

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

IN THE MATTER OF PETITIONS TO)
REVIEW CANCELLED PERMITS 73070)
AND 73071, WITHIN THE PAHRUMP)
VALLEY HYDROGRAPHIC BASIN (162),)
NYE COUNTY, NEVADA.)

RULING

#6294

GENERAL

I.

Application 73070 was filed by Western Best Ltd., on July 20, 2005, to change the point of diversion and place of use of a portion of Permit 49438, Certificate 14654. The proposed point of diversion was 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 proposed place of use was 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 existing point of diversion was described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, T.21S., R.54E., M.D.B.&M. The existing place of use was described as being located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, T.21S., R.54E. M.D.B.&M., of which, 1.214 acres was to be removed from cultivation. The manner of use stated on change Application 73070 was irrigation and domestic purposes, and the amount of water to be changed by the application was 4.0 acre-feet. Under Section 15 in the remarks of the application, the Applicant stated that the "water will be used for crop irrigation & domestic purposes."¹

II.

Application 73071 was filed by Western Best Ltd., on July 20, 2005, to change the point of diversion and place of use of a portion of Permit 23429, Certificate 7939. The proposed point of diversion was 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 proposed place of use was 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.54E., M.D.B.&M. The existing point of diversion was described as being located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 7, T.21S., R.54E.,

¹Exhibit No. 1, Public Administrative Hearing before the State Engineer, August 4, 2014, 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.

M.D.B.&M. The existing place of use was described as being located within the SW¼ NE¼ and the SE¼ NE¼ of Section 7, T.21S., R.54E., M.D.B.&M., of which, 0.8 acres was to be removed from cultivation. The manner of use stated on change Application 73071 was irrigation, and the amount of water to be changed by the application was 4.0 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.”²

III.

Permits 73070 and 73071 were issued on September 13, 2007. The permits required that Proofs of Completion of Work were to be filed on or before September 13, 2008, and that Proofs of Application of Water to Beneficial Use were to be filed on or before September 13, 2010.³

IV.

On September 17, 2008, the Permittee was notified that pursuant to Nevada Revised Statute (NRS) § 533.410 the Proofs of Completion of Work had not been timely filed. The Permittee was advised it had 30 days to file the proofs or seek an extension of time.⁴ The Permittee filed Applications for Extension of Time within 30 days (First Request for Extensions).⁵ The extensions were granted and the deadline for the Proofs of Completion of Work was extended to September 13, 2009.⁶

V.

On September 15, 2009, the Permittee was notified that pursuant to NRS § 533.410 the Proofs of Completion of Work had not been timely filed and the Permittee was advised it had 30 days to file the proofs or seek an extension of time.⁷ No proofs or applications for extensions of time were timely received and Permits 73070 and 73071 were cancelled for the first time as of December 18, 2009.⁸

² Exhibit No. 2.

³ Exhibit Nos. 3 and 4; *and see, e.g.*, NRS § 533.380.

⁴ Exhibit No. 5.

⁵ Exhibit Nos. 6 and 7.

⁶ Exhibit No. 8.

⁷ Exhibit No. 9.

⁸ Exhibit No. 10.

VI.

On February 8, 2010, the Permittee filed Petitions for Review of Cancelled Permits 73070 and 73071 pursuant to NRS § 533.395(2).⁹ Following a hearing held before the Nevada Division of Water Resources, the first cancellation was rescinded pending receipt of Proofs of Completion of Work or Applications for Extension of Time within 30 days of rescission of the cancellations.¹⁰

VII.

Applications for Extensions of Time (Second Request for Extensions) were filed within 30 days,¹¹ and the deadline to file the Proofs of Completion of Work was extended to September 13, 2010.¹² Pursuant to NRS § 534.395(3) the date of priority of the Permits was changed to February 8, 2010: the date of the filing of the Petitions for Review of the Cancellations.

VIII.

