Case No. CV-1806071

Dept. No. 1

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

BAKER RANCHES, INC., a Nevada corporation,

Petitioner,

vs.

JASON KING, P.E., in his capacity as Nevada State Engineer, and the DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION an agency of the State of Nevada,

Respondents.

ORDER GRANTING EQUITABLE RELIEF AND REINSTATING ORIGINAL PRIORITY DATES

BACKGROUND

Petitioner is owner of certain permits to appropriate groundwater issued by the Nevada State Engineer. Permits 68304 and 68305 were originally issued with a priority date of April 5, 1982.

On January 4, 2002 petitioner's agent Richard W. Forman filed an Amended Application to Change Point of Diversion for Permit 68304 and 68305.

On December 2003 petitioner's agent Dean Neubauer filed an Application for Extension of Time. Thereafter, an Application for Extension of Time was filed each year by petitioners

registered agent until 2017. Each year the State Engineer would approve the extension of time and petitioner would continue with its efforts to put the water to beneficial use.

Each year until 2017, as the end of the extension of time previously granted approached, the State Engineer would send a Notice to petitioner and copies to petitioner's agent. The Notice advised the extension of time was ending, thus petitioner would have to apply for another extension. Upon receiving that notice petitioner's agent would then timely file an application for extension. Beginning in 2012, the notice to petitioner's agent was always sent by email.

In 2017, the State Engineer did not email the notice to petitioner's agent, Basin Engineering, as had been the course of conduct for the previous five years. In fact, the record is clear that the State Engineer cannot show that notice was ever mailed to petitioner's agent. Consequently, petitioner's agent did not file an Application for Extension of Time. Pursuant to NRS 533.410 the permits were canceled on March 20, 2018.[1] This Notice of Cancellation was email to Basin Engineering.[2]

In April 2018, an administrative hearing was held pursuant to statute.[3] The decision of the hearing officer was to rescind the cancellation, and a priority date of March 26, 2018 was to be fixed for both permits.[4]

On June 13, 2018, Petitioner, Baker Ranches Inc., (petitioner) filed a Petition for Judicial Review and a Request for Equitable Relief, praying for the reinstatement of the original priority date of cancelled permits 68304 and 68305. The original priority dates of these permits is April

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[1] ROA 84.
[2] *Id.*
[3] NEV. REV. STAT. § 533.395(2).
[4] ROA 183-4.

5, 1982.[5]

After the case was filed, the State Engineer (respondent) moved for this Court to stay proceedings pending the outcome of a case currently before the Nevada Supreme Court. This motion was denied for the reasons set out in the Order Denying Respondents' Motion Stay Proceedings.

DISCUSSION

I. Standard of Review

District courts review "administrative agency's factual findings for clear error or an arbitrary abuse of discretion" and the "determination of question of law, including statutory interpretation, de novo."[6] The district court also maintains its equitable power to grant relief to a permittee when warranted.[7]

II. Analysis

The State Engineer canceled petitioner's permits because pursuant to NRS § 533.410 the State Engineer "shall cancel the permit" if the permit holder fails to file an affidavit attesting to proof of beneficial use and map, if a map is required, or application for extension of time. As described above, petitioner filed neither.

At the hearing, the hearing administrator, pursuant to NRS 533.395(2) rescinded the cancellation, but noted that he could not restore the original priority date because NRS 533.395(3) prevented him from doing so.[8]

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[5] ROA 95, 167.
[6] City of N. Las Vegas v. Warburton, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).
[7] *See* State Eng'r v. American Nat'l Ins. Co., 88 Nev. 424, 498 P.2d 1329, 1330 (1972) (citing Donoghue v. T.O.M. Co., 45 Nev. 110, 198 P. 553 (1921)).
[8] ROA 181 ("So, I don't see that we have any authority under statute, it's very clear, the statute says that if we were to reinstate these permits that the priority date becomes the date of the petition for review of the cancellation.").

Petitioner argues the State Engineer acted arbitrary and capriciously when he failed to maintain the course of conduct in his noticing procedures and that the court has equitable power to restore original priority dates to the cancelled permits when equity so warrants.

Respondent argues that the State Engineer followed the noticing procedures set out in NRS 533.410, and therefore, whether notice was actually received by the agent is not relevant, and that petitioner's reliance on their agent is unreasonable given that petitioner had actual notice of the pending cancellation. Respondent further argues that petitioner's permits were properly cancelled and that equitable relief is not available where a remedy at law is provided, as here, by statute.

