

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

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 24179, CERTIFICATE)
8641, AND CHANGE APPLICATIONS 52401,)
52402, AND 52953, PAHRUMP VALLEY)
ARTESIAN GROUNDWATER BASIN (162),)
NYE COUNTY, NEVADA.)

RULING

4403

GENERAL

I.

Application 24179 was filed by Earl Burson on October 16, 1967, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes on the 320 acres comprising the W $\frac{1}{2}$ of Section 12, T.21S., R.53E., M.D.B.&M. The point of diversion is described as being located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12.¹ A permit was issued under Application 24179 on March 26, 1968, for 2.7 cubic feet per second (cfs) of water, not to exceed 5.0 acre-feet per acre.²

On November 7, 1975, the State Engineer issued Certificate 8641 allowing for the diversion of 0.64 cfs of water, not to exceed 180.3 acre-feet annually (afa), for the irrigation of 36.06 acres within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12.³

II.

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

¹File No. 24179, official records in the Office of the State Engineer.

²State's Exhibit No. 8, public administrative hearing before the State Engineer, June 5, 1990. (Hereinafter "State's Exhibit No. 8".)

³State's Exhibit No. 8.

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

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 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.

III.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the forfeiture of Permit 24179, Certificate 8641, on June 5, 1990, at Pahrump, Nevada, before representatives of the Office of the State Engineer.⁷

FINDINGS OF FACT

I.

The water rights represented by Permit 24179, Certificate 8641, have been through a series of divisions, transfers,

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.

⁷Transcript, public administrative hearing before the State Engineer, June 5, 1990. (Hereinafter "Transcript".)

assignments and change applications.⁸ On December 20, 1969, before the use of water under Permit 24179 was perfected by the filing of proof of beneficial use, Mr. Burson sold to Curtis F. and Alice B. Freeman approximately 20.0 acres with appurtenant water rights in E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12.¹ The State Engineer finds this parcel was sold on March 19, 1985, to Glenn Brown, Trustee for Robert Graham, and on February 4, 1986, to Paul V. and Pamela L. Moore and Marvin Bawden.¹

II.

On December 13, 1974, Mr. Burson filed Change Application 29048 to change the point of diversion and place of use of a 0.10 cfs portion of the waters previously appropriated under Permit 24179. The proposed point of diversion and place of use are described as being located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 7, T.21S., R.54E., M.D.B.&M.⁹ Under the change application water was stripped from the "most Northerly and most Westerly thirty-five (35) feet and the West 205 feet of the East 325 feet of the South 205 feet of the North 240 feet of said NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12 being 3.0 acres.

A permit was issued under Application 29048 on September 29, 1975, for 0.10 cfs, not to exceed 15.0 afa, and after filing Proof of Beneficial Use of the waters, on March 4, 1977, Certificate 8988 was issued under Permit 29048 for 0.1 cfs, not to exceed 15.0 acre-feet annually for the irrigation of 3.0 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 7. The owner of record of Permit 29048, Certificate 8988, is James William Guin and Certificate 8988 was not part of this forfeiture proceeding.

The State Engineer finds from the records in the Division of Water Resources that as a permit had not been granted on the change

⁸See attached copy of Nye County Assessor's parcel map from State's Exhibit No. 8.

⁹File No. 29048, official records in the Office of the State Engineer.

application before the proof of beneficial use was filed, the waters under the Change Application 29048 are to be counted as part of the total amount certificated under Permit 24179 and deducted therefrom pursuant to the change application. After Permit 29048 was issued, 0.54 cfs, 165.3 afa, 33.06 acres, remained under Permit 24179, Certificate 8641.

III.

On December 13, 1974, Mr. Burson also filed Change Application 29049 to change the point of diversion and place of use of a 0.10 cfs portion of the waters previously appropriated under Permit 24179. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, T.21S., R.53E., M.D.B.&M.¹⁰ Under the change application water was stripped from 2.5 acres mostly in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12. A permit was issued under Application 29049 on September 29, 1975, and after filing Proof of Beneficial Use of the waters, on March 4, 1977, Certificate 8989 was issued under Permit 29049 for 0.1 cfs, not to exceed 12.5 afa for the irrigation of 2.5 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 1.¹⁰ The owners of record of Permit 29049, Certificate 8989, are Darwin and Mary Lee Easter and Certificate 8989 was not part of this forfeiture proceeding.

The State Engineer finds from the records in the Division of Water Resources that, as a permit had not been granted on the change application before the proof of beneficial use was filed, ordinarily the waters under Change Application 29049 would have been counted as part of the total amount certificated under Permit 24179 and deducted therefrom pursuant to the change application.¹¹ However, in this instance the 2.5 acres from which the water was stripped, was not thereafter certificated as irrigable ground;

¹⁰File No. 29049, official records in the Office of the State Engineer.

