

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 20355, CERTIFICATE)
7238, FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

4348

GENERAL

I.

Application 20355 was filed by Mrs. Jan T. Berry on March 9, 1962, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 20355 was approved on February 22, 1963, for 2.7 cubic feet per second (cfs) for irrigation and domestic use. Certificate 7238 under Permit 20355 was issued on December 11, 1969, for 1.4 cfs of water and not to exceed 351.55 acre feet annually (AFA) for the irrigation of 70.31 acres of land, located within the NW $\frac{1}{4}$ of Section 2, T.17S., R.49E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 2.¹

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.² Permit 20355, Certificate 7238 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.³

¹ File No. 20355, 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.

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

On February 5, 1996, a hearing was held to consider the possible forfeiture of Permit 20355, Certificate 7238.⁴

IV.

At the hearing to consider Permit 20355, Certificate 7238, 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 20355, Certificate 7238. 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 70.31 acres of land allowed under Permit 20355, Certificate 7238.⁶ The employees of the Division of Water Resources who performed the inventories observed that no crop irrigation occurred on the place of use for those years.⁷

Dr. Robert Bement, the expert witness for ARI, reviewed the high level aerial photographs⁸ and, in conjunction with the ground

⁴ Exhibit No. 126, Public Administrative Hearing before the State Engineer February 5, 1996.

⁵ Transcript pp. 8-9, Public Administrative Hearing before the State Engineer February 5, 1996.

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

⁷ Transcript pp. 14, 17-19 and 35-37, Public Administrative Hearing before the State Engineer, February 5, 1996.

⁸ Exhibit Nos. 20, 21, Public Administrative Hearing before the State Engineer, May 16-18, 1995.

truth photographs,⁹ determined that the creosote bush on the property was at least nineteen years old.¹⁰ Dr. Bement stated that the property had not been cultivated during the alleged period of non-use.¹¹

There is an area near the center of the place of use depicted on the aerial photographs where there appears that water was used for irrigation and domestic purposes.¹² The size of this area located on parcel no. 14 and a portion of parcel no. 17, was estimated to be 3.2 acres.¹³ The State Engineer finds that the maximum quantity of water used is 18.02 acre feet, including the domestic component of 2.02 acre feet.

The State Engineer finds that the annual pumpage inventories, the testimony of the persons who performed the inventories, the high level aerial photographs for the years 1989 and 1990, and Dr. Bement's interpretation of those photographs represent clear and convincing evidence that irrigation has not occurred on the place of use, excepting the 3.2 acres noted above, for a continuous period of time that exceeds five years. The quantity of water related to the non-use is 333.53 acre feet.

II.

Mr. Mills, whose family owns the major portion of the place of

⁹Exhibit No. 18, Public Administrative Hearing before the State Engineer, May 16-18, 1995.

¹⁰Transcript pp. 65, 70, 75-78, and 96, Public Administrative Hearing before the State Engineer, February 5, 1996. Although there is no aerial coverage for 1987, Dr. Bement stated that the vegetative pattern of the creosote is the same in 1989 and 1990 and he was able to determine the age of the creosote on this property.

¹¹Transcript p. 77, Public Administrative Hearing before the State Engineer, February 5, 1996.

¹²Transcript, p. 71, Public Administrative Hearing before the State Engineer, February 5, 1996.

¹³Transcript pp. 74-75 and Exhibit No. 135, Public Administrative Hearing before the State Engineer, February 5, 1996. See attached map.

use of Permit 20355, Certificate 7238¹⁴, testified that his view of the aerial photographs indicated that a larger portion of the place of use, as much as one-third of the property, had been cleared.¹⁵ However, Mr. Mills is not an expert in aerial photography interpretation and his testimony can be given very little weight in light of Dr. Bement's expert opinion that only 3.2 acres appear to have been cleared. The State Engineer finds that the cleared area is 3.2 acres.

III.

A review of the records of the Office of the State Engineer indicates that a change application has not been filed and a permit has not been issued for water rights for the well providing water for the irrigation of the 3.2 acres of property which covers APN 19-39-14 and a portion of APN 19-39-17. The State Engineer finds that water from the well on this property is being placed to beneficial use without benefit of a permit. The State Engineer further finds that the remedy is to require the water user, presumed to be Mr. de la Pena, to file the appropriate change application to reflect the use of water from this unpermitted well. The map filed in support of the change application will identify the areas where the water use occurs on the property.

IV.

Mr. Mills testified that there are other wells on the property that are being used for homes, gardens, and tree lines.¹⁶ With the exception of the 3.2 acres mentioned above, the State Engineer finds that this use of water is classified as domestic and cannot be considered as irrigation in accordance with the terms and conditions of Permit 20355, Certificate 7238.

V.

¹⁴The Mills Family owns the property identified as Assessor Parcel Nos. 19-39-25, 19-39-26, and 19-39-27. This accounts for about 43.5 acres out of the certificated 70.31 acres.

¹⁵Transcript p. 112, Public Administrative Hearing before the State Engineer, February 5, 1996.

¹⁶Transcript pp. 115-116, Public Administrative Hearing before the State Engineer, February 5, 1996.

A ten acre parcel, located within the place of use identified as APN 19-039-06, is owned by Kathleen Welch. A well provides water for several residences, a garden, a hardware store, and several trees and bushes that exist on the property.¹⁷ A quasi-municipal water right, identified as Permit 28777, Certificate 10664, was issued to serve this property.¹⁸ The State Engineer finds that the use of water on APN 19-039-06 is covered under the quasi-municipal water right and that irrigation has not occurred on the property during the alleged period of forfeiture.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.¹⁹

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 irrigation has not occurred during the statutory period on 67.11 of the certificated 70.31 acres. The State Engineer concludes that 333.53 acre feet of

¹⁷ Transcript, pp.120-121, and Exhibit No. 132, Public Administrative Hearing before the State Engineer, February 5, 1996.

¹⁸ File 28777, Official Records in the Office of the State Engineer.

¹⁹ NRS 533.090.

²⁰ NRS 534.090.

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

water right is forfeited.

IV.

Water from an unpermitted well is being used to irrigate the 3.2 acres identified above. The State Engineer concludes that a change application must be filed to reflect this unpermitted use.

RULING

That portion of Permit 20355, Certificate 7238, amounting to 333.53 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 20355, Certificate 7238, amounting to 18.02 acre feet is not declared forfeited.

The user of the water appurtenant to the 3.2 acres identified above must file the appropriate ownership documents and an application to change to reflect the current unpermitted use within 120 days of the date of this ruling.

Permit 28777, Certificate 10664, the quasi-municipal water right appurtenant to the Welch property is not declared forfeited.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 3rd day of

May, 1996.

PERMIT 20355 CERT. 7238
CERTIFICATED PLACE OF USE

