

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

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 20478, CERTIFICATE)
6243, LOCATED IN DIAMOND VALLEY, EUREKA)
COUNTY, NEVADA.)

RULING

3976

GENERAL

I.

Application 20478 was filed by Robert Wilson on May 23, 1962, to appropriate water from an underground source for irrigation and domestic purposes within the S $\frac{1}{2}$, Section 10, T.20N., R.53E. The point of diversion was to be within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 10, T.20N., R.53E., M.D.B.&M. A permit was issued under Application 20478 on February 19, 1963, for 5.4 c.f.s. for irrigation and domestic purposes. Certificate 6243 was issued under said permit on March 30, 1967 for 5.021 c.f.s., but not to exceed 1,280 acre feet annually for the irrigation of 320 acres of land.¹

II.

The ownership of a portion of Permit 20478, Certificate 6243 has been assigned to the Town of Eureka. That portion is described as 160 acres within the SW $\frac{1}{4}$ Section 10, T.20N., R.53E., M.D.B.&M., and is limited to an annual duty of 640 acre feet.¹

III.

Change Application 52892 was filed by the Town of Eureka to change the point of diversion, place of use and manner of use of Permit 20478, Certificate 6243. Application 52892 was protested by Edward B. Anderson and M.T. Thompson. The protestants alleged that the base right, Permit 20478, Certificate 6243, should be declared forfeited.²

¹ File No. 20478, official records in the office of the State Engineer.

² File No. 52892, official records in the office of the State Engineer.

IV.

On July 5, 1989, a public administrative hearing was held before the State Engineer to consider the possible forfeiture of that portion of Permit 20478, Certificate 6243 that is owned by the Town of Eureka. On August 10, 1989, Ruling No. 3637 was issued in which the State Engineer found that a portion of the water under Permit 20478, Certificate 6243, amounting to 440 acre feet was not placed to beneficial use for a six year period, 1981-1986, and therefore, was declared forfeited.³

V.

The Town of Eureka appealed the State Engineer's Ruling No. 3637 to the Seventh Judicial District Court of the State of Nevada. The State Engineer's ruling was affirmed.⁴

VI.

The Town of Eureka appealed the Seventh District Court Decision to the Nevada Supreme Court. On February 20, 1992, the Supreme Court upheld the State Engineer's decision that the forfeiture occurred as well as the constitutionality and retroactivity of NRS 534.090. However, the Supreme Court remanded to the Seventh District Court for referral to the State Engineer to conduct further proceedings to determine whether the Town of Eureka "cured" the forfeiture by substantial use of the water after the 5 year non-use period but before the initiation of forfeiture proceedings.⁵

VII.

Pursuant to the Order from the Seventh District Court dated

³ State Engineer's Ruling No. 3637, dated August 10, 1989, official records in the office of the State Engineer.

⁴ Town of Eureka v. The Office of the State Engineer, Case No. 3242, Seventh District Court of Nevada, December 26, 1990.

⁵ Exhibit No. 3, Public Administrative Hearing before the State Engineer, November 4, 1992.

March 23, 1992,⁶ the matter of the forfeiture of Permit 20478, Certificate 6243 was reopened and a hearing was held before the State Engineer on November 4, 1992. The purpose of this hearing was to consider the matter of water used under Permit 20478, Certificate 6243 during the years 1987, 1988 and 1989.

FINDINGS OF FACT

I.

At the hearing held on November 4, 1992, Protestants Edward B. Anderson of Diamond Valley and T.M. Thompson of Diamond Valley were allowed to fully participate in this matter.⁷ The Town of Eureka objected to these protestants being granted legal standing in this proceeding.⁸ Counsel for the Town of Eureka explained that this proceeding was the result of a remand after appeals to the State District Court and to the State Supreme Court. The protestants did not participate at any point in the appeal process and therefore, counsel felt that the protestants should not be allowed to participate in this proceeding. In addition, counsel placed on the record a continuing objection to any cross examination and presentation of evidence and testimony made by the protestants.⁶

The purpose of this administrative hearing before the State Engineer was to obtain all the available information regarding the use or non-use of water after the non-use period, under Permit 20478, Certificate 6243. The protestants, having filed their protests and participated in the previous administrative hearing, could have knowledge of the subject matter of this proceeding. Their cross examination and presentation of evidence and testimony could have brought out information that would have been helpful to the State Engineer in arriving at a decision in this matter.

⁶ Exhibit No. 2, Public Administrative Hearing before the State Engineer, November 4, 1992.