On September 1, 2010, the Permittee filed Applications for Extension of Time for the Proofs of Completion of Work and Proofs of Application of Water to Beneficial Use (Third Request for Extensions).¹³ The extensions of time were granted and the deadline for filing all proofs was extended to September 13, 2011.¹⁴

IX.

On September 2, 2011, the Permittee filed Applications for Extension of Time for the Proofs of Completion of Work and Proofs of Application of Water to Beneficial Use (Fourth Request for Extensions).¹⁵ The extensions of time were granted and the deadline for filing the proofs was extended to September 13, 2012.¹⁶

⁹ Exhibit Nos. 11 and 12.

¹⁰ Exhibit No. 13.

¹¹ Exhibit Nos. 14 and 15.

¹² Exhibit No. 16.

¹³ Exhibit Nos. 17 and 18.

¹⁴ Exhibit No. 19.

¹⁵ Exhibit Nos. 20 and 21.

¹⁶ Exhibit No. 22.

X.

On September 5, 2012, the Permittee filed Applications for Extension of Time (Fifth Request for Extensions) for the Proofs of Completion of Work and Proofs of Beneficial Use.¹⁷ The extensions of time were granted and the deadline for filing the proofs was extended to September 13, 2013.¹⁸

XI.

On September 17, 2013, the Permittee was notified that pursuant to NRS § 533.410 the Proofs of Completion of Work and Proofs of Beneficial Use had not been timely filed and the Permittee was advised it had 30 days to file the proofs or seek extensions of time.¹⁹

XII.

The Permittee filed Applications for Extension of Time (Sixth Request for Extensions) citing the depressed economy and reduction in demand for housing projects.²⁰ The Office of the State Engineer requested the Permittee submit evidence pursuant to NRS § 533.395(1) to demonstrate that it was proceeding in good faith with reasonable diligence to perfect the appropriation.²¹ The Office of the State Engineer 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 of the State Engineer reiterated that Permits 73070 and 73071 were issued for irrigation purposes, and evidence was requested describing actions or progress made during the prior year to put the water to beneficial use under the permitted manner of use.

The agent for the Permittee provided a written response.²² The response advised that work had been conducted toward a residential subdivision project, although work toward that project had stalled due to the economic slowdown. The response acknowledged that work was not proceeding under the permitted manner of use of irrigation and that the Permittee anticipated filing change applications to reflect the appropriate manner of use toward the subdivision project.

¹⁷ Exhibit Nos. 23 and 24.

¹⁸ Exhibit No. 25.

¹⁹ Exhibit No. 26.

²⁰ Exhibit Nos. 27 and 28.

²¹ Exhibit No. 29.

²² Exhibit No. 31.

XIII.

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 an irrigation project and denied the Applications for Extensions of Time pursuant to NRS § 533.380(3).²³ The State Engineer then cancelled the permits pursuant to NRS § 533.395 effective December 17, 2013.²⁴ The Permittee timely petitioned the State Engineer for a hearing to review the cancelled permits pursuant to NRS § 533.395(2).²⁵

FINDINGS OF FACT

I.

An administrative hearing was held on August 4, 2014, before the Division of Water Resources in the matter of Petitions to Review Cancelled Permit Nos. 73070 and 73071. Representing the Petitioner Western Best, Ltd. (Petitioner) was David Richards, agent for the Petitioner. After considering the evidence, testimony and arguments of the Petitioner, the State Engineer makes the following findings of fact, conclusions of law and ruling.

II.

The hearing opened with a brief discussion of cancelled Permit 73072, formerly held by the Petitioner, and the relevance of identical facts which previously lead to the cancellation of Permit 73072.

