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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF WATER RIGHTS UNDER PERMIT 17137, CERTIFICATE 5699 FROM AN UNDERGROUND SOURCE, AMARGOSA DESERT GROUNDWATER BASIN (230), NYE COUNTY, NEVADA.	)	RULING #4461

GENERAL

I.

Application 17137 was filed by Charles M. Barr on January 3, 1957, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 17137 was approved on April 29, 1957, for 3.0 cubic foot per second (cfs) for irrigation and domestic use. Certificate 5699 under Permit 17137 was issued on March 17, 1964, for 1.56 cfs of water not to exceed 400 acre feet annually (AFA) for the irrigation of 80 acres of land, located within the NE¼ NE¼ and the NW¼ NE¼ of Section 35, T.16S., R.48E., M.D.B.&M. The point of diversion is located within the NE¼ NE¼ of said Section 35.[1]

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.[2] Permit 17137, Certificate 5699 is 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.

III.

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.[3]

---

[1]File No. 17137, official records in the office of the State Engineer.

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

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

On October 9, 1996, a hearing was held to consider the possible forfeiture of Permit 17137, Certificate 5699.[4] The petitioner, ARI, did not appear at the hearing.[5]

IV.

At the hearing to consider the forfeiture of Permit 17340, Certificate 5865, administrative notice was taken of the record developed at the foundation hearing, May, 1994, and of the record developed at all the previous hearings on the individual water rights.[6]

V.

At the hearing, Counsel for one of the water right holders moved to dismiss the petition regarding Permit 17137, Certificate 5699, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 17137, Certificate 5699.[7] In addition, a motion to strike Exhibit Nos. 17 through 21 and 27 was entered, based on ARI's failure to appear and make its witnesses available for cross examination.[8]

The Hearing Officer stated that the State Engineer has the statutory authority to declare a forfeiture of water rights in the absence of a third party petition, as provided in NRS 534.090. The evidence submitted at the foundation hearing is on the record, was subject to general cross examination, and stands on its own, even in the absence of expert testimony that was provided in past hearings by ARI's witnesses. The Hearing Officer found that where evidence of a possible forfeiture of water rights exists, it must

---

[4]Exhibit No. 199, Public Administrative Hearing before the State Engineer October 9, 1996.

[5]Transcript p. 10, Public Administrative Hearing before the State Engineer, October 9, 1996.

[6]Transcript pp. 9, Public Administrative Hearing before the State Engineer October 9, 1996.

[7]Transcript pp. 10, Public Administrative Hearing before the State Engineer, October 9, 1996.

[8]Transcript pp.10-16, Public Administrative Hearing before the State Engineer, October 9, 1996.

be pursued, regardless of who appears or does not appear to support such evidence. The Hearing Officer further found that the hearing should rightfully proceed. The motion to dismiss and the motion to strike were denied.[9]

Counsel for the water right holder noted for the record that cross examination of ARI's witnesses regarding the specific water rights was not allowed at the foundation hearing.[10] That cross examination was deferred to the hearing on the specific water right. Counsel noted that the water right holder was denied the opportunity to cross examine ARI's witnesses on his specific water right, by ARI's failure to appear at this hearing.[10] General cross examination of ARI's exhibits occurred at the foundation hearing. Some exhibits are clear and stand on their own and don't require any further cross examination. Others are not self explanatory and may be given less weight due to ARI's failure to appear. The State Engineer is dedicated to developing a complete record and providing a full and fair hearing.[11]

VI.

Mr. Bill Quinn, who performed the pumpage inventory in Amargosa Valley in 1990, is no longer an employee of the Division of Water Resources. The water right holders had the opportunity to submit questions for Mr. Quinn prior to the hearing, that would be answered in writing and be made a part of the record.[12] No questions for Mr. Quinn were submitted. Before the hearing, Counsel for the water right holder requested the State Engineer to subpoena Mr. Quinn.[13] The State Engineer stated that Mr. Quinn's

---

[9]Transcript pp. 11-12 and 16-18, Public Administrative Hearing before the State Engineer, October 9, 1996.

[10]Transcript pp. 12-14, Public Administrative Hearing before the State Engineer, October 9, 1996.

[11]Transcript pp. 13-14, Public Administrative Hearing before the State Engineer, October 9, 1996.