Petitioner seeks two avenues of relief. The first being that petitioner requests this Court to reverse the cancellation and restore the priority date as a matter of law. As an alternative, petitioner requests the court exercise its equitable powers and restore the original priority date.

As to the first, the court declines to reverse the cancellation. The cancellation, while possessing defects in how it was noticed, was done according to the statute. However, as shown below, equitable relief is appropriate.

A. Total Expenditure Per Project Per Permit

Pursuant to the record, petitioner had expended in excess of $100,000 for each permit prior to cancellation.[9]

B. Diligence in Completion and Beneficial Use and Injury to Others

The record is replete with progress in the sense of both money spent, and diligence in completing work on both permit projects. The work began on January 4th, 2002, with the filing

[9] ROA 95, 167 respectively.

of an Application to Change Point of Diversion for Permit 68304 and Permit 68305.[10] In these applications, the "[e]stimated time required to construct works" was three years.[11] And the "[e]stimated time required to complete the application of water to beneficial use" was 5 years.[12] In December 2003, petitioner filed an Application for Extension of Time was filed for both permits.[13] These applications demonstrate $10,000 had been spent on Permit 68304 and $20,000 on Permit 68305.[14] Then on January 12, 2004 Proof of Completion of Work was filed, indicating that a well had been completed for each permit and that each well had a meter installed.[15]

Every year after that, until 2017, an Application for Extension of Time was filed detailing why an extension was needed and showing diligence and progress on each Permit.[16] In December 2005, an extension was requested for both Permits because petitioner needed to finish the fields.[17] By December 2006, the fields had been finished, and petitioner was in the process of putting the crops into production.[18] In December 2007, petitioner was still working on installing the crops in the fields.[19] By December 2008, the crops were now installed, but another extension was requested because petitioner had filed an Application to Change Point of Diversion to add additional water to the fields to maximize use.[20] Both Permits at this point were being put to beneficial use, and the Application for Extension of Time states that 120 acres were being

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[10] ROA 7, 102.
[11] *Id.*
[12] *Id.*
[13] ROA 17, ROA 111.
[14] *Id.*
[15] ROA 18, 112.
[16] All of these Applications for Extension of Time were granted for both Permits: for Permit 68304: ROA 19, 25, 30, 35, 40, 45, 51, 55, 59, 64, 70, 75, 80; for Permit 68305: ROA 113, 117, 120, 125, 128, 131, 135, 138, 141, 144, 149, 153, 157.
[17] ROA 24, 116.
[18] ROA 29, 119.
[19] ROA 34, 134.
[20] ROA 39, 127.

irrigated at three acre feet annually (afa).[21]

From December 2008, until 2011, an Application for Extension of time was filed each year because petitioner was awaiting a decision from the State Engineer's Office regarding the Application to Change Point of Diversion to add additional water to the fields.[22] In 2011, an additional reason was added, namely, that it had been an unusually wet spring and therefore the pumping volumes were not representative.[23]

Although, petitioner filed an Application for Extension of Time in 2012 citing a need for more time to complete field surveying and mapping, petitioner was ready to file Proof of Beneficial Use.[24]

From November 2013 until November 2016, Applications for Extension of Time were filed every year for the same reason: petitioner was waiting for the State Engineer to rule on the request to Change Point of Diversion for both Permit 68304 and 68305, and when those applications were approved the Permittee would file Proof of Beneficial Use concurrently on both Permits.[25]

At the administrative hearing, the hearing officer correctly found that the water for Permits 68304 and 68305 had been put to beneficial use.[26] It is clear from the record that the permittee was diligent in completion of the work to apply the water and diligent in putting the water to beneficial use.

As to whether the restoration of petitioner's priority date would cause injury to others, the

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[21] *Id.*
[22] For Permit 68304: ROA 44, 50, 54; for Permit 68305: ROA 130, 134, 137.
[23] ROA 54, 137.
[24] ROA 58, 140.
[25] For Permit 68304: ROA 63, 68, 73, 78; for Permit 68305: ROA 143, 147, 151, 155.
[26] ROA 180.

court finds that no injury will be done to others because by restoring the priority date the court simply restores the status quo. That is, all permittees are in the position they were in before petitioner's permits were cancelled. Not restoring the original priority date would work substantial harm to petitioner because the substantial sum of money already spent, and the dead loss the new priority date would provide petitioner. Moreover, not restoring the original priority date would put Baker Ranches in the position of being junior to every other permit and application in the Snake Valley Basin.[27] Being junior to everyone designates Baker Ranches to the uncoveted position of being the first to have their water taken away in a curtailment proceeding. In a basin where there is a total of 13,120.26 acre feet of water available for appropriation, and the applications pending are in excess of 55,000 acre feet, this all but cements petitioner in the position of having their water curtailed.