The relevant facts are briefly restated here, which include that the Petitioner filed Permits 73070, 73071 and 73072 for irrigation and domestic use. All three applications were filed as change applications to change the point of diversion and place of use of existing water rights; however, none of the applications requested a change in the manner of use. The Petitioner proceeded with preliminary work on a residential subdivision project; and, on the advice of its prior agent, the Petitioner did not request to change the manner of use from irrigation to an appropriate manner of use believing it was not required until the subdivision project was complete.²⁶ The Petitioner proceeded with some work on the project; however, due to the economic downturn and other issues, did not proceed with additional work on the project for

²³ Exhibit No. 32.

²⁴ Exhibit No. 32.

²⁵ Exhibit Nos. 33 and 34.

²⁶ Transcript, pp. 7-10.

some years, but instead, filed Applications for Extensions of Time for Proofs of Completion of Work and Proofs of Application of Water to Beneficial Use. As it did for the permits now under consideration, the Office of the State Engineer requested proof of the Petitioner's good faith effort and reasonable diligence toward perfecting the permitted manner of use of irrigation on Permit 73072. The Petitioner provided no evidence of works or beneficial use toward an irrigation project and Permit 73072 was cancelled.²⁷ The Petitioner timely petitioned for review of cancelled Permit 73072.

At the administrative hearing to review cancelled Permit 73072, statements were made that demonstrated a lack of good faith and reasonable diligence, including that there was never an intent to proceed with an irrigation project, that it was known the permit was for irrigation yet there was no intention of proving up on an irrigation right, that drilling an irrigation well would have been a waste of time and effort when the real intent was to use the water for a subdivision project. The State Engineer affirmed the cancellation of Permit 73072 after the hearing to review the cancellation.^{28,29} In light of the same fact pattern giving rise to the cancellation of Permits 73070 and 73071, the State Engineer finds it appropriate to take administrative notice of the evidence and testimony presented during the administrative hearing on Permit 73072.³⁰

III.

In the hearing on Permits 73070 and 73071, Mr. Richards indicated that the same evidence he was intending to present on cancelled permits 73070 and 73071 was already considered during the administrative hearing on cancelled Permit 73072.³¹ In this case, the State Engineer finds that the facts leading to the cancellation of Permits 73070 and 73071 are indistinguishable from that of cancelled Permit 73072. As indicated by Mr. Richards during the hearing, there is no real dispute that the same facts as before also form the basis of the denial of extensions of time and the cancellation of Permits 73070 and 73071. Indeed, Mr. Richards stated the evidence in this case is the same as that already previously presented during the hearing on Permit 73072. The State Engineer finds the determination that there was *prima facie* evidence to

²⁷ See generally, Ruling No. 6251, Official records in the Office of the State Engineer.

²⁸ Ruling No. 6251, Official records in the Office of the State Engineer.

²⁹ The cancellation of Permit 73072 in Ruling No. 6251 was not appealed within 30 days and is therefore a final order. As such, the cancellation of Permit 73072 is not at issue in this Ruling.

³⁰ NAC § 533.300(1); and see Transcript, p. 4.

³¹ Transcript, p. 7.

support the cancellation of Permits 73070 and 73071 as irrigation rights was correct, and the State Engineer will not disturb that finding here.

IV.

A slightly different question is posed in this matter where the Petitioner ultimately filed change Applications 83518 and 83519 to change the manner of use of Permits 73070 and 73071 from irrigation to quasi municipal use.³² Thus, the State Engineer is called upon to determine whether the cancellation of Permits 73070 and 73071 should be rescinded in order to allow the change applications to be considered, which would in essence ratify prior work performed on the subdivision project. In order to make that determination, the State Engineer examines, as it did for Permit 73072, the work on the subdivision project, despite that the work proceeded as an unpermitted manner of use.

V.

The standard for an extension of time for Proof of Completion of Work or Proof of Beneficial Use is set out in NRS § 533.380(3), which states in relevant part:

[T]he State Engineer may, for good cause shown, grant any number of extensions of time within which construction work must be completed, or water must be applied to a beneficial use under any permit therefor issued by the State Engineer. . . . An application for the extension must in all cases be . . . [a]ccompanied 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 pursuant to this subsection is prima facie evidence that the holder is not proceeding in good faith and with reasonable diligence to perfect the application. (Emphasis added).

