

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 22140, CERTIFICATE)
7975 AND PERMIT 22141, CERTIFICATE 7974 FROM)
AN UNDERGROUND SOURCE, AMARGOSA DESERT)
GROUNDWATER BASIN (230), NYE COUNTY, NEVADA.)

RULING

4349

GENERAL

I.

Application 22140 was filed by James M. Daniels on July 21, 1964, to change the underground waters heretofore appropriated under Permit 14523, within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 22140 was approved on March 26, 1965, for 3.4 cubic feet per second (cfs) for irrigation and domestic use. Certificate 7975 under Permit 22140 was issued on January 4, 1973, for 1.92 cfs of water and not to exceed 272.5 acre feet annually (AFA) for the irrigation of 54.5 acres of land, located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, T.17S., R.52E., M.D.B.&M and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 7, T.17S., R.52E., M.D.B.&M. The point of diversion is located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8.¹

II.

Application 22141 was filed by James M. Daniels on July 21, 1964, to change the underground waters heretofore appropriated under Permit 14522, within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 22141 was approved on March 26, 1965, for 2.4 cubic feet per second (cfs) for irrigation and domestic use. Certificate 7974 under Permit 22141 was issued on January 4, 1973, for 2.05 cfs of water and not to exceed 272.5 AFA for the irrigation of the same 54.5 acres of land described above.² The

¹ File No. 22140, official records in the office of the State Engineer.

² Permit 22140, Certificate 7975 and Permit 22141, Certificate 7974 are supplemental water rights with respect to the place of use and each has a separate point of diversion.

point of diversion is located within the NE¼ SE¼ of Section 7, T.17S., R.52E., M.D.B.&M.³

III.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.⁴ Permit 22140, Certificate 7975 and Permit 22141, Certificate 7974 are 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.

IV.

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.⁵ On February 7, 1996, a hearing was held to consider the possible forfeiture of Permit 22140, Certificate 7975 and Permit 22141, Certificate 7974.⁶

V.

At the hearing to consider Permit 22140, Certificate 7975, and Permit 22141, Certificate 7974, administrative notice was taken of record developed at the foundation hearing of May, 1994, and of the record developed at all the previous hearings on the individual water rights.⁷

³ File No. 22141, official records in the office of the State Engineer.

⁴ Exhibit No's. 1 and 2, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁵ Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁶ Exhibit No. 138, Public Administrative Hearing before the State Engineer February 7, 1996.

⁷ Transcript p. 14, Public Administrative Hearing before the State Engineer February 7, 1996.

FINDINGS OF FACT

I.

The place of use of Permit 22140, Certificate 7975 and Permit 22141, Certificate 7974, consisting of 54.5 acres, has been divided into two parcels identified as APN 21-431-03 (parcel 3, 33.3 acres, Richards) and 21-431-17 (parcel 17, 21.1 acres, Lilly).⁸ The point of diversion of Permit 22140, Certificate 7975 is located on parcel 3 and that for Permit 22141, Certificate 7974 is located on parcel 17. There is now separate ownership of the two parcels and the two wells and neither party wishes to use the other party's well. Therefore, the State Engineer finds that these water rights are no longer supplemental and the place of use of Permit 22140, Certificate 7975 is parcel 3 and that for Permit 22141, Certificate 7974 is parcel 17.

II.

At the hearing, the Petitioner presented evidence and testimony supporting his case in favor of the forfeiture of Permit 22140, Certificate 7975, and Permit 22141, Certificate 7974. 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 1987 through 1989, shows that no water was used for irrigation on any of the 54.5 acres of land allowed under Permit 22140, Certificate 7975 and Permit 22141, Certificate 7974.⁹ In 1991 and 1992, the inventory showed that 10 acres had been irrigated,⁷ and it was later learned that the 10 acres were located outside of the certificated place of

⁸Exhibit No. 148, Public Administrative Hearing before the State Engineer, February 7, 1996.

⁹Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994.

use.¹⁰ A check of the records revealed that no change application to change the place of use of this well to include the 10 acres was ever filed and, therefore, no permit was ever granted. No inventories were performed for this area in 1985, 1986, or 1990¹¹ and there is no high level aerial photograph coverage for this area presented for the alleged period of forfeiture.¹²

Dr. Robert Bement, the expert witness for ARI, visited the property in 1994 and made two observations regarding parcel 3.¹³ First he observed that on the east portion of the property, there was an area of about eight acres that had been irrigated.¹⁴ Next, he observed that the remainder of parcel 3 had not been irrigated in many years and that the creosote bush he saw growing on this portion of parcel 3 was about ten years old.¹⁵

The State Engineer finds that the expert testimony and the observations of Dr. Bement overcome the lack of aerial photographs and the lack of a continuous pumpage inventory record with regard to a portion of the Richards property (parcel 3). The State Engineer further finds that the record contains clear and

¹⁰Transcript p.204, Public Administrative Hearing before the State Engineer, February 7, 1996.

¹¹Transcript p. 15, Public Administrative Hearing before the State Engineer, February 7, 1996 and Transcript pp. 118-120 and Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

¹²Transcript p. 146, Public Administrative Hearing before the State Engineer, February 7, 1996.

¹³Transcript p.156-157, Public Administrative Hearing before the State Engineer, February 7, 1996.

¹⁴Exhibit No. 17, Public Administrative Hearing before the State Engineer, May 16-18, 1994 and Transcript p. 157 and Exhibit No. 148, Public Administrative Hearing before the State Engineer, February 7, 1996.

¹⁵Transcript pp. 157-161, Public Administrative Hearing before the State Engineer, February 7, 1996.

convincing evidence that 25.3 acres of parcel 3 have not been irrigated for a continuous period of time exceeding five years. The remaining eight acres is found to have been irrigated during the alleged period of non-use.