C. Course of Conduct in Communication Between Petitioner and Respondent

As noted above, the course of conduct in communications between petitioner and respondent is clear from the record: communication was always provided to the petitioner's agent, except, in 2017 when the Final Notice was sent to cancel Permits 68304 and 68305.

From 2003 until 2006 the permittee and the agent were sent final notice for both Permits by certified mail.[28] From 2007 to 2012 the permittee was notified by certified mail, while the agent simply listed as "cc" (i.e., no longer receiving notice by certified mail).[29] In 2013 the notice remained the same for the permittee,[30] however, the agent was now being notified by

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[27] Petitioner's Reply Brief at 1, 5, Baker Ranches v. Jason King, No. CV18-06071 (7th Jud. Dist. Ct. of Nev. 2018).
[28] ROA 15-6, 21-2, 26-7.
[29] ROA 31-2, 36-7, 41-2, 46-7, 52-3, 56-7. In 2011 the agent changed from Dean Neubauer/Summit Engineering to Basin Engineering Corporation.
[30] NEV. REV. STAT. § 533.410 (requiring the State Engineer to "advise the holder of the permit, by registered or certified mail, that [the permit] is held for cancellation . . . .").

email and the notice procedure remained the same into 2016.[31]

In 2017 the means by which notice was given to the agent changed. The letters from 2013 to 2016 all read the same way "cc: Basin Engineer Corporation (email)"[32] but the 2017 letter simply reads "cc: Basin Engineering Corporation" without the "(email)" afterwards.[33]

It is clear from the record that the course of conduct in communication was deviated from by the State Engineer's Office. Respondent's office sent notice by email to the agent four consecutive years and then in one correspondence, for no reason, did not send notice by email. More importantly, the one time that notice was not sent by email there is no proof that notice was ever sent.[34] This proved highly detrimental to petitioner because it lead to the cancellation of Permits 68304 and 68305.

Here the permittee has an agent, and has had an agent since at least 2002. The record clearly supports a finding that, based on the long standing course of communication, petitioner relied on the agent performing the tasks associated with permitting and establishing petitioner's water rights. The agent had received notice for 15 years. The permittee, therefore, understandably trusts that the agent concurrently receives notice. So when the permittee receives notice of a cancellation, as the permittee did here, the permittee would naturally understand that the agent has also received notice, and that such notice will be addressed by the agent. After 15 years of building trust that one's agent will receive notice, the law cannot be so harsh as to require a permittee to divine in one specific instance that its agent did not in fact receive notice of a cancellation of two permits.

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[31] ROA 60-1, 66-7, 71-2, 76-7.
[32] *Id.*
[33] ROA 81-2.
[34] ROA 178-79 ("I have been unable to find any notice to these permits via e-mail or by hard copy by mail.").

The effect of any permit being canceled is that it loses its priority date[35] and the new priority date is the date of the filing of the written petition requesting review of such cancellation. In western water, losing one's priority date, can be the death nail to the security of their water. As the saying goes, western water is "first in time, first in right" and thus, by canceling an existing priority date and installing a priority date of recent vintage, that individual is moved to the back of the line. In other words, that person will be one of the first to have their water extinguished in a curtailment proceeding.

In *Benson v. State Engineer*,[36] the Nevada Supreme Court, goes out of its way in dicta to distinguish *Benson* from *State Engineer v. American National Insurance Company*,[37] stating that Benson had failed to show: 1) that her family had spent money towards either improvements to, or completion of the project; 2) that the water was put to beneficial use; 3) that a third party would not be harmed by appropriation, or that such appropriation would benefit the county.[38]

The record makes clear the petitioner has been a model of what the case law requires to provide equitable relief: the petitioner has spent a large sum of money in developing the water rights; petitioner has been diligent in moving towards completion of the work, and has put the water to beneficial use; and a third party will not be harmed here as equitable relief will simply put petitioner (and every water rights holder) back in the position they were in before the cancellation.

III. Statute and Case Law Analysis

A. Statutory Construction

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[35] NEV. REV. STAT. § 533.395(2)-(3).
[36] 358 P.3d 221, 227 (2015).
[37] 88 Nev. 424, 498 P.2d 1329 (1972).
[38] Benson v. State Engineer, 358 P.3d 221, 227 (2015).

