

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

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 21232, CERTIFICATE)
7200, APPROPRIATED FROM AN UNDERGROUND)
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND-)
WATER BASIN (162), NYE COUNTY, NEVADA.)

RULING

#4376

GENERAL

COMMENTS

I.

Application 21232 was filed by Earl Burson on April 29, 1963, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes within the SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ Section 12, T.21 S., R.53 E., M.D.B.&M.¹ The point of diversion is described as being located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12. A permit was issued on Application 21232 on February 26, 1965, for 2.7 cubic feet per second (cfs).² On July 28, 1969, after Proof of Beneficial Use of the waters as allowed under the permit was filed with the Division of Water Resources, the State Engineer issued Certificate 7200 allowing for the diversion of 0.41 cfs, not to exceed of total duty of 121 acre-feet annually (afa), for the irrigation of 24.2 acres of land within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.³

II.

Documents were submitted to the Office of the State Engineer which transferred ownership of Permit 21232, in the records of the Office of the State Engineer, from the original permittee through several persons to the present owner of record Clover J. Burson.

¹File No. 21232, official records in the Office of the State Engineer.

²State's Exhibit No. 18A, public administrative hearing before the State Engineer, December 10, 1987. (Hereinafter "Exhibit No.").

³State's Exhibit No. 20A.

III.

The State Engineer initially described and designated a portion of the Pahrump Valley Artesian Groundwater Basin on March 11, 1941.⁴ The State Engineer subsequently extended the boundaries of the designated area of the Pahrump Valley Artesian Groundwater Basin on January 15, 1948,⁵ and on January 23, 1953.⁶

On October 26, 1987, the State Engineer issued Order 955 wherein he found that the groundwater levels in the Pahrump Valley were declining and ordered that all applications filed to appropriate water from the Pahrump Valley Artesian Groundwater Basin in the east side of the basin on the Pahrump and Manse Fans would be denied; all applications for all uses except small commercial uses on the valley floor would be denied; and all applications filed to appropriate water for irrigation purposes on lands in Pahrump Valley that have had a certificated water right forfeited where the forfeiture occurred prior to January 1, 1988, would be considered for approval on an individual basis; however, such applications would only be considered if they had been filed within 60 days of the date the water right had been declared forfeited.

IV.

After all parties of interest were duly noticed by certified mail dated October 28, 1987, an administrative hearing was held with regard to the forfeiture of Permit 21232, Certificate 7200, on

⁴State Engineer's Order No. 176, dated March 11, 1941, official records in the Office of the State Engineer.

⁵State Engineer's Order No. 193, dated January 15, 1948, official records in the Office of the State Engineer.

⁶State Engineer's Order No. 205, dated January 23, 1953, official records in the Office of the State Engineer.

December 10, 1987, at Pahrump, Nevada, before representatives of the Office of the State Engineer.⁷

FINDINGS OF FACT

I.

The State Engineer finds that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or the date set by any extension of time granted by the State Engineer.⁸ After a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to use beneficially all, or any part of the underground water of the State of Nevada for the purpose for which the right is acquired or claimed, works a forfeiture of the right to the use of that water to the extent of the nonuse.⁹

II.

Testimony and evidence presented at the administrative hearing showed that from 1982 through 1986 employees of the Office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as ground water pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 7200.¹⁰ From 1982 through 1986, the pumpage inventories indicated that no water had been used for irrigation as allowed under the certificate. The State Engineer finds that from 1982 through 1986 no irrigation took place at the certificate's identified place of use.

⁷ Transcript, public administrative hearing before the State Engineer, December 10, 1987.

⁸ NRS 533.410.

⁹ NRS 534.090.

¹⁰ State's Exhibit No. 5.

III.

Testimony and evidence provided by staff from the Division of Water Resources indicate that on December 7, 1987, a staff person visited the place of use under Permit 21232 and found that 30 acres in the eastern portion of the quarter section had been plowed, including 7 to 8 acres which do not have an appurtenant water right, and that 5 acres of grain was growing. The permittee provided evidence that on August 8, 1987, the permittee had the well motor repaired, on September 4, 1987, oat seed was purchased, on September 23, 1987, the field was plowed, and September and October 1987 electric bills were provided as evidence of usage of the water for irrigation.¹¹ The State Engineer finds evidence exists of usage of water under the permit that predates the October 28, 1987, hearing notice which began the forfeiture proceeding.

IV.

On November 5, 1987, the permittee filed an application for extension of time,¹² stating it was for the purpose of requesting additional time to comply with the provisions for filing proof of beneficial use. The State Engineer believes the permittee was mistaken in the terminology used on the application for extension of time. Proof of beneficial use is filed before a certificate is ever issued on a water right. The State Engineer finds the permittee intended to file a request for extension of time to avoid the forfeiture and not a request for extension of time to file proof of beneficial use.

¹¹Permittee's Exhibit No. 9.

¹²File No. 21232, official records of the Office of the State Engineer..

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹³

II.

Forfeiture must be demonstrated by clear and convincing evidence.¹⁴ Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.¹⁵ To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.¹⁶

In the case of Town of Eureka v. Office of the State Engineer¹⁷, the Nevada Supreme Court adopted a rule that substantial use of water rights after the statutory period of non-use "cures" claims of forfeiture so long as no claim or proceeding of forfeiture has begun. The State Engineer concludes clear and convincing evidence exists as to non-use of the water from 1982 through 1986; however, evidence was also presented by the permittee as to substantial use of the water after the statutory period of non-use and before the forfeiture proceedings began; thus, curing the forfeiture as of September 1987. The State Engineer makes no conclusions as to the status of the water rights from September 1987 to the present time.

¹³NRS Chapters 533 and 534.

¹⁴Town of Eureka v. Office of the State Engineer, 826 P.2d. 948 (1992).

¹⁵1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

¹⁶Id. at 239.

¹⁷826 P.2d. 948, 952 (1992).

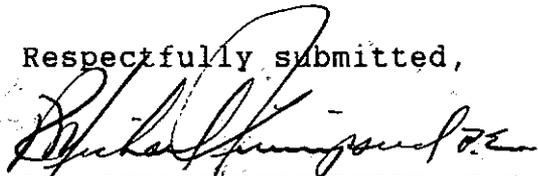
III.

Nevada law provides that the holder of a water right may file a request for extension of time necessary to work a forfeiture if the request is made before the expiration of the time necessary to work the forfeiture. The State Engineer concludes that the application for extension of time to avoid the forfeiture was not timely as the five year period of non-use had run in 1986; however, based on the conclusion of cure made above, the State Engineer concludes the matter of the extension of time is moot.

RULING

As of the hearing held on December 10, 1987, the right to beneficially use water under Permit 21232, Certificate 7200, has not been forfeited for the purposes for which the subject right was acquired. No finding is made as to the status of the water right under Permit 21232, Certificate 7200 from December 10, 1987, to the present time.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 22nd day of

July, 1996.