

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

IN THE MATTER OF THE CANCELLATION)
OF PERMIT 81362, WHICH APPROPRIATED)
UNDERGROUND WATER WITHIN THE)
CARSON VALLEY HYDROGRAPHIC BASIN)
(105), DOUGLAS COUNTY, NEVADA.)

RULING
#6341

GENERAL

I.

Application 81362 was filed on December 8, 2011, by James and Roxanne Usher to change the point of diversion and place of use of 2.0 acre-feet annually, a portion of water previously appropriated under Permit 25855, Certificate 7857, for irrigation purposes within the Carson Valley Hydrographic Basin.¹

II.

Application 81362 was granted and Permit 81362 was issued to the Ushers on August 30, 2012.² The deadlines set by the Permit terms were that Proof of Completion of Work was required to be filed by August 30, 2014, and Proof of Beneficial Use was required to be filed by August 30, 2015.³

III.

The Ushers failed to timely file Proof of Completion of Work and a Final Notice was served by certified mail on September 15, 2014, advising the Ushers they had 30 days, pursuant to NRS § 533.390(2), within which to file the proof or the permit would be cancelled.⁴ The September 15, 2014, certified letter was returned by the U.S. Postal Service, with the notation "Forward Time Expired" and a new address, to the State Engineer's office two days later on September 17, 2014. Service was re-attempted by

¹ File No. 81362, official records in the Office of the State Engineer; *and see also* public administrative hearing before the State Engineer, January 13, 2016, Exhibit No. 2. Hereinafter, exhibits and transcripts will be referred to by exhibit number or transcript volume and page.

² Exhibit No. 3.

³ Exhibit Nos. 3, 4.

⁴ Exhibit No. 5.

regular mail to the address provided by the U.S. Postal Service on the returned envelope.⁵

IV.

No Proof of Completion or Application for Extension of Time was filed and the State Engineer proceeded to pursue cancellation of the permit.⁶ The State Engineer served notice of cancellation of Permit 81362 by certified mail to the Ushers on November 17, 2014.⁷ That certified letter was also returned by the U.S. Postal Service, with the notation "Forward Time Expired" and a new address, to the State Engineer's office three days later on November 20, 2014, and service was re-attempted on November 25, 2014, by regular mail to the address provided on the envelope by the U.S. Postal Service.⁸

V.

On November 21, 2014, Natalie Nielson filed a Report of Conveyance to update ownership of Permit 81362.⁹ On December 9, 2014, the State Engineer confirmed ownership of the permit to Ms. Nielson.¹⁰ On July 1, 2015, the State Engineer provided additional notice of the cancellation of the permit to Ms. Nielson.¹¹ From the July 1, 2015, letter, Ms. Nielson timely filed the Petition for Review of Cancelled Permit No. 81362.¹²

VI.

An administrative hearing was held on January 13, 2016, before the Division of Water Resources to review the cancellation of Permit 81362. Representing the Petitioner was Jennifer Yturbide, Esq. Appearing as witnesses for the Petitioner were Pete Morros and the Petitioner, Natalie Nielson. After considering the evidence, testimony and arguments of the Petitioner, the State Engineer makes the following findings of fact, conclusions of law and ruling.

⁵ Exhibit Nos. 5, 6.

⁶ Exhibit No. 7.

⁷ Exhibit No. 8.

⁸ Exhibit No. 8.

⁹ Exhibit No. 9.

¹⁰ Exhibit No. 10.

¹¹ Exhibit No. 11.

¹² Exhibit No. 12.

FINDINGS OF FACT

I.

Each permit issued by the State Engineer is conditioned upon compliance with the deadlines set out in the permit issued by the State Engineer.¹³ Nevada Revised Statute § 533.410, by its mandatory language, requires the State Engineer to summarily cancel a permit if the provisions of that statute have not been strictly adhered to.¹⁴

The record in this case establishes that the sale of the water right was consummated on July 8, 2013, and the deed was not recorded with the Douglas County Recorder until August 20, 2014.¹⁵ The Report of Conveyance reveals that the Petitioner had completed and had the Report of Conveyance form notarized on September 8, 2014, yet the Report of Conveyance was not filed with the Office of the State Engineer until November 21, 2014 – over 16 months after the sale of the water right.¹⁶ The Petitioner did not deny the delay in filing the Report of Conveyance, citing being overwhelmed with the purchase of the property around the time she purchased it in 2013, and the deaths of two uncles around the time she completed the Report of Conveyance.¹⁷

In this case, it appears to the State Engineer that had the Petitioner diligently filed the Report of Conveyance she would have received notice of the cancellation. This is demonstrated by the fact that on November 6, 2014, staff of the State Engineer's office performed an internal review of office records for any pending reports of conveyance prior to service of the cancellation notice to the Ushers on November 17, 2014.

