

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

IN THE MATTER OF THE PETITION TO)
REVIEW CANCELLED PERMIT 66370 (ROOK)
PORTION) WITHIN THE AMARGOSA DESERT)
HYDROGRAPHIC BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

#6295

GENERAL

I.

Application 66370 was filed by James C. Sr. and Nora M. Rook (the Rooks) on May 16, 2000, to change the point of diversion and place of use of .3200 cubic feet per second not to exceed 85.6 acre-fee annually (afa), a portion of water previously appropriated under Permit 19197, Certificate 6675 for irrigation and domestic purposes. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T.16S., R.49E., M.D.B.&M. The proposed place of use is described as being 17.12 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T.16S., R.49E., M.D.B.&M. The existing point of diversion is described as being located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T.16S., R.49E., M.D.B.&M. The existing place of use is described as the same as the proposed place of use.¹

II.

Permit 66370 was issued on May 25, 2001.² The Proof of Completion of Work was filed February 22, 2002.³ In 2005, the Rooks conveyed 15 acre-feet (af) of Permit 66370 to the Hafen Family Trust.⁴ In 2006, the Rooks conveyed 55.6 af to Rockveiw Dairies, Inc.⁵ After these two conveyances, 15 af remained owned by the Rooks, referred to as the "Rook Portion" of Permit 66370, which is the subject of the cancellation proceeding.

¹ Exhibit No. 1, Public Administrative Hearing before the State Engineer, September 16, 2014, official records of the Office of the State Engineer. Hereinafter, the exhibits and transcript will be referred to only by the exhibit number or transcript page.

² Exhibit No. 2.

³ Exhibit No. 3.

⁴ Exhibit No. 5.

⁵ Exhibit No. 6.

III.

Also in 2006, the Rooks conveyed the remaining 15 af in the Rook Portion to Ultimate Industries, Inc.⁶ Ultimate Industries filed change Application 73862, which was denied.⁷ After Application 73862 was denied, the 15 af of the Rook Portion of the permit was conveyed back to James and Nora Rook in 2008.⁸ The conveyance back to the Rooks was confirmed on April 12, 2010.⁹ In 2009, 2010 and 2011, the Rooks requested, and received, extensions of time to file proof of beneficial use and its supporting cultural map.¹⁰ In 2012, the Rooks filed an Extension of Time to file Proof of Application of Water to Beneficial Use, which was denied.¹¹ The Rooks had until June 25, 2013, to file Proof of Application of Water to Beneficial Use (PBU).¹² A PBU was not filed before June 25, 2013; however, pursuant to NRS § 533.410, the Rooks were granted an additional 30 days within which to file a PBU.¹³

The PBU was not filed within that time and the Rook Portion of Permit 66370 was cancelled effective August 21, 2013.¹⁴ The Rooks timely petitioned for review of the cancelled permit pursuant to NRS § 533.395(2).¹⁵

IV.

Just prior to the cancellation of the Rook Portion, Application 82998 was filed on August 5, 2013, by Frank Raetz through his agent, to change the point of diversion and place of use of the Rook Portion of Permit 66370.¹⁶ In a cover letter dated July 18, 2013,¹⁷ the agent indicated that change Application 82998 was accompanied by a report of conveyance and an Application

⁶ Exhibit No. 7.

⁷ Ruling No. 5902, official records in the Office of the State Engineer.

⁸ Exhibit No. 13.

⁹ Correspondence dated April 12, 2010, File No. 66370, official records in the Office of the State Engineer.

¹⁰ Exhibit Nos. 12, 14 and 15.

¹¹ Exhibit Nos. 16 and 17.

¹² Exhibit No. 17.

¹³ Exhibit No. 18.

¹⁴ Exhibit No. 20.

¹⁵ Exhibit No. 21.

¹⁶ File No. 82998, official records in the Office of the State Engineer.

¹⁷ The explanation of the lag between the date of this letter and the filing of the Application on August 5, 2013, appears to be that the agent had not signed the application and it was returned for signature. The Application was resubmitted again with the additional cover letter dated July 31, 2013, and was received and filed in the Office of the State Engineer on August 5, 2013.

for Extension of Time to Prevent a Forfeiture.^{18,19} In a second letter dated July 31, 2013, the agent offered his assistance regarding any questions concerning the Application or report of conveyance. On August 13, 2013, Application 82998 was returned for the correction of numerous issues with the application. The amended application was not submitted within the allowed time and Application 82998 was cancelled on December 17, 2013. In the letter from the Office of the State Engineer advising of the cancellation of Application 82998, the State Engineer observed that Application 83190 had already been filed and that Application 83190 requested the same changes to the Rook Portion of Permit 66370 as had been proposed by Application 82998.

V.

On October 18, 2013, Application 83190 was filed by Frank Raetz, through his agent, to change the point of diversion and place of use of the Rook Portion of Permit 66370.²⁰ The application remains Ready for Action pending disposition of the Rook Portion of Permit 66370 by this ruling.

FINDINGS OF FACT

I.

