

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF )  
WATER RIGHTS UNDER PERMIT 19197, CERTIFICATE )  
6675, FROM AN UNDERGROUND SOURCE, AMARGOSA )  
DESERT GROUNDWATER BASIN (230), NYE COUNTY, )  
NEVADA. )

RULING  
**# 4191**

GENERAL

I.

Application 19197 was filed by Charles Ward Pinkerton on September 12, 1960, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 19197 was approved on January 20, 1961, for 5.0 cubic feet per second (cfs) for irrigation and domestic use. Certificate 6675 under Permit 19197 was issued on May 27, 1968, for 3.62 cfs and not to exceed 968.65 acre feet annually (AFA) for the irrigation of 193.73 acres of land located within the S½ Section 22, T.16S., R.49E., M.D.B.&M. The point of diversion is located within the NW¼ SE¼ of said Section 22.<sup>1</sup>

II.

On March 17, 1993, Amargosa Resources, Incorporated (petitioner) petitioned the State Engineer to declare certain water rights forfeited.<sup>2</sup> Permit 19197, Certificate 6675 is included in the petition. The petitioner submitted records going back to 1985 to show the non-use of water. The alleged period of non-use, for the purpose of this forfeiture proceeding, is 1985 through 1992.

III.

On May 16, 17, and 18, 1994, the State Engineer conducted a hearing to allow the petitioner the opportunity to provide the foundation for the evidence filed in support of the petition.<sup>3</sup>

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<sup>1</sup> File No. 19197, official records in the office of the State Engineer.

<sup>2</sup> Exhibit No's. 1 and 2, Public Administrative Hearing before the State Engineer May 16-18, 1994.

<sup>3</sup> Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

On March 1, and 2, 1995, a hearing was held to consider the possible forfeiture of Permit 19197, Certificate 6675.<sup>4</sup>

IV.

At the hearing to consider Permit 19197, Certificate 6675, administrative notice was taken of the record established at the May, 1994, hearing.<sup>5</sup> In addition, administrative notice of the records in the office of the State Engineer was taken.<sup>6</sup>

FINDINGS OF FACT

I.

On May 18, 1994, the State Engineer entered a ruling<sup>7</sup> regarding Permit 17657, Certificate 6978, an irrigation water right, in which the place of use had been parceled into domestic lots (Dansby Subdivision). The buyers of the lots purchased that portion of Permit 17657, Certificate 6978, appurtenant to their lots. In many cases, the new owners used water from their domestic wells, and not from the certificated point of diversion. The quantity of the water used and the specific location and number of acres irrigated are unknown. In order to resolve this situation, the State Engineer ruled that the owners of the individual lots must file change applications and appropriate ownership documents. If the applications are approved, then the new owners will be required to file proof of beneficial use and show where the water is used on their individual lots. This process is useful where water righted land has been subdivided or parceled into domestic lots, and water was used on the new lots, but the specific location

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<sup>4</sup> Exhibit No. 49, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>5</sup> Transcript p. 15, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>6</sup> Transcript p. 16, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>7</sup> State Engineer's Ruling No. 4114, May 18, 1994, official records of the State Engineer.

of that use and the quantity of water used are unknown.

At the hearing to consider the possible forfeiture of Permit 19197, Certificate 6675, one of the water right holders, Darrell Cypert, moved that the Hearing Officer, acting for the State Engineer, enter a ruling on Permit 19197, Certificate 6675, that is similar to the ruling on the Dansby Subdivision.<sup>8</sup> No action was taken on the motion at the hearing.

The place of use of Permit 19197, Certificate 6675, is similar to the Dansby Subdivision, in that much of the property was parceled into domestic lots. These domestic lots of less than ten acres, can be identified as follows: APN 19-541-01 (Leake), 19-541-03 (Cypert), 19-541-04 (Cypert), 19-541-06 (Black), 19-541-07 (White), 19-541-08 (White), 19-541-09 (Hulse), 19-541-10 (Richardson), 19-541-13 (Rook), 19-541-14 (Copeland), 19-541-15 (Cypert), 19-541-16 (Cypert), 19-541-17 (Cypert), 19-541-18 (Cypert), 19-541-19 (O'Neill), 19-541-20 (Dillard), 19-541-21 (Jackson), 19-541-22 (Selbach), 19-541-25 (Porsche), 19-541-27 (Rook), 19-541-28 (Rook), 19-541-29 (Rook), and 19-541-30 (Rook). Much evidence and testimony were provided by some of the owners that water rights were purchased with the lots<sup>9</sup> and that water was used on many of the parcels from the wells located on the parcels.<sup>10</sup> The State Engineer finds that the conditions of Ruling No. 4114 apply to the above domestic parcels. The State Engineer further finds that three parcels, identified as APN 19-541-02 (Jacobs), 19-541-23 (Cypert), and 19-541-24 (Cypert) were not

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<sup>8</sup> Transcript pp. 10-11, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>9</sup> Exhibit No's. 53, 54, 58, 61, 62, 63, 63, and 66, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>10</sup> Exhibit No's. 55, 59 and Transcript pp. 210-354, Public Administrative Hearing before the State Engineer March 1-2, 1995. Many of the domestic lots were not sold and remain unoccupied as in the Dansby Subdivision.

parceled into domestic lots and the conditions of Ruling No. 4114 do not apply to these parcels.