III.

Mr. Richards, the owner of parcel 3, submitted evidence of water use on his property.¹⁶ An objection was made to the admission of this evidence on several grounds.¹⁷ First, no foundation was provided for the photographs, the power records, and the information in the letter and the affidavit. Next, there is no corroboration to the allegation that all the power was used for irrigation of the property. This is especially noteworthy because a photograph, already in evidence, shows a standpipe for a water truck filling operation.¹⁸ Water, that was pumped into trucks, could have been used at another site. The authors of the letter and the affidavit were not present at the hearing and there was no opportunity for cross-examination to verify the information. Finally, the photographs, alleging irrigation of the entire 33.3 acres, were taken in 1993, after the period of non-use and appear to show only portions of the eight acres that are acknowledged to have been irrigated. The evidence was admitted into the record with the objection noted, leaving the State Engineer to determine the weight it is given.

The electrical power records submitted by Mr. Richards indicate that a great quantity of electrical power was consumed in 1990, 1991, and 1992.¹⁶ The quantity of water pumped in 1991 is estimated to be about 680 AF or 20 AF per acre of land, assuming

¹⁶Exhibit No. 145, Public Administrative Hearing before the State Engineer, February 7, 1996.

¹⁷Transcript pp. 228-230, Public Administrative Hearing before the State Engineer, February 7, 1996.

¹⁸Exhibit No. 17, Public Administrative Hearing before the State Engineer, May 16-17, 1994.

that all of the power consumed in 1991 was used to irrigate the entire Richards parcel. Twenty acre-feet of water per acre is four times more than is required for the highest water consuming crop known to grow in Nevada. The foregoing and the fact that Mr. Richards owns only 72.72 acre feet of water right,¹⁹ cast doubt on the power records and because no one testified about these records, it cannot be determined for what purpose the power was used.

Based on the above, the State Engineer finds that the Richards evidence can be given no weight in the consideration of this matter.

IV.

In contrast to the evidence of non-use on a portion of the Richards property, the evidence of non-use on the Lilly property (parcel 17) is lacking. None of the photographs presented by ARI show this property²⁰ and there is no creosote on the property.²¹ Dr. Bement testified that he observed no irrigation in 1994²² but he did not say for how long parcel 17 had not been irrigated. Mrs. Lilly testified that she did not irrigate the property except for the 144 trees and 24 grape plants that she planted in 1993. However, she obtained the property in 1991 and there is no testimony related to any prior years. The record lacks: 1) aerial and ground photographs of the Lilly property; 2) a continuous record of pumpage inventories; and 3) expert testimony related to the length of time since irrigation occurred. Therefore, the State Engineer finds that the record does not contain the required clear

¹⁹Exhibit No. 144, pp. 13-16, Public Administrative Hearing before the State Engineer, February 7, 1996.

²⁰Transcript p. 103, Public Administrative Hearing before the State Engineer, February 7, 1996.

²¹Transcript p. 202, Public Administrative Hearing before the State Engineer, February 7, 1996.

²²Transcript pp. 158-159, Public Administrative Hearing before the State Engineer, February 7, 1996.

and convincing evidence of non-use on the Lilly property (parcel 17).

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.²³

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.²⁴

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.²⁵ The State Engineer concludes that there is clear and convincing evidence that 25.3 acres of the Richards property (parcel 3) was not irrigated for a period of time that exceeds five years. The State Engineer further concludes that 126.5 acre feet of water right under Permit 22140, Certificate 7975, appurtenant to the 25.3 acres is forfeited. The remaining 40 acre-feet appurtenant to eight acres located within Parcel 3 is not forfeited.

IV.

The State Engineer concludes that ARI did not meet its burden to provide clear and convincing evidence of non-use on the Lilly property (parcel 17). Therefore, the water right under Permit 22141, Certificate 7974, consisting of 106 acre feet appurtenant to the 21.2 acres on parcel 17, is not declared forfeited.

²³ NRS 533.090.

²⁴NRS 534.090.

²⁵ Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

v.

Although the original 54.5 acres could be irrigated out of either one or both wells (Permit 22140 and Permit 22141), the land has been divided and has two separate owners (Lilly - Parcel 17 and Richards - Parcel 3). The State Engineer concludes that it makes little sense to have each parcel owner have water rights in the other parcel owner's well. The State Engineer further concludes that the wells will no longer supplement each other, therefore, the water rights that remain appurtenant to Parcel 17 shall be diverted from the point of diversion described under Permit 22141, Certificate 7974 and the water rights that remain appurtenant to Parcel 3 shall be diverted from the point of diversion described in Permit 22140, Certificate 7975.

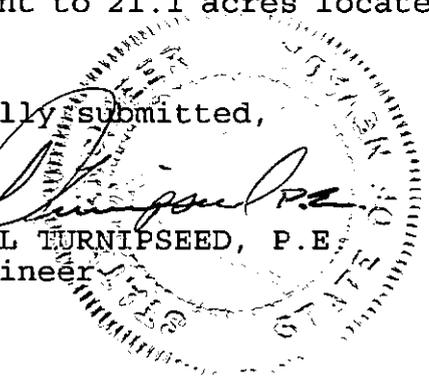
RULING

That portion of Permit 22140, Certificate 7975, amounting to 126.5 acre feet annually, which is appurtenant to 25.3 acres located within parcel 3, 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 22140, Certificate 7975 consisting of 40 acre feet appurtenant to eight acres located within parcel 3, is not declared forfeited.

The water right under Permit 22141, Certificate 7974, now determined to be 106 acre feet appurtenant to 21.1 acres located on parcel 17, is not declared forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/JCP/ab

Dated this 3rd day of
May, 1996.