Permit 73072.

### III.

The reasonable diligence requirement requires the steady application of effort to perfect the application in a reasonably expedient and efficient manner under all the facts and circumstances. NRS §§ 533.380(6); 533.395(5). The State Engineer reiterated this doctrine in the cancellation letter, explaining that "[t]o ensure and maintain the integrity and equity of the appropriation process, it is essential that the Extension of Time process not be improperly applied to reserve the water resource without beneficial use of the water, or to retain a water right permit without reasonable progress to establish beneficial use, or without the expectation to establish beneficial use within a reasonable period of time."<sup>24</sup>

Even if the State Engineer looked to Petitioner's subdivision project, bearing in mind it is not the permitted manner of use, the State Engineer does not find evidence of reasonable diligence here, either. Preliminary road construction drawings had been completed in 2007, and Mr. Turner indicated that currently, further design work was being

given a low priority. Aside from the economic downturn, Petitioner testified about problems encountered with attaining rights-of-way for the project, and that there had been an inability to get power run to the project site. Mr. Turner's written statement that the "long term" plan included acquiring sufficient water rights for the project suggests both that there was no immediate plan to put this water to beneficial use, and that the current water rights were insufficient to serve the proposed subdivision. As well, in the Second and Third Requests for Extension of Time, Petitioner's assertions that discussions with utility companies were ongoing and that the water rights "may" be transferred to a utility company, and that it was "expected" the water right would be assigned to a local utility company, fail to demonstrate the existence of any actual agreement with a utility company.

As stated above, Petitioner admitted it had no intention of pursuing an irrigation project. Petitioner never constructed any irrigation works, and never filed a Proof of Completion of Work despite six extensions of time. The Proof of Completion of Work is a preliminary requirement to the commencement of putting water to beneficial use. The State Engineer finds that there was no evidence presented during the hearing to find that Petitioner pursued perfection of its irrigation right with reasonable diligence. Therefore, the State Engineer finds that no evidence was presented that would cause him to modify or reverse his prior determination that Petitioner was not proceeding with reasonable diligence to perfect the water right for the authorized purpose.

The State Engineer finds that the evidence presented clearly supports a finding that no attempt was made to beneficially use the water for irrigation for which it was permitted, or any other manner of use for that matter. Therefore, the State Engineer finds that there is insufficient evidence to reverse or modify his prior finding of lack of reasonable diligence on the part of Petitioner.

### CONCLUSIONS OF LAW

#### I.

The State Engineer has jurisdiction over this matter pursuant to NRS §§ 533.380 and 533.395.

#### II.

An application for an extension of time in all cases must be: (a) made within 30 days following notice by registered or certified mail that proof of the work is due as

provided for in NRS 533.390 and 533.410; and (b) accompanied by proof and evidence of the reasonable diligence with which the applicant is pursuing the perfection of the application.

The State Engineer shall not grant an extension of time unless the State Engineer determines from the proof and evidence so submitted that the applicant is proceeding in good faith and with reasonable diligence to perfect the application. The failure to provide the proof and evidence required is *prima facie* evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the application.<sup>35</sup> For the purposes of determining whether good cause is present to grant a request for extension of time, 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.<sup>36</sup>

After receiving and considering the evidence at a hearing to review the cancellation, the State Engineer concludes that the evidence presented at the hearing on this matter is insufficient to modify or reverse the denial of the Seventh Request for Extension filed on Permit 73072, and the denial of the Seventh Request for Extension should be affirmed.

### III.

If, in the judgment of the State Engineer, the holder of any permit to appropriate the public water is not proceeding in good faith and with reasonable diligence to perfect the appropriation, the State Engineer shall require the submission of such proof and evidence as may be necessary to show a compliance with the law. If, in the judgment of the State Engineer, 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 and advise the holder of its cancellation. The failure to provide the proof and evidence required is *prima facie* evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the appropriation.<sup>37</sup>

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<sup>35</sup> NRS § 533.380(3).

<sup>36</sup> NRS § 533.380(6).

<sup>37</sup> NRS § 533.395(1).

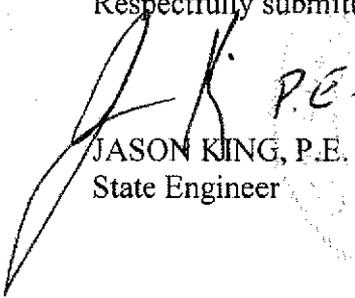
The measure of reasonable diligence is the steady application of effort to perfect the appropriation in a reasonably expedient and efficient manner under all the facts and circumstances.<sup>38</sup>

After receiving and considering evidence at the administrative hearing, the State Engineer concludes that there was insufficient evidence presented at the hearing to reverse or modify the cancellation, and the decision to cancel Permit 73072 should be affirmed.

**RULING**

Based upon the foregoing findings of fact and conclusions of law, the State Engineer affirms the cancellation of Permit 73072.

Respectfully submitted,

  
JASON KING, P.E.  
State Engineer

Dated this 7th day of  
January, 2014.

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<sup>38</sup> NRS § 533.395(5).