¹¹File No. 24179, official records of the Office of the State Engineer.

therefore, the State Engineer finds that the waters under Permit 29049 should not be deducted from the certificated amount under Permit 24179. Thus, after Permit 29049 was issued, 0.54 cfs, 165.3 afa, 33.06 acres remained under Permit 24179, Certificate 8641.

IV.

On the basis of the Proof of Beneficial Use filed, on November 7, 1975, the State Engineer issued Certificate 8641 allowing for the diversion of 0.64 cfs of water, not to exceed of total duty of 180.3 acre-feet annually (afa), for the irrigation of 36.06 acres within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12, 17.0 acres (85.0 afa) of water rights had been perfected in the W $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, and 19.06 acres (95.3 afa) of water rights had been perfected on the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$.¹² In 1969, Mr. Burson sold the Freemans approximately 20.0 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12, along with appurtenant water rights. On December 1, 1975, Mr. Burson executed a quitclaim deed to the Freemans for the same property, along with 90.0 acre-feet of water rights; however, the proof of beneficial use filed on May 13, 1975, showed 19.06 acres (95.3 afa) was perfected in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$. The State Engineer finds that the discrepancy as to the amount of water conveyed to the Freemans is of little importance based on the finding below that all the water appurtenant to that property is forfeited based on the failure of the holder to use the water as authorized under the certificate.

V.

On January 27, 1989, Paul V. and Pamela L. Moore and Marvin Bawden, successors to the Freemans' 20.0 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, sold to Steven V. and Cindy L. Shearer 6.0 acres of agricultural water rights off their land in the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12.¹ On February 22, 1989, Steven V. Shearer and Cindy L. Shearer filed Change Application 52953 to change the point of diversion and place of use of 0.0778 cfs, not to exceed 30.0 afa, a portion of the

¹²State's Exhibit No. 8.

waters previously appropriated under Permit 24719. The water is to be stripped from the 36.06 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12, that portion being the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ deeded to Paul V. Moore and Pamela L. Moore and Marvin R. Bawden on February 13, 1986. Application 52953 became ready for the State Engineer's action on May 28, 1989. The State Engineer finds that no action was taken on Change Application 52953 pending a resolution of whether the base water right Permit 24179, Certificate 8641, had been forfeited before Change Application 52953 was filed on February 22, 1989.

VI.

On December 14, 1977, Mr. Burson entered into an Agreement for Sale of Real Estate whereby Darwin Easter agreed to purchase the NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, totalling 10.0 acres more or less, together with 9.0 acres of water rights under Permit 24179.¹ On December 11, 1978, Darwin Easter filed Change Application 36276 to change the point of diversion of 0.16 cfs, not to exceed 45.075 acre-feet, a portion of the waters previously appropriated under Permit 24179. The proposed point of diversion is described as being located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M,¹³ with the proposed place of use being described as 10.0 acres within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12.

By deed dated July 12, 1980, Clover J. Burson, Mr. Burson's widow, conveyed the 10.0 acres, along with 9.0 acres of water rights, to Darwin Easter. On September 22, 1981, a permit was issued on Application 36276 for 0.16 cfs, not to exceed 45.0 afa, and after filing Proof of Beneficial Use of the waters, on July 24, 1984, Certificate 10975 was issued under Permit 36276 for 0.16 cfs, not to exceed 45.0 acre-feet annually for the irrigation of 9.0 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12.¹³ Permit 36276, Certificate 10975, was not part of this forfeiture proceeding.

¹³File No. 36276, official records in the Office of the State Engineer.

The State Engineer finds that after Permit 36276 was granted, 0.38 cfs, 120.3 afa, 24.06 acres remained under Permit 24179, Certificate 8641.

VII.

On October 5, 1978, Mr. Burson sold to Paul A. and Teresa M. Tanner 4.47 acres located in the N $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ along with a proportionate share of the water rights.¹ By quitclaim deeds dated December 4, 1980, and January 2, 1981, Clover Burson conveyed to Laramie L. Burson, Mary J. Burson, Gary L. Burson, Timothy F. Burson, Phillip R. Burson, Judith A. Burson Trahean and Linda S. Burson Mackie the S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12. The State Engineer finds that the water rights for these parcels remain under Permit 24179, Certificate 8641.

VIII.

Change Application 49942 was filed by Paul V. Moore and Pamela L. Moore and Marvin R. Bawden on June 24, 1986, to change the manner of use of 0.005 cfs, not to exceed 1.46 acre-foot, a portion of the waters previously appropriated under Permit 24179. The proposed manner of use is for quasi-municipal purposes within the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M.¹⁴

A permit was issued on Application 49942 on June 30, 1989, and after filing Proof of Beneficial Use of the waters, on February 7, 1994, Certificate 13835 was issued under Permit 49942 for 0.005 cfs, not to exceed 0.326 million gallons (1.46 acre-feet) annually.¹⁴ Permit 49942, Certificate 13835, was not part of this forfeiture proceeding. The State Engineer finds the remaining water under Permit 24179, Certificate 8641, appurtenant to the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ is subject to this forfeiture proceeding.

