

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

IN THE MATTER OF FORFEITURE OF WATER:)
RIGHTS UNDER PERMIT 24337, CERTIFICATE)
7783, APPROPRIATED FROM AN UNDERGROUND)
SOURCE AND CHANGE APPLICATION 51708 FILED)
TO APPROPRIATE WATER FROM AN UNDERGROUND)
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND-)
WATER BASIN (162), NYE COUNTY, NEVADA.)

RULING

#4387

GENERAL

I.

Application 24337 was filed by David Paul Allison on January 24, 1968, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes within the SE $\frac{1}{4}$ of Section 36, T.21 S., R.53 E., M.D.B.&M. The point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ (Lot IV) of said Section 36. A permit was issued on Application 24337 on August 20, 1968, for 1.7 cubic feet per second (cfs) of water.¹ After Proof of Beneficial Use of the waters as allowed under the permit was filed in the Office of the State Engineer, on March 13, 1972, the State Engineer issued Certificate 7783 allowing for the diversion of 1.46 cfs of water, not to exceed 115.0 acre-feet annually (afa), for the irrigation of 23.0 acres within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36.²

II.

Documents were submitted to the Office of the State Engineer which transferred the ownership of Permit 24337, in the records of the Office of the State Engineer, from the original permittee to the present owners of record, Gerald H. Allison (undivided $\frac{1}{2}$ interest) and Virginia A. Allison (undivided $\frac{1}{2}$ interest).¹

¹File No. 24337, official records in the Office of the State Engineer.

²State's Exhibit No. 6, public administrative hearing before the State Engineer, June 7, 1990. (Hereinafter "State's Exhibit No. 6".)

III.

Change Application 51708 was filed by Gerald H. Allison and Virginia A. Allison on December 23, 1987, to change the place of use of a 0.73 cfs, not to exceed 57.5 afa portion of the waters previously appropriated under Permit 24337, Certificate 7783, for irrigation and domestic purposes on 11.5 acres within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36, T.21 S.; R.53 E.; M.D.B.&M. The point of diversion is described as being located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36.³ Application 51708 became ready for the State Engineer's action on April 16, 1988.

IV.

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 that all applications filed to appropriate water for irrigation purposes on lands in Pahrump Valley that have had a certificated water right

³File No. 51708, official records in the Office of the State Engineer.

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.

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.

V.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the forfeiture of Permit 24337, Certificate 7783, on June 7, 1990, at Pahrump, Nevada, before representatives of the Office of the State Engineer.⁷

FINDINGS OF FACT

I.

The State Engineer finds that the permittees did not show at the time and place scheduled for the hearing on June 7, 1990.⁸

II.

Testimony and evidence presented at the administrative hearing showed the place of use under Certificate 7783 has been subdivided into smaller parcels of land.⁹ The records of the Nye County Assessor's Office at the time of the public administrative hearing indicated that the smaller parcels of land are owned by Desert Tracks Agrico, Inc., (APN 4481106), James G. and Virginia Allison (APN 4481107, 4481108, 4481109, 4481110, 4482101, 4482102, 4482103, 4482104) and Kenneth E. and Donna L. Walker (APN 4482105). The State Engineer finds that Donna Walker appeared for the public administrative hearing; however, nothing in the records of the Office of the State Engineer shows any assignment of a portion of Permit 24337, Certificate 7783, to Kenneth E. and Donna L. Walker.

⁷Transcript, public administrative hearing before the State Engineer, June 7, 1990. (Hereinafter "Transcript".)

⁸Transcript, p. 41.

⁹State's Exhibit No. 6.

III.

Testimony and evidence presented at the administrative hearing showed that 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 7783.¹⁰ For the years 1982 through 1987 the pumpage inventories indicated no water had been used for irrigation within the certificated place of use. Mrs. Walker did not provide any evidence of ownership of a portion of Permit 24337, Certificate 7783, nor any evidence of beneficial use of the waters between the years 1982 through 1987. The State Engineer finds that from 1982 through 1987 no irrigation took place within the certificated place of use.

IV.

By this decision the State Engineer declares forfeited the water right identified as Permit 24337, Certificate 7783, which supported Change Application 51708. The State Engineer finds that as a result of the declaration of forfeiture no water right remains under Permit 24337, Certificate 7783, in the name of Gerald Allison and Virginia Allison. The State Engineer finds that a permit cannot be granted for Change Application 51708 because there is no valid water right that can be changed by the application.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹¹

II.

The State Engineer concludes that in order for a water right permit to ripen into a water right certificate the permittee must

¹⁰State's Exhibit No. 6.

¹¹NRS Chapters 533 and 534.

file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.¹² 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.¹³

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 higher standard of beyond a reasonable doubt.¹⁴ 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.¹⁵

The State Engineer concludes clear and convincing evidence showing non-use of the water right as allowed under Permit 24337, Certificate 7783, for five successive years is found in the testimony and evidence regarding the pumpage inventories, visits to Pahrump Valley Artesian Groundwater Basin, failure of the permittee to attend and present evidence of any water use, and in the testimony of Mrs. Walker, resulting in the forfeiture of 1.46 cfs, 115.0 acre-feet annually (afa), of water for the irrigation of 23.0 acres within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 36 under Permit 24337, Certificate 7783.

¹²NRS 533.410.

¹³NRS 534.090.

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

¹⁵Id. at 239.

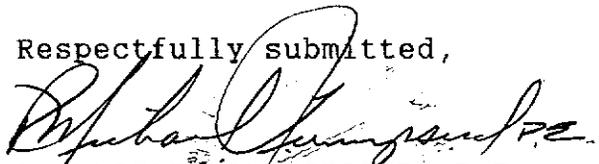
III.

NRS 533.345(1) provides that an application can be filed to change the place of diversion, manner or place of use of water already appropriated. Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate in good standing.¹⁶ Where a permit/certificate has been forfeited, the water right is no longer valid; thus, it is not in good standing and cannot be used to support a change application. The State Engineer concludes that in the case of Change Application 51708, the underlying permit/certificate has been forfeited; therefore, no water right exists that can be used to support the change application.

RULING

The right to beneficially use 115.0 acre feet under Permit 24337, Certificate 7783, is hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to beneficially use the water for the purposes for which the subject water right was acquired. No water right remains in existence under Certificate 7783. Change Application 51708 is hereby denied as no valid water right exists which can be changed by Application 51708.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 1st day of
August, 1996.

¹⁶NRS 533.324.