⁷ Transcript pp. 5-6, Public Administrative Hearing before the State Engineer, November 4, 1992.

⁸ Transcript pp. 4-5, Public Administrative Hearing before the State Engineer, November 4, 1992.

Therefore, the State Engineer finds that the protestants rightfully participated in this proceeding as parties with standing.

II.

At the hearing on November 4, 1992, the Town of Eureka submitted a copy of the Diamond Valley Crop and Water Survey for 1987.⁹ This document is part of the official records in the office of the State Engineer. Observations of water used during 1987, taken by employees of the Division of Water Resources, are recorded in the Survey. Under the entry for the SW $\frac{1}{4}$ Section 10, T.20N., R.53E., the survey shows that the parcel of land which was purchased by the Town of Eureka and is the subject of the forfeiture, was irrigated by center pivot covering 135 acres of the total of 160 acres. The State Engineer finds that this use of water in 1987, after the 5 year period of non-use but prior to the forfeiture proceedings, represents substantial use of the water under Permit 20478, Certificate 6243 and the application for extension of time to prevent a forfeiture should be approved.

III.

On May 29, 1992, an application for extension of time to prevent a forfeiture for Permit 20478, Certificate 6243, was filed by the Town of Eureka.¹ The water under Permit 20478, Certificate was last put to beneficial use during the 1987 irrigation season.⁸ The year, 1992, represents the fifth consecutive year of non-use. The Town of Eureka has attempted to place the water to beneficial use under Temporary Permit 53437-T.¹⁰ The Town of Eureka is awaiting the outcome of the appeal process regarding the forfeiture of a portion of Permit 20478, Certificate 6243. Therefore, the State Engineer finds that the Town of Eureka has shown good cause for the failure to use the water.

⁹ Exhibit 10, Public Administrative Hearing before the State Engineer, November 4, 1992.

¹⁰ Transcript pp 15-16, Public Administrative Hearing before the State Engineer, November 4, 1992.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the subject matter of contained herein.¹¹

II.

The Nevada Supreme Court has stated that substantial use of perfected water rights after the statutory 5 year period of non-use "cures" claims to forfeiture so long as no claim or proceeding of forfeiture has begun.¹² Since substantial use of water under Permit 20478, Certificate 6242 occurred in 1987, after the period of non-use and before the forfeiture proceedings in 1992, it can be concluded that the forfeiture, declared in State Engineer's Ruling No. 3637, has been cured. The portion of Permit 20478, Certificate 6243, owned by the Town of Eureka should be restored to a diversion rate of 2.51 c.f.s. and an annual duty of 640 acre feet.

III.

When a portion of Permit 20478, Certificate 6243 was forfeited in State Engineer's Ruling No. 3637, Application 52982 was approved for the unforfeited portion appurtenant to Section 10, T.20N., R.53E., M.D.B.&M., being 1.78 c.f.s., and not to exceed 200 acre feet annually. However, Permit 52982 was not issued, pending the outcome of the appeal process. Because the quantity of water declared forfeited should now be restored to Permit 20478, Certificate 6243, Permit 52982 should be issued to include the entire quantity of water in the name of the Town of Eureka under Permit 20478, Certificate 6243. (2.51 c.f.s. and not to exceed 640 acre feet annually).

IV.

The Town of Eureka has shown good cause for the failure to use the water during the period from 1987 to 1992. Therefore, the

¹¹ NRS 533 and 534.

¹² Town of Eureka v. office of the State Engineer, 108 Nev. Ad. Op. 28, 826 P.2d 948 (1992).

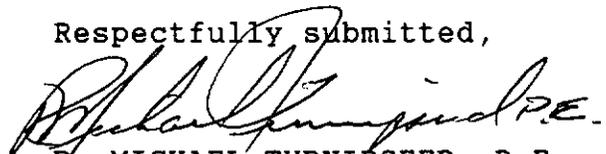
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application for extension of time to prevent the forfeiture of Permit 20478, Certificate 6243 should be granted.

RULING

The forfeiture declared in State Engineer's Ruling No. 3627 is hereby determined to have been cured and the quantity of water declared forfeited is hereby restored to Permit 20478, Certificate 6243. The protests to change Application 52892 are hereby overruled and subject to payment of the statutory fees, said application is hereby approved for an amount equal to 2.51 c.f.s., not to exceed 640 acre feet annually. The application of extension of time to prevent the forfeiture of Permit 20478, Certificate 6243 is hereby approved.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 6th day of
May, 1993.