IX.

Change Application 52401 was filed on August 10, 1988, by Charles K. Hollis and Jean Hollis to change the point of diversion,

¹⁴File No. 49942, official records in the Office of the State Engineer.

place of use and manner of use of a 0.0065 cfs portion of the waters previously appropriated under Permit 24179. The proposed manner of use is for quasi-municipal purposes within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 15, T.20S., R.53E., M.D.B.&M.¹⁵ The water is to be stripped from the 36.06 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12, that portion being the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ deeded to Paul V. Moore and Pamela L. Moore and Marvin R. Bawden on February 13, 1986. Application 52401 became ready for the State Engineer's action on February 11, 1989. The State Engineer finds that no action was taken on Change Application 52401 pending a resolution of whether the base water right Permit 24179, Certificate 8641, had been forfeited before Change Application 52401 was filed on August 10, 1988.

X.

Change Application 52402 was filed on August 10, 1988, by Clarence J. Mason to change the point of diversion and place of use of a 0.1037 cfs portion of the waters previously appropriated under Permit 24179. The proposed manner of use is for irrigation and domestic purposes within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 8, T.20S., R.53E., M.D.B.&M.¹⁶ The water is to be stripped from the 36.06 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 12, that portion being the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ deeded to Paul V. Moore and Pamela L. Moore and Marvin R. Bawden on February 13, 1986. Application 52402 became ready for the State Engineer's action on February 11, 1989. The State Engineer finds that no action was taken on Change Application 52402 pending a resolution of whether the base water right Permit 24179, Certificate 8641, had been forfeited before Change Application 52402 was filed on August 10, 1988.

¹⁵File No. 52401, official records in the Office of the State Engineer.

¹⁶File No. 52402, official records in the Office of the State Engineer.

XI.

Testimony and evidence presented at the administrative hearing showed that each year from 1982 through 1988 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 8641 for each of those years.¹⁷ The pumpage inventories indicate that from 1982 through 1988 no water had been used for irrigation as allowed under the certificate. No evidence was presented by the permittee or any holder of the water rights that showed any use of the water as authorized under Permit 24179, Certificate 8641, at the certificated place of use. The State Engineer finds that from 1982 through 1988 no use of water for irrigation purposes took place at the certificated place of use; therefore, forfeiture of the water right worked in 1987.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁸

II.

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 by the date set forth in the permit or in any extension of time granted by the State Engineer.¹⁹ 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

¹⁷ State's Exhibit No. 8.

¹⁸ NRS Chapters 533 and 534.

¹⁹ NRS 533.410

a forfeiture of the right to the use of that water to the extent of the nonuse.²⁰

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.²¹ 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.²²

The State Engineer concludes there is clear and convincing evidence as to non-use of the water right under Permit 24179, Certificate 8641, and no evidence was presented to the contrary; thus, a forfeiture of the water right worked in 1987.

III.

The State Engineer concludes that after the transfers of water pursuant to Change Applications 29048, 29049, 36276 and 49942; under Permit 24179, Certificate 8641, there remained 0.375 cfs, 118.84 afa, appurtenant to the remaining place of use under Certificate 8641 and a forfeiture of this quantity worked in 1987. Change Applications 52401 and 52402 were filed on August 10, 1988, and Change Application 52953 was filed on February 22, 1989. The State Engineer concludes these applications were filed after the underlying base water right had been forfeited.

NRS 533.345(1) provides that an application can be filed to change the point 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

²⁰NRS 534.090.

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

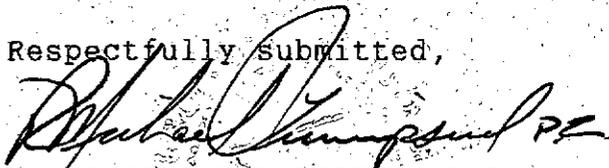
²²Id. at 239.

permit or certificate in good standing.²³ Where a 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 Change Applications 52401, 52402 and 52953 cannot be granted as a forfeiture of the underlying water rights, Permit 24179, Certificate 8641, which supported the change applications, had already occurred before the change applications were filed. Therefore, no water right exists that can be used to support the change applications.

RULING

The right to beneficially use 0.375 cfs, 118.84 afa, appurtenant to the E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ and the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ under Permit 24179, Certificate 8641, is hereby declared forfeited. Change Applications 52401, 52402 and 52953 are hereby denied as no valid water right exists which can support the change applications.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/ab

Dated this 15th day of
August, 1996.