“[G]ood cause is a relative and highly abstract term such that its meaning must be determined not only by the verbal context of the statute in which the term is employed, but also by the context of the action and procedures involved and the type of case presented.” *Nunnery v. State*, 127 Nev. Adv. Op. 69, 263 P.3d 235 (2011) (quoting *Wray v. Folsom*, 166 F.Supp. 390, 394 (W.D.Ark. 1958) (internal quotations omitted)). “Good cause” is understood to mean “[a] legally sufficient reason,” and it reflects “the burden placed on a party to show why a request

³² See generally, Exhibit Nos. 37 and 38.

should be granted or an action excused.” *Joseph v. Hess Oil V.I. Corp.*, 651 F.3d 348 (3d Cir. 2011) (citing Black’s Law Dictionary 251 (9th ed.2009)). Generally, the good cause standard applies in situations where the need for an extension is usually occasioned by something that is not within the control of the movant. *Joseph v. Hess Oil*, 651 F.3d at 356. Further, 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. NRS § 533.395(5). The concept of diligence in the application of water to beneficial use has its origins in the early development of the principles of prior appropriation in the water law of the Western states. *Bailey v. State*, 95 Nev. 378, 594 P.2d 734 (1979) (citing 1 S. Wiel, *Water Rights in the Western States*, § 382 (3d ed. 1911)). Whether an appropriator of public waters has used due diligence to utilize water for beneficial use must be determined upon facts of particular case. *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th Cir. 1917).

The State Engineer first examines whether the requisite proof and evidence of good faith and reasonable diligence that the Petitioner was required to file in support of its Sixth Requests for Extension, constituted good cause, such that the extensions of time should have been granted, potentially averting cancellation of the permits.

VI.

Question 7 of the Application for Extension of Time form allows an applicant to give a narrative response to describe progress made during the prior year and to explain why the request for extension is being made.³³ Applicants are instructed to use additional pages for the explanation if necessary and to refer to the instructions on the reverse side of the form.³⁴ The instructions on the reverse side of the form request specific information which documents reasonable diligence and steady application of effort to perfect the application. The form instructs applicants to “**Highlight progress made during the previous year.**” (Emphasis original). The instructions give non-exclusive examples of activities that might highlight progress made during the prior year.

³³ See, e.g., Exhibit Nos. 27 and 28.

³⁴ The instructions found on the reverse side of the extension form can be viewed at http://water.nv.gov/Forms/forms09/Ext_app09.pdf

In the Sixth Request for Extensions of Time, the Petitioner stated that “[b]ecause of the deep economic depression in the southern Nevada area, plans for the development have been curtailed. Upon resumption of demand for housing, work toward proff [sic] of completion shall move forward.” No additional explanation, pertinent examples or other evidence was submitted in support of the extension requests.

The State Engineer previously found that the proof and evidence failed to demonstrate that the Petitioner was proceeding in good faith with reasonable diligence to perfect the application - denying the extensions. The State Engineer makes the same finding here again. Although Petitioner attested it expended \$5,000.00 on work during the prior year, the narrative response under Question 7 detailed no work performed or progress made, but affirmatively stated that it was waiting for economic conditions to improve before proceeding with additional work. The lack of any evidence of work performed and the affirmative decision to delay additional work confirms to the State Engineer that there was *prima facie* evidence that the Petitioner was not proceeding with good faith and reasonable diligence and the State Engineer finds that the sixth extension requests were correctly denied.

VII.