An administrative hearing was held on September 16, 2014, before the Division of Water Resources to review cancelled Permit 66370. Representing the Petitioners James and Nora Rook was James Rook. Also appearing as a witness for the Petitioners was Frank Raetz. After considering the evidence, testimony and arguments of the Petitioners, the State Engineer makes the following findings of fact, conclusions of law and ruling.

II.

In this case, the State Engineer's analysis concerning the cancellation begins at the point when the Rook Portion of Permit 66370 was re-conveyed to the Rooks from Ultimate Industries after Ultimate Industries' Application 73862 was denied. Mr. Rook testified that part of his sales agreement with Ultimate Industries was that if its change application was denied, the Rooks

¹⁸ File No. 82998, official records in the Office of the State Engineer; *see also*, Exhibit No. 19.

¹⁹ Notwithstanding that the Permit was the subject of cancellation proceedings – not forfeiture proceedings, the Application of Extension of Time to Prevent a Forfeiture was rejected on the basis that it was untimely. The last date Proof of Beneficial Use could have been filed was extended to Friday, August 2, 2013. The extension request was filed on Monday, August 5, 2013.

²⁰ File No. 83190, official records in the Office of the State Engineer.

would return the purchase monies and the water right would be re-conveyed back to the Rooks.²¹ True to the agreement, a report of conveyance from Ultimate Industries to the Rooks was filed on December 10, 2008.²² An Application for Extension of Time for the PBU was filed by the Rooks in June 2009, citing that a change in ownership of the water right was pending. An extension of time was granted for one year.

Rooks' ownership of the water right was confirmed on April 12, 2010. As of that date, the Rooks were again the owner of the water right pursuant to Nevada law. *See* NRS § 533.386(5) (The State Engineer shall not consider or treat the person to whom a permit is conveyed as the owner or holder of the permit until a report of the conveyance is confirmed). Just two months after being confirmed as the owners, the prior extension of time expired and the Rooks filed an Application for Extension of Time for the PBU in June 2010. An extension was granted for one year. In June 2011, the Rooks filed a second Application for Extension of Time for the PBU, which was granted for one year. On June 14, 2012, the Rooks filed a third request for extension of time, stating:

Due to the economic conditions in Nevada and particularly in Nye County I am not economically able to complete P.B.U. at this time. Efforts to sell this water right have not been fruitful. Efforts to lease this water right are on going [sic] and should be completed shortly. Buyers of this water right are not able to bear the financial burden of purchasing these rights until economic conditions improve.

In a letter dated August 28, 2012, the Office of the State Engineer informed the Rooks that the extension of time was denied. The letter stated that the Rooks' explanation demonstrated that they were not intending to place the water to beneficial use, but were holding the water right until it could be sold. The letter advised that no evidence was submitted that the Rooks were attempting to place the water to beneficial use, and advised the Rooks that Nevada water law required that an appropriator use reasonable diligence to beneficially use the water, as defined by NRS § 533.395(5). In this letter the Rooks were advised they had one year until June 25, 2013 to file a PBU.

At the hearing, Mr. Rook produced evidence of a lease agreement between him and Frank Raetz dated June 25, 2012 – just ten days after Rook filed the third extension request on June 14, 2012. Aside from Petitioners' statements concerning the economic conditions and a potential sale of the water right, the State Engineer finds Mr. Rook's assertion that he was close to

²¹ Transcript p. 14.

²² Exhibit No. 13.

procuring a lease agreement for the water right to be an accurate and credible statement. The State Engineer further finds there is no evidence the lease agreement was ever provided to the Office of the State Engineer prior to the administrative hearing.

III.

Frank Raetz testified that he was the owner of Applications 82998 and 83190, which were both filed as change applications for the Rook Portion of Permit 66370. Mr. Raetz testified that he procured the services of an agent to assist him with filing change applications and a report of conveyance, but that the agent had procrastinated in getting the appropriate documents filed. No evidence was presented as to when the agent was actually retained; however, numerous other pieces of evidence lend credence to Mr. Raetz' assertion.²³ Application 82998 was initially received unsigned in the Office of the State Engineer and had to be returned for the agent's signature. When received a second time, Application 82998 was filed on August 5, 2013, a little over two-weeks before the Rook Portion of Permit 66370 was cancelled. However, once the application was filed, it was returned for additional corrections, which were never made and the application was ultimately cancelled. The application was accompanied by an untimely request for extension to prevent forfeiture, rather than a timely request for extension to file proof of beneficial use. In addition, despite the agent's references to a report of conveyance in his letters dated July 18 and July 31, 2013, there is no evidence that a report of conveyance was ever filed to transfer title to the water right from the Rooks to Frank Raetz.^{24,25}

With regard to Application 83190, this change application was filed after the Rook Portion of the water right had already been cancelled and was filed the same day as the Petition for Review of the Cancelled Permit. As with the prior change application, Application 83190 was returned for corrections after being received, but here, the corrections were timely made and

²³ In addition to a lack of diligence, Mr. Raetz testified as to other problems with the agent, including not having phone calls returned and that the agent had left the state and Raetz was unable to obtain a copy of his file from the agent.