[12]Exhibit No. 199, Public Administrative Hearing before the State Engineer, October 9, 1996.

[13]Exhibit No. 215, Public Administrative Hearing before the State Engineer, October 9, 1996.

live testimony is not an essential element in determining whether the evidence of a forfeiture meets the clear and convincing standard.[14] The State Engineer felt that the water right holders would have a full and fair hearing without Mr. Quinn's testimony. The State Engineer found that it was not warranted to subpoena Mr. Quinn. Therefore, the request for the subpoena was denied.[15]

FINDINGS OF FACT

I.

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 1985 through 1992 shows that no water was used for irrigation on any of the 80 acres of land shown as the place of use under Permit 17137, Certificate 5699.[16] The testimony of the individuals who performed the inventories for those years, except 1990,[17] confirmed that no irrigation occurred during those years.[18] Mr. Jason King, who performed the inventory in 1991, 1992, and 1993 testified that it was obvious to him that the place of use was not irrigated.[19] The property was covered with sagebrush and rabbitbrush.[20] In 1993,

---

[14]Exhibit No. 216, Public Administrative Hearing before the State Engineer, October 9, 1996.

[15]Exhibit No. 216, Public Administrative Hearing before the State Engineer, October 9, 1996.

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

[17]Mr. Bill Quinn performed the 1990 inventory in Amargosa Valley.

[18]Transcript pp. 26 and 50-51, Public Administrative Hearing before the State Engineer, October 9, 1996.

[19]Transcript p. 70, Public Administrative Hearing before the State Engineer, October 9, 1996.

[20]Transcript p. 65-66 and Exhibit No. 14, Public Administrative Hearing before the State Engineer, October 9, 1996.

Mr. King noted that there was no electrical power at the site of the certificated point of diversion and he was unable to locate the well casing.[21]

The property to which Permit 17137, Certificate 5699 is appurtenant, has been divided into six parcels, identified as Assessor Parcel Nos. (APN) 19-091-04 (20 acres), 19-091-05 (10 acres), 19-091-06 (10 acres), 19-091-07 (10 acres), 19-091-07 (10 acres), and 19-091-08 (20 acres).[22] In an affidavit, a resident of the area stated that during the period 1988-1992, she personally observed a vegetable garden and a pasture with a pond in which horses, burros, and birds were feeding and watering. According to the affidavit, this area covered about one-half of the 20 acres on APN 19-091-08.[23] Mr. King testified that there was an open area near a house that is observed in the photograph he took in 1993.[24] It is difficult to see where the open area begins because of the sagebrush growing on the rest of the property.[25] APN 19-091-08 is located at least one-quarter mile from the certificated point of diversion and is served by a well other than the certificated well.[26] The State Engineer finds that one-half of APN 19-091-08, amounting to 10 acres, was irrigated during the alleged forfeiture period. Regarding the remaining 70 acres, the State Engineer finds that the pumpage inventories, the sagebrush coverage over the

---

[21]Transcript pp. 43, 51, and 60, Public Administrative Hearing before the State Engineer, October 9, 1996.

[22]Exhibit No. 206, Public Administrative Hearing before the State Engineer, October 9, 1996.

[23]Exhibit No. 221, Public Administrative Hearing before the State Engineer, October 9, 1996.

[24]Transcript pp. 74-75 and Exhibit No. 14, Public Administrative Hearing before the State Engineer, October 9, 1996.

[25]Transcript p. 75, Public Administrative Hearing before the State Engineer, October 9, 1996.

[26]Transcript p. 74 and Exhibit Nos. 205 and 206, Public Administrative Hearing before the State Engineer, October 9, 1996.

entire 70 acres, and the aerial photograph taken in 1990,[27] present clear and convincing evidence that water was not used under this portion of Permit 17137, Certificate 5699 during the alleged forfeiture period.

II.

In 1995 and 1996, beneficial use of the water under Permit 17137, Certificate 5699 occurred on two of the parcels comprising the place of use. Mr. Richard DeWitt, who purchased APN 19-091-06 in 1995,[28] planted and irrigated an oat crop on his 10 acres in 1996.[29] Mr. William Shuster purchased APN 19-091-04 in 1995[30] and irrigated trees on his property.[31] Neither Mr. DeWitt nor Mr. Shuster have knowledge of any irrigation on their respective properties prior to 1993.[32] Given the fact that the forfeiture proceeding began in June, 1993, the State Engineer finds that the beneficial use of a portion of Permit 17137, Certificate 5699 occurred after the forfeiture proceeding had begun.

