

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 25636, CERTIFICATE)
7696, FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

4322

GENERAL

I.

Application 25636 was filed by Albert E. Sasse on May 28, 1970, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 25636 was approved on May 7, 1971, for 1.3 cubic feet per second (cfs) for irrigation and domestic use. Certificate 7696 under Permit 25636 was issued on January 21, 1972, for 1.3 cfs of water and not to exceed 200 acre feet annually (AFA) for the irrigation of 40 acres of land, located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5, T.16S., R.49E., M.D.B.&M. The point of diversion is located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 5.¹

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.² Permit 25636, Certificate 7696 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.

¹ File No. 25636, official records in the office of the State Engineer.

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

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.³

On May 2, 1995, a hearing was held to consider the possible forfeiture of Permit 25636, Certificate 7696.⁴

IV.

At the hearing to consider Permit 25636, Certificate 7696, administrative notice was taken of the record developed at the foundation hearing, May, 1994, and of the record developed at all the previous hearings on the individual water rights.⁵ In addition, administrative notice of the records in the office of the State Engineer was taken.⁵

FINDINGS OF FACT

I.

At the hearing, the Petitioner presented evidence and testimony supporting his case in favor of the forfeiture of Permit 25636, Certificate 7696. The State Engineer has taken annual pumpage inventories in the Amargosa Desert Groundwater Basin since 1983 for the purpose of overall basin management. The annual groundwater pumpage inventory for the Amargosa Desert Groundwater Basin, for the years 1985 through 1992, shows that no water was used for irrigation on any of the 40 acres of land allowed under

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

⁴ Exhibit No. 93, Public Administrative Hearing before the State Engineer May 2, 1995.

⁵ Transcript pp. 5-6, Public Administrative Hearing before the State Engineer May 2, 1995.

Permit 25636, Certificate 7696.⁶ The employees of the Division of Water Resources who performed the inventories observed that no crop irrigation occurred on the place of use.⁷

There are windbreak trees surrounding the 40 acre parcel and a row of windbreak trees running in the east-west direction down the middle of the property.⁸ There are two locations on the property where there is development in the form of a house or mobile home and other buildings, one area in the southwest part of the property and another in the northwest part.⁸ Water use for a garden, landscaping, and the homes occurred in these areas.⁹ The extent of this use of water was not quantified and was considered to be domestic use for the purpose of the inventory.

Dr. Robert Bement, the expert witness for ARI, reviewed the high level aerial photographs¹⁰ and, in conjunction with the ground truth photographs,¹¹ determined that the creosote bush on the property was seven to ten years old.¹² Outside of the areas

⁶ Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁷ Transcript pp. 24-27 and 60-61, Public Administrative Hearing before the State Engineer, May 2, 1995.

⁸ Transcript p. 24, Public Administrative Hearing before the State Engineer, May 2, 1995.

⁹ Transcript p. 28, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹⁰ Exhibit Nos. 19, 20, 21, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹¹ Exhibit No. 18, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹² Transcript pp. 103-106, Public Administrative Hearing before the State Engineer, May 2, 1995.

identified above, where evidence of water use exists, Dr. Bement stated that the property had not been cultivated for approximately seven to ten years.¹³

The State Engineer finds that annual pumpage inventories, the testimony of the persons who performed the inventories, the high level aerial photographs for the years 1987, 1989, and 1990, and Dr. Bement's interpretation of those photographs represent clear and convincing evidence that irrigation has not occurred on a portion of the place of use for a continuous period of time that exceeds five years.

II.

Regarding the areas on the property where water use occurred, Mr. Fred White, the water right holder of Permit 25636, Certificate 7696, testified that he installed drip lines, a windmill, another well, and booster pumps for the irrigation system on the property.¹⁴ The water system was used for the irrigation of about 180 to 200 jojoba plants occupying two and a half acres located near the residence in the southwest corner of the property, a second residence in the north half of the property, a yard, a one acre garden, a five acre pasture, and some peach trees which occupied eight to ten acres.¹⁵ Mr. White also installed a drip system to water the rows of windbreak trees which surround the forty acres and also divide the parcel in half. The evidence package and photographs submitted by Mr. White support his

¹³ Transcript p. 105-106, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹⁴ Transcript p. 176, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹⁵ Transcript pp. 176-178, 183-185, and 198-199, Public Administrative Hearing before the State Engineer, May 2, 1995. The peach trees did not survive the killing frost of 1990 and therefore are not visible on the aerial photographs.

testimony.¹⁶ Adding up the acreages, ie., 2.5 (jojoba plants)+ 1.0 (garden)+ 5.0 (pasture)+ 8.0 (peach trees)+ 1.5 (windbreak trees¹⁷) equals 18 acres of irrigation. This results in 90 acre feet of water right. Adding 4.04 acre feet for the two residences on the property yields a total of 94.04 acre feet. The State Engineer finds that 94.04 acre feet of water right was placed to beneficial use during the alleged period of forfeiture. The State Engineer further finds that the balance of the water right under Permit 25636, Certificate 7696, amounting to 105.96 acre feet of water, was not used during the alleged forfeiture period.

III.

Mr. White testified that there are three wells on the property, one of which is the certificated well.¹⁸ The records in the office of the State Engineer indicate that no change applications have been filed and no permits have been issued for water rights for the other two wells. The State Engineer finds that water from two wells on this property is being used without benefit of permits. The State Engineer further finds that the remedy is to require Mr. White to file the appropriate change applications to reflect the use of water from the two unpermitted wells. The maps filed in support of the change applications will identify the areas where the water use occurs on the property.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.¹⁹

¹⁶ Exhibit Nos. 108 and 110, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹⁷ The area of the windbreak trees was calculated by multiplying 10 foot wide times 1.25 miles long and getting 1.5 acres.

¹⁸ Transcript pp.176-177, Public Administrative Hearing before the State Engineer, May 2, 1995.

¹⁹ NRS 533.090.

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.²⁰

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.²¹ The annual pumpage inventories, the testimony of those who performed the inventories, the aerial photographs, and the interpretation of those photographs provide clear and convincing evidence that water was not used for the statutory period on 22 of the 40 acres. The State Engineer concludes that 105.96 acre feet of water right should be forfeited.

IV.

Water from two unpermitted wells is being placed to beneficial use on the place of use of Permit 25636, Certificate 7696. The State Engineer concludes that change applications must be filed to reflect these unpermitted uses.

²⁰ NRS 534.090.

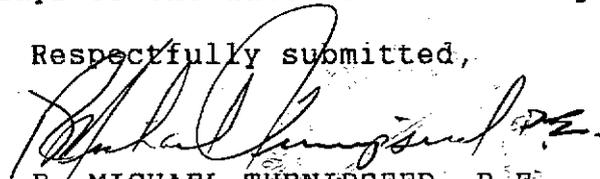
²¹ Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

RULING

That portion of Permit 25636, Certificate 7696, amounting to 105.96 acre feet annually, is hereby declared forfeited on the grounds that the land has not been irrigated for a continuous period of time exceeding five years. The remaining portion of Permit 25636, Certificate 7696, amounting to 94.04 acre feet is not declared forfeited.

The owner of Permit 25636, Certificate 7696 must file appropriate applications to change to reflect the current unpermitted uses within 120 days of the date of this ruling.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 9th day of
April, 1996.