II.

The property within the place of use of Permit 19197, Certificate 6675, not divided into domestic lots, has been previously identified as APN 19-541-02 (Jacobs), 19-541-23 (Cypert), and 19-541-24 (Cypert). Mr. Cypert testified that in 1988, he planted alfalfa seeds at the rate of about one pound per acre and oat seeds at about 1.5 pounds per acre, on the above identified parcels and on parcels APN 19-541-03, 19-541-04, and part of 19-541-25.<sup>11</sup> He also testified that he broadcast the seeds among the creosote and sage brush that existed on the property. He then irrigated the property for about two months, but after the plants came up, rabbits destroyed the entire crop.<sup>12</sup> In his evidence package,<sup>13</sup> Mr. Cypert submitted receipts from 1988 showing purchases of the alfalfa and oat seed, hydraulic fluids for the pump, gaskets for the distribution pipe, and large quantities of gasoline for the engine which powered the pump. There was no evidence or testimony provided on the record that refuted Mr. Cypert's evidence and testimony. The high level aerial photograph for 1989<sup>14</sup> submitted by petitioner does not show the place of use

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<sup>11</sup> Transcript pp. 427, 429-430, and Exhibit No. 67, Public Administrative Hearing before the State Engineer March 1-2, 1995. In February, 1988, Mr. Cypert purchased 150 pounds of alfalfa seed and 200 pounds of oat seed for the 99.3 acres that he planted.

<sup>12</sup> Transcript pp. 436, 443-446, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>13</sup> Exhibit No. 67, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>14</sup> Exhibit No. 20, Public Administrative Hearing before the State Engineer May 16-18 1994.

of Permit 19197, Certificate 6675 and that for 1990<sup>15</sup> is inconclusive. The State Engineer finds that the parcels identified by APN 19-541-02, 19-541-03, 19-541-04, 19-541-23, 19-541-24 and 19-541-25 may have been irrigated in 1988.

The petitioner has the burden to show by clear and convincing evidence that the non-use of water occurred on these parcels. The State Engineer finds that the petitioner has failed to carry this burden.

### III.

The property identified as APN 19-541-27, 19-541-28, 19-541-29, and 19-541-30, was purchased by Mr. and Mrs. James Rook, Sr., from Darrell Cypert in 1992.<sup>16</sup> There is corroborating testimony from two witnesses that the property was irrigated in 1989. Michelle Rook testified that she observed watermelon plants growing among the creosote bushes, that were watered out of the certificated well.<sup>17</sup> Testimony indicates that Mr. Cypert planted the watermelon seeds among the creosote bushes, then watered the property from the certificated well through an eight inch distribution line with 1.5 inch outlets, that turned the water into furrows on the land.<sup>18</sup> No evidence or testimony was provided on the record which refutes this testimony. The State Engineer finds that the parcels identified as APN 19-541-27, 19-541-28, 19-541-29, and 19-541-30, may have been irrigated in 1989.

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<sup>15</sup> Exhibit No. 21, Public Administrative Hearing before the State Engineer May 16-18 1994.

<sup>16</sup> Transcript p. 286, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>17</sup> Transcript pp. 277-284, Public Administrative Hearing before the State Engineer March 1-2, 1995.

<sup>18</sup> Transcript pp. 291-292, Public Administrative Hearing before the State Engineer March 1-2, 1995.

The petitioner has the burden to show by clear and convincing evidence that the non-use occurred on these parcels. The State Engineer finds that the petitioner has failed to carry this burden.

**CONCLUSIONS**

**I.**

The State Engineer has jurisdiction in this matter.<sup>19</sup>

**II.**

Failure for a period of five consecutive years on the part of a water right holder, to use beneficially all or any part of the underground water for the purpose for which the right is acquired, works a forfeiture of the water right, to the extent of the non-use.<sup>19</sup>

**III.**

Because the law disfavors a forfeiture, there must be clear and convincing evidence of the statutory period of non-use, for the State Engineer to declare a forfeiture.<sup>20</sup> The State Engineer concludes that in declaring a partial forfeiture of an irrigation water right, the acreage of land determined to have undergone the statutory period of non-use, the location of that land within the place of use, and the quantity of water forfeited must be specified.