Petitioner argues this is "precisely" the case that warrants equitable relief because the statutory remedy is not an adequate legal remedy.[39] The statutory remedy would not be adequate here, petitioner argues, because petitioner would be junior to all current permittees and all pending applications, thus rendering its current water right meaningless in a curtailment.[40] At bottom, petitioner argues, that given the facts of this case, the remedy at law is inadequate.

Respondent argues that if a court uses its equitable power to restore a priority date after cancellation it renders the legal remedy provided by the statute "utterly meaningless."[41] And that the court, because of the *exclussio unius est exclusion alterius* canon of construction, should "give effect to the statute's plain meaning and not go beyond the plain language to determine the Legislature's intent."[42] Respondent also argues that a court cannot "fashion equitable remedies when legal remedies are available . . . ."[43] The Court will address these in turn.

Here the plain language rule fails because the plain language of the statute does not preclude an equitable remedy provided by a court. The statute, taken in context, and given its plain meaning, is clearly a directive not to the courts, but to the State Engineer.[44] Subsection (1) provides for when the State Engineer shall cancel a permit;[45] subsection (2) provides for review by the State Engineer of such a cancelation;[46] subsection (3) provides the *only* remedy that the State Engineer can issue: a new priority date; subsection (5) and (6) are also directives to the State Engineer, (5) consisting of what "reasonable diligence" is, and (6) providing special

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[39] Petitioner's Reply Brief at 5, Baker Ranches v. Jason King, No. CV18-06071 (7th Jud. Dist. Ct. of Nev. 2018).
[40] *Id.*
[41] Respondent's Answering Brief at 9, (CV-1806071) (2018).
[42] *Id.*
[43] *Id.* at 11.
[44] NEV. REV. STAT. § 533.395
[45] *Id.* at (1).
[46] *Id.* at (2).

considerations for political subdivisions of the State and public utilities. In fact, the statute is clear when judicial review (and thus an equitable remedy) is prohibited: when a permit has been canceled and that cancellation was not "affirmed, modified or rescinded" in accordance with subsection 2.[47] Respondent's argument, if accepted, would in essence require the court to rewrite the statute to include a subsection under NRS 533.395(4), stating that "Upon the review of a permit that has been affirmed, modified, or the cancellation rescinded, a court may not use its equitable powers to restore the original priority date.[48] This Court refuses to rewrite the statute.

aThe legislature took the time to enumerate the remedy the State Engineer could provide, but not what remedy a court can provide when reviewing the State Engineer's decision. If the legislature intended to preclude judicial review it could have done so. By allowing judicial review, the legislature clearly contemplated that some remedy was available in the courts.

B. Case Law Analysis

A cases dispel any doubt as to the resolution of this case and thus an exhaustive treatment of the case law is not necessary. The court will begin with first principles, starting with the oldest case, and progressing chronologically.

It begins with *Donoghue v. Tonopah Oriental Mining Company* which is the genesis of an equitable remedy when a literal interpretation would produce injustice.[49] There the Nevada Supreme Court "refused to enforce literal compliance with the terms of a statute" regarding mining claims where the claimant had relied in good faith on the advice of local government

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[47] *Id.* at (4). For example, review by a court is prohibited when a permit is canceled, and the permittee does not petition the State Engineer to review that cancellation.

[48] Whether a legislature can circumscribe courts equitable powers without violating separation of powers is not a question this Court attempts to answer.

[49] 45 Nev. 110, 118, 198 P. 553, 555 (1921).

officials as to maintaining the good standing of his claim.[50] This case stands for the principle that when a strict interpretation leads to manifest injustice, a court will avoid ascribing such intent to the legislature.

In *State Engineer v. American National Insurance Company*, the Nevada Supreme Court affirms this Court's statutory construction *supra*, concluding:

> "The statute does provide that the permit "shall" be cancelled by the State Engineer when the permittee fails to file proof of application of water to beneficial use. This directive to his office does not, however, affect the power of the district court to grant equitable relief to the permittee when warranted."[51]

In *American National* a permit was cancelled because the permittee failed to file proof of beneficial use, but the parties agreed that the well and pump were completed and that the water was put to beneficial use to before the filing deadline had passed.[52] The district court found that $35,000 had been spent to improve the land; that the State Engineer did not intend to approve new permits; that no one would be damaged by permittee's appropriation of water; and that the permittee's appropriation of water would provide benefit to Humboldt County in the form of tax revenues. The Nevada Supreme Court held that equity rested with the petitioner and affirmed the district court.[53]