The State Engineer next looks to evidence and testimony presented at the hearing to determine if sufficient evidence was presented to warrant rescission of the cancellations. Documents filed in support of the Petitions for Review of Cancelled Permits 73070 and 73071 appear to show that the first discussions for the subdivision project started in or around 2004.³⁵ In 2005, meetings were held between the Petitioner and its then-agent, and Permits 73070 and 73071 were filed.³⁶ The Petitioner was also invoiced for road construction drawings in 2005.³⁷ Prior testimony put completion of preliminary road construction drawings in 2007. In 2005 and again 2008, the Petitioner attempted to obtain rights of way for the project.³⁸ Prior testimony by Ken Green for the Petitioner discussed the economic downturn in late-2008 resulting in the

³⁵ Exhibit No. 35 at pp. 52-58, 67 (handwritten notes, memoranda and invoice).

³⁶ Exhibit Nos. 1 and 2; Exhibit No. 34 at p. 59.

³⁷ Exhibit No. 35 at p. 62.

³⁸ Exhibit No. 35 at pp. 48-49; Transcript of Public Administrative Hearing to Review Cancelled Permit 73072, before the State Engineer, September 24, 2013, official records of the Office of the State Engineer, p. 15 (“73072 Transcript”).

Petitioner's decision not to proceed with construction of the road.³⁹ Mr. Green admitted that in good conscience he could not spend a lot of money to develop the road due to poor economic conditions.⁴⁰ Between 2009 and 2011 the Petitioner did not spend any money toward the project in what the Petitioner described as good common business sense.⁴¹ The Petitioner did not spend any money on the project during 2013.⁴² Mr. Richards testified regarding the current status of the project stating that rights of way had yet to be obtained, there were permits and environmental studies required, appraisals which need updating, county approvals that were required and that Petitioner had to acquire additional water rights to at least replace the 25 acre-feet lost through the cancellation of Permit 73072.⁴³

At the prior hearing, Ken Green testified that the Petitioner had retained the land hoping to see economic recovery.⁴⁴ Mr. Green testified as to the belief there has been some improvement in the economy from 2012 forward and that the Petitioner intended to resume work on the project. As explained in the prior section, the Petitioner asserted in its extensions of time that it intended to resume work when the demand for housing in Pahrump increased. As well, Mr. Richards testified that it was the Petitioner's intent to move forward with the project as soon as it was economically feasible.⁴⁵

The State Engineer makes several findings from the testimony and evidence outlined above:

First, the State Engineer finds that in applications for extensions of time filed for years 2009, 2010, 2011, 2012 and 2013, the Petitioner filed verified statements, which asserted that the Petitioner had spent \$5,000.00 under each permit for each year.⁴⁶ Contradictory testimony was given during the hearings that no money had been spent in 2009, 2010, 2011 and 2013.⁴⁷ The lack of documentary evidence in the record after 2008 corresponds with testimony that no money

³⁹ 73072 Transcript, p. 16.

⁴⁰ 73072 Transcript, pp. 17-18.

⁴¹ 73072 Transcript, p. 17.

⁴² Transcript, pp. 20-21.

⁴³ Transcript, pp. 16-19, 21.

⁴⁴ 73072 Transcript, p. 17.

⁴⁵ Transcript, p. 10.

⁴⁶ See Exhibit Nos. 6, 7, 14, 15, 17, 18, 20, 21, 23, 24, 27 and 28.

⁴⁷ Although no mention was made of 2012, there was no evidence to support a finding that the expenditure of funds for 2012 was an accurate assertion, either.

was spent, and hence, no work was performed in those years. The State Engineer finds the Petitioner did not act in good faith by representing to the State Engineer that money was being spent on the project every year under each permit toward work on the project when, in fact, it was not.