III.

Both Mr. DeWitt and Mr. Shuster stated that they did not receive notice of this forfeiture proceeding.[33] Mr. DeWitt acquired APN 19-091-06 in 1995 from Nye County and Mr. Shuster acquired APN 19-091-04 from Russell and Ruth Leonard in 1995. A

---

[27]Exhibit No. 221, Public Administrative Hearing before the State Engineer, October 9, 1996.

[28]Transcript p. 97, Public Administrative Hearing before the State Engineer, October 9, 1996.

[29]Transcript pp. 94-96 and Exhibit Nos. 217, 218, and 219, Public Administrative Hearing before the State Engineer, October 9, 1996.

[30]Transcript p. 101, Public Administrative Hearing before the State Engineer, October 9, 1996.

[31]Transcript pp. 100, Public Administrative Hearing before the State Engineer, October 9, 1996.

[32]Transcript pp. 97 and 101, Public Administrative Hearing before the State Engineer, October 9, 1996.

[33]Transcript pp. 97-98 and 101-102, Public Administrative Hearing before the State Engineer, October 9, 1996.

review of the file for Permit 17137 indicates that Nye County and Mr. and Mrs. Leonard were notified by certified mail in June, 1993, that a forfeiture proceeding had begun regarding Permit 17137, Certificate 5699. These same parties were sent by certified mail, the notice of the hearing held on October 9, 1996.[34]

Because Mr. DeWitt and Mr. Shuster did not notify the State Engineer that they had obtained ownership of portions of Permit 17137, Certificate 5699, the State Engineer was unaware of any ownership change. It is the responsibility of the new owner of a water right to notify the State Engineer of the change in ownership.[35]

The State Engineer finds that proper notice of the forfeiture proceedings was made in accordance with the information on record in the office of the State Engineer.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.[36]

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.[37]

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. Under the rule adopted by

---

[34]File 17137, official records in the office of the State Engineer.

[35]NRS 533.384.

[36]NRS Chapters 533 and 534.

[37]NRS 534.090.

the Nevada Supreme Court, substantial use of water rights after the statutory period of non-use "cures" claims to forfeiture so long as no claim or proceeding of forfeiture has begun.[38]

IV.

There is evidence showing that water, diverted from a well other than the certificated well, was used on 10 acres within APN 19-091-08. The State Engineer concludes that this portion of Permit 17137, Certificate 5699 is not declared forfeited. The holder of this portion of the water right must file the appropriate ownership documents and an application to change the point of diversion within 120 days of the date of this ruling.

Regarding the remainder of Permit 17137, Permit 5699, the State Engineer concludes that there is clear and convincing evidence of continuous non-use exceeding five years. The State Engineer further concludes that this remaining portion of Permit 17137, Certificate 5699 is forfeited.

V.

Re-use of water under Permit 17137, Certificate 5699 occurred on parcels identified as APN 19-091-04 and 19-091-06 in 1995 and 1996, respectively. This use of water occurred after the forfeiture proceeding had begun. Therefore, the State Engineer concludes that the forfeiture was not cured.

VI.

The current owners of parcels identified as APN 19-091-04 and 19-091-06 did not notify the State Engineer that they had acquired portions of Permit 17137, Certificate 5699. Therefore, the State Engineer was not aware that they owned portions of this water right. The State Engineer properly noticed those parties whom he reasonably ascertained were the owners of Permit 17137, Certificate 5699. The State Engineer concludes that proper notice was made regarding these forfeiture proceedings.

---

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

RULING

The right to beneficially use the water appropriated under that portion of Permit 17137, Certificate 5699 appurtenant to 10 acres of land within APN 19-091-08 amounting to 50 AFA, is not declared forfeited. The owner of said parcel is required to file appropriate ownership documents and an application to change the point of diversion within 120 days of the date of this ruling.

The right to beneficially use the water appropriated under the remaining portion of Permit 17137, Certificate 5699, amounting to 350 AFA appurtenant to 70 acres of land, is hereby declared forfeited on the grounds that the water was not placed to beneficial use for a continuous period of time exceeding five years.

Respectfully submitted,

R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 10th day of December, 1996.