In *Baliey v. State of Nevada*, the Nevada Supreme Court again confirmed that the use of

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[50] Bailey v. State, 95 Nev. 378, 382-83, 594 P.2d 734, 737 (1979) (describing the ruling in Donoghue v. Tonopah Oriental Mining Co. 45 Nev. 110 (1921)).
[51] 88 Nev. 424, 426, 498 P.2d 1329 (1972) (citing Donoghue v. T.O.M. Co., 45 Nev. 110, 198 P. 553 (1921)).
[52] *Id.* at 425-26.
[53] *Id.* at 426.

equitable powers by district courts in water permitting cases was permissible.[54] There the court held that "where an aggrieved party had no actual knowledge that his permits were cancelled until after expiration of the 30 day period [provided for Final Notice], it was not the intention of the Legislature to preclude judicial review of such an order or decision."[55] The court held that Bailey was entitled to equitable relief.

Noteworthy is *Preferred Equities Corporation v. State Engineer*, where the Nevada Supreme Court declined to grant equitable relief because it has "restricted such relief . . . to parties who have made beneficial use of their water rights . . . ."[56] With its ruling in this case the Nevada Supreme Court made clear that "[t]he preeminent public policy concern in Nevada regarding water rights is beneficial use."[57]

The reasoning of the court in *Bailey* and *American National* are similar. In *American National* the district court found that "considerable sums had been spent improving the land; that no other person would be damaged if the permittee were allowed to use the water appropriated under the permit."[58] In *Bailey*, the district court found that "substantial sums" had been spent improving the land, and "that water had been applied to some of the acres under cultivation," in other words, the court found beneficial use.[59]

Taken together, these cases call for one result: an equitable remedy for petitioners. This Court refuses to give a strict interpretation to the statute at issue, where, as here, it would produce manifest injustice. Moreover, this case fits squarely within *American National* because

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[54] 95 Nev. 378, 594 P.2d 734 (1979).
[55] Engelmann v. Westergard, 98 Nev. 348, 352, 647 P.2d 385, 388 (1982) (describing the Bailey court's reasoning and holding.).
[56] 119 Nev. 384, 389, 75 P.3d 380, 383 (2003).
[57] *Id.*
[58] Bailey v. State, 95 Nev. 378, 383 594 P.2d 734, 737 (1979).
[59] *Id.* at 383.

here petitioner failed to file proof of beneficial use but all parties agree that the wells have been completed, the pumps installed, and the water put to beneficial use. *Bailey* is also applicable because while the permittee in this case did have notice of cancellation, petitioner's agent did not have notice and petitioner relied on the State Engineer to provide its agent notice. Consequently, similar to *Engelmann v. Westergard*, it was factually impossible for petitioner to know that its agent had not received notice, and therefore, that an Application for Extension of Time was not filed.[60] Finally, as this court found above, petitioner spent considerable sums of money improving the land; was diligent in completing their wells; installing their pumps; putting the water to beneficial use; and lastly that restoring the priority date of petitioner will work no injury to others.

CONCLUSION

This case is exactly the case where an equitable remedy is warranted because the remedy at law is not adequate to address the harm to petitioner. Baker Ranches legal remedy is inadequate because it puts them first in line to have their water curtailed. In a basin where there is only 13,000 acre feet of water left to appropriate, and applications in excess of 55,000 acre feet, Baker Ranches has no chance to survive a curtailment proceeding with their water rights intact. Baker Ranches has spent over $100,000 per permit installing wells and completing works; it has put its water to beneficial use (the litmus test as far as Nevada public policy is concerned); and restoring their priority date will work no harm to others because such a remedy merely puts all permittees back to where they were prior to cancellation; and there is still 13,000 acre feet to appropriate in the basin.

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[60] Engelmann v. Westergard, 98 Nev. 348, 353, 647 P.2d 385, 388 (1982)

Good cause appearing,

IT IS HEREBY ORDERED petitioner's priority date for Permits 68304 and 68305 are restored to their original priority date of April 5, 1982.

DATED THIS 6 day of July, 2019.

DISTRICT JUDGE

SEVENTH JUDICIAL DISTRICT COURT
STEVE L. DOBRESCU
DISTRICT JUDGE
DEPARTMENT 1
WHITE PINE, LINCOLN AND EUREKA COUNTIES
STATE OF NEVADA