Further, had the Petitioner filed the Report of Conveyance closer in time to the sale of the water right, she would also have been served with the Final Notice, giving her ample time to have filed any necessary proofs or extensions of time to avoid the cancellation altogether. However, because no change in ownership of the water right had been filed at the time that the Office of the State Engineer performed its internal review, or by the time the Final Notice was served or the notice of cancellation was

¹³ *Bailey v. State*, 95 Nev. 378, 381, 594 P.2d 734, 736 (1979).

¹⁴ *State Engineer v. Am. Nat'l Ins.*, 88 Nev. 424, 498 P.2d 1329 (1972).

¹⁵ Exhibit No. 9 at p. 3.

¹⁶ Exhibit No. 9 at p. 1 (notary block) and at p. 2 (filing date); *see also*, Transcript, pp. 9, 21 (noting delay in filing date).

¹⁷ Transcript, pp. 9-10, 21.

served on November 17, 2014, all notices were sent to the Ushers as owners of record. The Permit was already cancelled at the time the Petitioner filed her Report of Conveyance; therefore, the State Engineer finds that service of all required notices upon the Ushers was proper.¹⁸

II.

The next question concerns any notice requirement for the period of time between November 20 and November 25, 2014.

Transferees of water rights must file a report of conveyance.¹⁹ In *Dept. of Cons. and Natural Resources v. Foley*, 121 Nev. 77, 109 P.3d 760 (2005), the Nevada Supreme Court examined what, if any, notice was required to be given where the purchaser of a water right had failed to file a report of conveyance, and therefore received no notice of the cancellation of the water right. The court stated that effective October 1, 1995 [the date of the amendments to NRS § 533.386(4)], the Division may only consider persons mentioned in a report of conveyance as interested parties in water rights.²⁰

Applying *Foley*, the Petitioner argues she became an interested party upon the filing of the Report of Conveyance on November 21, 2014. Thus, the Petitioner contends that the State Engineer should have re-examined its records again for a change in ownership between the time the Ushers' certified letter was returned to the State Engineer's office on November 20, 2014, as undeliverable, and when service was re-attempted by regular mail on November 25, 2014. In that event, the Petitioner contends the State Engineer would have discovered that the Petitioner was an interested party and she should have received a copy of the cancellation notice.

¹⁸ See *Dept. of Cons. and Natural Resources v. Foley*, 121 Nev. 77, 82-83, 109 P.3d 760, 764 (2005) (nothing in the statutory scheme requires the Division to give notice of cancellation to any person whose interest in the water rights is not on file with the State Engineer).

¹⁹ NRS § 533.384.

²⁰ NRS 533.386(4) provides that a party may not be treated as the owner or holder of the permit until the report of conveyance is confirmed. In Petitioner's case, the notice confirming her as the owner of the water right was sent on December 9, 2014. Exhibit No. 10. The *Foley* court held that "water right holders of record with the Division remain the only interested parties entitled to notice of cancellation of water rights permits." Thus, it is somewhat unclear whether the court intended that a party who has filed a Report of Conveyance but is not yet confirmed as the owner is an interested party, or whether only the owner of record is an interested party.

Of note to the State Engineer is the fact that the Report of Conveyance was filed at 4:53 p.m. on Friday, November 21, 2014. In that light, the State Engineer finds that any failure to discover the Report of Conveyance filed at 4:53 p.m. on a Friday before service of the cancellation notice was re-attempted by regular mail on the next Tuesday (effectively giving the State Engineer's Office 1 business day on Monday to make such a discovery), was not unreasonable or negligent.^{21,22}

Nevertheless, even if such failure to make the discovery of the Petitioner's pending Report of Conveyance in one day could be seen as an error, such error was cured by an additional notice of the cancellation provided directly to the Petitioner on July 1, 2015, which allowed the Petitioner 60 days from July 1, 2015, to file her petition to review the cancellation.²³ Thus, the State Engineer finds that any error, if it exists, was harmless error.

