

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

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 21229, CERTIFICATE)
7483, APPROPRIATED FROM AN UNDERGROUND)
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND-)
WATER BASIN (162), NYE COUNTY, NEVADA.)

RULING

4381

GENERAL

I.

Application 21229 was filed by W.J. Williams on April 26, 1963, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes within the SW $\frac{1}{4}$ Section 8, T.20 S., R.53 E., M.D.B.&M.¹ The point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8. A permit was issued under Application 21229 on January 10, 1966, for 2.7 cubic feet per second (cfs).² After Proof of Beneficial Use of the waters was filed with the Division of Water Resources, on November 12, 1970, the State Engineer issued Certificate 7483 allowing for the diversion of 1.75 cfs, not to exceed 222.1 acre-feet annually (afa), for the irrigation of 22.04 acres of land within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 23.38 acres within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8.³

II.

Documents were submitted which transferred ownership of Permit 21229, Certificate 7483, in the records of the Office of the State Engineer, from the original permittee to the present owners of record Ron E. & Charlotte A. Floyd.¹

¹File No. 21229, official records in the Office of the State Engineer.

²State's Exhibit No. 13-C.

³State's Exhibit No. 14-C.

III.

Portions of Permit 21229, Certificate 7483, were abrogated by change applications 48602 and 48603. Permit 48602 changed the point of diversion, place of use and manner of use of 0.26 cfs, not to exceed 10.753 million gallon annually (mga), a portion of the waters previously appropriated under Permit 21229, Certificate 7483.⁴ Permit 48603 changed the point of diversion, place of use and manner of use of 0.26 cfs, not to exceed 10.753 mga, a portion of the waters previously appropriated under Permit 21229, Certificate 7483.⁵ Together Permits 48602 and 48603 stripped water from a 13.2 acre parcel of land in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and a small portion in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8⁶, leaving 31.22 acres as irrigable at the place of use under Certificate 7483 with appurtenant water rights of 1.23 cfs, not to exceed 156.1 acre-feet annually.

IV.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the forfeiture of Permit 21229, Certificate 7483, on December 14, 1988, 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

⁴File No. 48602, official records in the Office of the State Engineer.

⁵File No 48603, official records in the Office of the State Engineer.

⁶State's Exhibit No. 15-C.

⁷Transcript, public administrative hearing before the State Engineer, December 14, 1988. (Hereinafter "Transcript".)

the time frame set forth in the permit or in 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.

The place of use under Permit 21229, Certificate 7483, has been subdivided and testimony and evidence indicate that no portion of the agricultural water right was assigned to any of the purchasers of lots within the subdivision.¹⁰ The State Engineer finds that no person appeared at the public administrative hearing claiming any ownership interest in Permit 21229, Certificate 7483, except the owner of record, Mr. Floyd.

III.

Testimony and evidence presented at the administrative hearing showed that from 1973 through 1978¹¹ there was no record of irrigation at the place of use. Each year from 1982 through 1987 employees of the Office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as groundwater pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 7483.¹² The 1982 and 1983 pumpage inventories showed 2 acres were irrigated in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 22.38 acres irrigated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8, (using 122 acre-feet); the 1984 pumpage

⁸NRS 533.410.

⁹NRS 534.090.

¹⁰Transcript, pp. 18, 93.

¹¹Transcript, pp. 85-86.

¹²Exhibit No. 2.

inventory showed no irrigation in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 22.38 acres irrigated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ (112.0 acre-feet); the 1985 pumpage inventories showed 2 acres irrigated in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 22.38 acres irrigated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 8, (using 122 acre-feet); the 1986 pumpage inventory showed no irrigation in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 22.38 acres irrigated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ (111.9 acre-feet);¹³ and the 1987 pumpage inventory showed no irrigation in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 22.38 acres irrigated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ (106.9 acre-feet).¹⁴

Testimony indicated that within the portion of the place of use with remaining appurtenant water rights in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ approximately 2 acres of trees was irrigated during the 1982 through 1987 time frame.¹⁵ However, no evidence was provided which identified the exact location of any irrigation within that portion of the place of use.

The State Engineer finds that evidence was presented that a substantial portion of the remaining water right under Permit 21229, Certificate 7483 was put to beneficial use for irrigation during the time period from 1982 through 1987.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁶

II.

Forfeiture must be demonstrated by clear and convincing evidence. Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the

¹³State's Exhibit No. 2.

¹⁴State's Exhibit No. 11.

¹⁵Transcript, pp. 86-87.

¹⁶NRS Chapters 533 and 534.

higher standard of beyond a reasonable doubt.¹⁷ 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.¹⁸

In the case of Town of Eureka v. Office of the State Engineer¹⁹, 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. Evidence was presented as to non-use of the water from 1973 through 1978. However, the evidence also shows substantial use of the water under Permit 21229, Certificate 7483, for the years 1982 through 1987. The forfeiture proceeding began with the sending of the notice of hearing dated October 17, 1988.²⁰ The State Engineer concludes that the substantial use of water as allowed under the permit from 1982 through 1987 cured any forfeiture that may have taken place prior to the October 17, 1988, notice of forfeiture hearing. The State Engineer makes no conclusions as to the status of the water rights from December 14, 1988, to the present time.

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

¹⁸Id. at 239.

¹⁹826 P.2d. 948, 952 (1992).

²⁰State's Exhibit No. 1.

RULING

The right to beneficially use water under Permit 21299, Certificate 7483, is hereby declared not forfeited. No finding is made as to the status of the water right under Permit 21229, Certificate 7483 from December 14, 1988, to the present time.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 24th day of
July, 1996.