**IV.**

Water righted lands that are subdivided or parceled into domestic lots, present a unique situation. Often a new owner irrigates some part of his parcel from his domestic well, not from the certificated point of diversion. This is a violation of Nevada Water Law. The remedy is to require the new owner to file an application to change the point of diversion of his portion of the original water right, as was required in State Engineer's Ruling

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<sup>19</sup> NRS 533.090.

<sup>20</sup> Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

No. 4114, dated May 18, 1994. A permit issued under such an application requires the permittee to prove beneficial use, in which the quantity of water used and the location of that use are specified. The State Engineer concludes that this procedure is appropriate to effectively manage the groundwater resource in areas where previously irrigated lands are subdivided or parceled into domestic lots.

V.

Several domestic lots have been created within the place of use of Permit 19197, Certificate 6675. Many of these lots have been sold with water rights, to new owners who reside on their properties. This situation is similar to the Dansby Subdivision and the conditions of Ruling No. 4114 apply. The State Engineer concludes that the owners of the following domestic parcels: APN 19-541-01, 19-541-03, 19-541-04, 19-541-06, 19-541-07, 19-541-08, 19-541-09, 19-541-10, 19-541-13, 19-541-14, 19-541-15, 19-541-16, 19-541-17, 19-541-18, 19-541-19, 19-541-20, 19-541-21, 19-541-22, 19-541-25, 19-541-27, 19-541-28, 19-541-29, and 19-541-30, should file change applications to correct the points of diversion and places of use.

VI.

Uncontroverted evidence and testimony regarding the planting and irrigating in 1988, of alfalfa and oats on parcels APN 19-541-02, 19-541-03, 19-541-04, 19-541-23, 19-541-24, and 19-541-25, was presented at the hearing. The crop was destroyed by rabbits and the irrigation did not occur for the entire season, but the State Engineer concludes that the above numbered parcels were probably irrigated in 1988. The State Engineer further concludes the petitioner did not prove by clear and convincing evidence that a continuous five year period of non-use occurred on the above numbered parcels during the alleged period of forfeiture. A partial forfeiture cannot be declared since the exact quantity of

water pumped and the exact acreage irrigated cannot be determined from the record.

**VII.**

Uncontroverted testimony from two witnesses, regarding the planting and irrigating of watermelon plants in 1989, among the creosote bushes on parcels APN 19-541-27, 19-541-28, 19-541-29, and 19-541-30, was presented on the record. The plants were consumed by rabbits before they bore fruit and the irrigation did not occur for the entire season, but the State Engineer concludes that the above numbered parcels were irrigated in 1989. The State Engineer further concludes that the petitioner did not prove by clear and convincing evidence that a continuous five year period of non-use occurred on the above numbered lots during the alleged period of forfeiture. A partial forfeiture cannot be declared since the exact quantity of water pumped and the exact acreage irrigated cannot be determined from the record.

**RULING**

The owners of portions of Permit 19197, Certificate 6675, appurtenant to APN 19-541-01, 19-541-03, 19-541-04, 19-541-06, 19-541-07, 19-541-08, 19-541-09, 19-541-10, 19-541-13, 19-541-14, 19-541-15, 19-541-16, 19-541-17, 19-541-18, 19-541-19, 19-541-20, 19-541-21, 19-541-22, 19-541-25, 19-541-27, 19-541-28, 19-541-29, and 19-541-30, must file appropriate ownership documents and applications to change their respective portions, within 120 days of the date of this ruling.

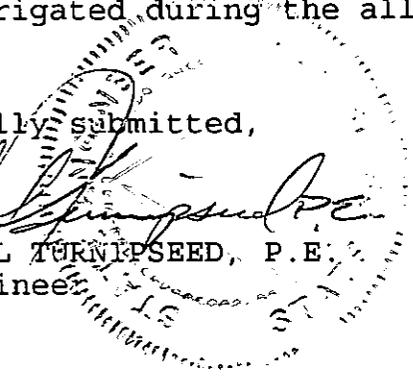
That portion of Permit 19197, Certificate 6675 appurtenant to APN 19-541-02, 19-541-03, 19-541-04, 19-541-23, 19-541-24, 19-541-25, 19-541-27, 19-541-28, 19-541-29, and 19-541-30, is not declared

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forfeited because these parcels were irrigated during the alleged period of non-use.

Respectfully submitted,

  
R. MICHAEL TURNPSEED, P.E.  
State Engineer



RMT/JCP/pm

Dated this 23rd day of  
May, 1995.