Going further, the State Engineer finds that the real failures in this case were on the part of the former owners, the Ushers, to maintain current address information²⁴ and by the Petitioner to timely file the Report of Conveyance.^{25,26} Had the owners adhered

²¹ See *Foley* at 121 Nev. 82 (State Engineer's compliance with statutory notice provision regarding cancellation satisfies due process unless there is a defect in the notice or the State Engineer has been negligent in the notice process).

²² This is owing to the fact that even if an additional internal review of State Engineer's records had been performed, the Report of Conveyance may still have not been discovered as it would be unlikely that the Report would have been entered into the Division's titles database within one day (*see generally* <http://water.nv.gov/data/titles/>).

²³ See Transcript, 25:14-17 (Petitioner's agreement that the additional notice to Petitioner revived ability to petition for review within 60 days).

²⁴ This fact is significant for the reason that in some cases, the former owner, who is still owner of record, alerts the State Engineer's Office that the water right has been conveyed to a new owner.

²⁵ Although there is no set time within which the filing of a Report of Conveyance is required, the sooner such a report is made, the sooner the State Engineer may become aware of the new owner's interest in the water right.

²⁶ In *Foley*, the court stated that the amendments which added the report of conveyance requirement specifically placed the duty to memorialize conveyance transactions on the person to whom the water right is conveyed, relieving the State Engineer's office of any affirmative duty to seek information from county recorders when acting on expired water rights. 121 Nev. at 81, 109 P.3d 762-63. Accordingly, the State Engineer rejects Petitioner's argument that the filing of the deed with the Douglas County Recorder on August 20, 2014, imparted notice to the State Engineer of the conveyance of the water right on that date. Transcript, p. 15.

to the responsibilities borne by water right owners, the Petitioner could likely have avoided cancellation of the Permit.²⁷

III.

The Petitioner testified that she ultimately discovered her Permit was cancelled when she was pursuing establishing a permanent pasture at the property and had contacted a seed company and the cooperative extension.²⁸ Petitioner also testified that she and the prior owners did not have any discussions specifically of pending due dates for the permit, only generally did the former owner inform her that some additional action was required for the water right.²⁹ There have been no prior extensions requested or granted for this Permit. The State Engineer finds that the Petitioner has a plan for the water within the permitted manner of use, and that she was taking necessary work to perfect the appropriation at the time she discovered the permit had been cancelled. Taken together, the State Engineer finds that the testimony and evidence in this case warrant rescission of the cancellation.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.³⁰

II.

The State Engineer concludes that James and Roxanne Usher failed to comply with the deadlines set forth in Permit 81362; and therefore, NRS § 533.390 mandated that the State Engineer cancel Permit 81362.

III.

The Petitioner, Natalie Nielson, timely petitioned for review of the cancellation from the notice given July 1, 2015, and the State Engineer concludes the evidence adduced at the hearing warrants rescission of the cancellation of Permit 81362.

²⁷ Here too, the State Engineer takes great pains to inform permittees of their obligations to maintain current contact information and to file Reports of Conveyance if the water right is sold. *See* Exhibit Nos. 4, 5, 6, 8, 10 and 11 (correspondence advising owners to keep address and ownership records current).

²⁸ Transcript, pp. 10-11.

²⁹ Transcript, pp. 13-14.

³⁰ NRS Chapter 533.

IV.

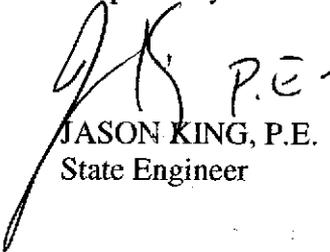
The State Engineer concludes that he lacks jurisdiction to restore the original priority date according to NRS § 533.395(3), and that upon the rescission of the cancellation, the priority date shall be replaced with the date of the filing of the Petition on August 20, 2015.³¹

RULING

The cancellation of Permit 81362 is hereby rescinded subject to:

1. The Petitioner filing an extension of time for the Proof of Completion of Work within 30 days of the date of the Ruling; and,
2. The priority date for Permit 81362 shall be vacated and replaced with a priority date of August 20, 2015.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 25th day of
February, 2016.

³¹ See *Benson v. State Engineer*, 131 Nev. Adv. Op. 78, ___ P.3d ___ (2015) (affirming that the State Engineer is not authorized to restore the original priority date); cf., *Andersen Family Associates v. Ricci*, 124 Nev. 182, 179 P.3d 1201 (2008) (vested rights do not lose priority as such a result would “impair” the right in violation of NRS § 533.085(1)).