²⁴ See generally, File No. 66370, official records in the Office of the State Engineer (*absence* of a report of conveyance); Nevada Division of Water Resources' Title Database, official records in the Office of the State Engineer (last accessed October 10, 2014).

²⁵ Mr. Rook testified that the lease agreement was in the nature of a lease-purchase agreement whereby Raetz' intention was to lease the water right and make payments toward the purchase of the right over time – hence, the necessity of a report of conveyance to put title to the water right in Raetz' name.

the change application remains active. Mr. Raetz testified that he would be able to put the water to beneficial use “tomorrow” in his existing well if his change application was approved.²⁶

The State Engineer finds that Mr. Raetz in good faith engaged the services of a professional water rights surveyor to aid Raetz in filing change applications, an extension of time and a report of conveyance. The professional services provided appear to have contained mistakes or were missing information, and do not appear to have been diligently pursued. Although these facts alone are not sufficient grounds to set aside the cancellation, the State Engineer finds it worthy of some consideration as the timing and quality of materials submitted on Raetz’ behalf potentially contributed to the cancellation of the water right.

For example, the lease agreement between the Rooks and Raetz was signed June 25, 2012 - exactly one year before the deadline to the PBU. Had all necessary materials described above been diligently and accurately filed, including Mr. Raetz’ change application, the report of conveyance, and an extension of time, timely consideration of the materials could have been given by the State Engineer, which may have averted cancellation of the water right. The fact that Application 82998 was eventually filed two-weeks before the cancellation is misleading. The change application was never corrected and was therefore never in the proper form for consideration prior to the cancellation. As well, change Application 83190 was not filed until after Permit 66370 was already cancelled. In short, there was no real opportunity for the State Engineer to consider a change application of the Rook Portion due to the quality and timing of the materials that were filed on the change application.

As stated above, the State Engineer finds that missing or late filings do not serve as grounds alone to rescind the cancellation. Rather, the Nevada Legislature and Nevada Supreme Court have repeatedly recognized that beneficial use is the central concept in Nevada water law. *See Bacher v. State Engineer*, 122 Nev. 1110, 146 P.3d 793 (2006). Beneficial use of the water right remains the highest consideration. The evidence in this case demonstrates that Petitioners did secure an arrangement to make beneficial use of the water through a lease agreement, which was never presented to the State Engineer until the administrative hearing. Further, the lease agreement contemplates immediate beneficial use once the necessary approval may be given through any change applications. These facts, together with the facts as found above demonstrate sufficient evidence to rescind the cancellation and reinstate the Rook Portion of Permit 66370.

²⁶ Transcript p. 16.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over this matter pursuant to NRS §§ 533.380 and 533.410.

II.

After receiving and considering evidence at the administrative hearing, the State Engineer concludes that there was sufficient evidence presented at the hearing pursuant to NRS § 533.395(2) to rescind the cancellation and reinstate the Rook Portion of Permit 66370.

III.

The State Engineer concludes that upon the rescission of the cancellation and reinstatement of the water right, the priority date of the Rook Portion of Permit 66370 shall be changed to October 18, 2013, as required by NRS § 533.395(3).

IV.

The State Engineer concludes that an application to change the Rook Portion of the water right can only be made by the owner of the water right. Here, the Rooks are the owner of the water right but change Application 83190 was filed by Frank Raetz. The State Engineer concludes that in order to consider a change application on the Rook Portion, one of two things must occur: (1) Either the Rooks request the changes sought by Application 83190;²⁷ or, (2) a report of conveyance must be filed to reflect Frank Raetz as the owner of the Rook Portion of the water right to support Application 83190.

RULING

The cancellation of Permit 66370 is rescinded and the permit is reinstated with a priority date of October 18, 2013, subject to the following conditions:

1. Petitioners must file within **30 days** of the date of this Ruling, an Application for Extension of Time for filing the Proof of Beneficial Use, with the understanding that no further extensions of time will be granted for filing the proof of beneficial use, except for good cause shown as provided under NRS §§ 533.380 and 533.410; and,

2. Petitioners and/or Frank Raetz, must take action within **30 days** to make any change application and title to the Rook Portion of the water right consistent, by either:

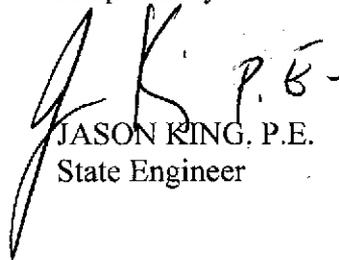
²⁷ This could conceivably be done by filing a new change application; or, by Frank Raetz assigning Application 83190 to the Rooks.

a) Petitioners James and Nora Rook requesting a change to the point of diversion and place of use of the Rook Portion of the water right; or,

b) Filing a Report of Conveyance to reflect Frank Raetz as the owner of the Rook Portion of the water right.

3. Failure to meet these conditions will result in the State Engineer issuing further rulings to affirm the cancellation.

Respectfully submitted,



JASON KING, P.E.
State Engineer

Dated this 29th day of

October, 2014.