Second, the Petitioner testified that it made a conscious business decision to not proceed with work on the project due to poor economic conditions. In *Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534 (1869), the court examined the issue of whether reasonable diligence had been exercised in the construction of necessary works for claim to an earlier priority date. There, the appropriator argued his short illness, lack of money to construct the works and economic conditions were circumstances to be considered in determining reasonable diligence. The Nevada Supreme Court opined that these types of conditions were conditions incident to the *person* and not to the *project*; and as such, did not excuse the appropriator's delays in the work. As recently as its Sixth Request for Extensions of Time, the Petitioner stated that upon *resumption of a demand for housing*, work toward the proof of completion of work would move forward. The Petitioner's most recent extension requests do not indicate any ongoing work on the project, but rather a continuation of a deliberate decision not to proceed with work on the project and to continue to wait-and-see what external economic conditions bring. The Petitioner cannot argue it has applied steady effort to construct the necessary works, when, by its admission, there has been no effort made since 2008. The State Engineer finds the Petitioner failed to exercise reasonable diligence in constructing the necessary works.

Third, while the Petitioner has made numerous statements concerning its intention to continue with the project which may evidence good faith, for the same reasons announced above, mere intentions without any evidence of work performed is insufficient to meet the reasonable diligence requirement. *See generally, Desert Irr. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997) (A mere statement of intent to put water to beneficial use, uncorroborated with any actual evidence, after nearly twenty years of nonuse is insufficient to justify additional extension and cancellation was affirmed) (additional citation omitted).

Fourth, the State Engineer considers, on the whole, progress on the project under all the facts and circumstances. Preliminary work on the project started in or around 2004 and some efforts were made through 2008. Mr. Richards testified as to the great amount of work and tasks that lay ahead for the Petitioner on the project; however, rather than forward progress, the

Petitioner has actually lost ground on the project due to the cancellation of the majority of his water rights for the project under Permit 73072. The State Engineer finds that after ten years, the project has essentially not progressed beyond the conceptual stage and the reasonable diligence requirement is not met in this case.

Taking these findings together, the State Engineer finds that insufficient evidence was presented at the hearing that would cause the State Engineer to reverse or modify the decision to cancel Permits 73070 and 73071.

VIII.

Additional testimony and evidence presented at the hearing on Permit 73072 buttresses the State Engineer's findings above. During the prior hearing, the State Engineer examined whether the Petitioner had exercised reasonable diligence under the wrong manner of use, concluding there that the Petitioner had not. The Petitioner's preliminary road construction drawings had been completed in 2007 and the Petitioner's former agent testified that further design work was given a low priority. Aside from the economic downturn, the Petitioner testified about problems encountered with attaining the rights-of-way for the project and that there had been an inability to get power run to the project site. The Petitioner's previous agent had submitted a written statement indicating that the long term plan included acquiring sufficient water rights for the project, which suggests both that there was no immediate plan to put its water to beneficial use, and that its current water rights were insufficient to serve the proposed subdivision. As well, in requests for extensions of time on Application 73072, the Petitioner asserted that discussions with utility companies were ongoing and that the water rights might be transferred to a utility company, and that it was expected the water right would be assigned to a local utility company - although there was no evidence of an agreement with a utility company.⁴⁸ The State Engineer takes notice of this testimony and evidence as relevant to the good faith and reasonable diligence analysis and finds that this prior evidence supports affirming the cancellations here.

⁴⁸ Ruling No. 6251, Official records in the Office of the State Engineer.

CONCLUSIONS OF LAW

I.

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

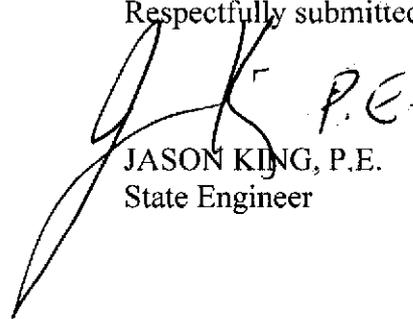
II.

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 Permits 73070 and 73071 should be affirmed.

RULING

Based upon the foregoing findings of fact and conclusions of law, the State Engineer affirms the cancellation of Permits 73070 and 73071.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. King P.E.', is written over the typed name and title.

JASON KING, P.E.
State Engineer

Dated this 20th day of
October, 2014.