

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

IN THE MATTER OF THE FORFEITURE OF)
PERMIT 15410, CERTIFICATE 5157, AND)
APPLICATION 57304 FILED TO CHANGE)
THE POINT OF DIVERSION, MANNER OF)
USE AND PLACE OF USE OF THE WATERS)
PREVIOUSLY APPROPRIATED UNDER)
PERMIT 15410, CERTIFICATE 5157, WITHIN)
THE AMARGOSA DESERT HYROGRAPHIC)
BASIN (230), NYE COUNTY, NEVADA.)

**AMENDED
RULING**

#5479 - A

GENERAL

I.

Application 15410 was filed by Wm. J. Moore, Jr., on November 27, 1953, to appropriate the underground waters of the Amargosa Desert Hydrographic Basin, Nye County, Nevada. Permit 15410 was approved on April 6, 1954, and allowed for the diversion of 2.5 cubic feet per second (cfs), not to exceed 800 acre-feet annually (afa), for the irrigation of 160 acres of land located within the NE¼ (northeast quarter) of Section 25, T.16S., R.48E., M.D.B.&M. Certificate 5157 was issued pursuant to Permit 15410 on August 4, 1961, for 2.5 cfs of water, not to exceed 800 afa, for the irrigation of the 160 acres of land referenced above and from the point of diversion referenced above.¹

II.

On January 29, 1982, the Morris DeLee Revocable Trust requested that the State Engineer assign Permit 15410, Certificate 5157 from Morris DeLee into its name.¹

III.

On March 16, 1992, the Morris DeLee Revocable Trust filed change Application 57304, which requested permission to change the point of diversion, place of use and manner of use of the water previously appropriated under Permit 15410, Certificate 5157. The proposed place of use is described as being located within the NW¼ (northwest quarter) of Section 25, T.16S., R.48E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ NW¼ of said Section 25.²

¹ File No. 15410, official records in the Office of the State Engineer.

² File No. 57304, official records in the Office of the State Engineer.

IV.

On March 17, 1993, Amargosa Resources, Incorporated, petitioned the State Engineer to declare certain water rights forfeited. Permit 15410, Certificate 5157 was included in those water rights requested for forfeiture. Amargosa Resources, Incorporated, alleged a period of non-use spanning 1985 through at least 1992. By notice dated June 16, 1993, the State Engineer informed the Morris DeLee Revocable Trust that Permit 15410, Certificate 5157 may be subject to forfeiture. On May 16, 17, 18, 1994, the State Engineer conducted an initial hearing to allow Amargosa Resources, Incorporated, the opportunity to provide the foundation for the evidence filed in support of its petition for forfeiture. During the administrative hearings on the forfeiture of the DeLee water rights held on October 22, 1996, counsel for the DeLee Trust requested that Permit 15410, Certificate 5157 be removed from the hearing due to a pending lawsuit, that lawsuit being the Petition for Writ of Mandamus referenced next. The Hearing Officer granted the request noting that the possible forfeiture of the water right would be considered at a later date depending on the outcome of the lawsuit.³

V.

On February 21, 1995, Morris DeLee and the Morris DeLee Revocable Trust filed a Petition for Writ of Mandamus in the Fifth Judicial District Court requesting the Court order the State Engineer to either approve or deny Application 57304. The State Engineer filed an answer to the petition in March 1995. The applicant has not taken any further action as to the petition since the original filing in 1995.⁴

VI.

On May 15, 2003, a public administrative hearing was held to consider the possible forfeiture of Permit 15410, Certificate 5157. Despite being duly noticed of the time and place for the hearing, representatives of the Morris DeLee Revocable Trust and their counsel of record failed to appear. The hearing proceeded as scheduled and a record was developed.⁵ Based on the record established at this hearing, the State Engineer issued Ruling No. 5289 in which Permit 15410, Certificate 5157 was declared forfeited and Application 57304 was denied.

Subsequently, this decision was appealed to the Fifth Judicial District Court (Court). The Court remanded the matter for further consideration consistent with the remand order. Following

³ State Engineer's Ruling No. 5289, official records in the Office of the State Engineer.

⁴ *Ibid.*

⁵ Transcript and Exhibits, public administrative hearing before the State Engineer, May 15, 2003.

the remand order, the State Engineer scheduled a hearing on June 22, 2004, to give the petitioner an opportunity to present its case.

FINDINGS OF FACT

I.

By Notice dated May 4, 2004, the State Engineer set the date of June 22, 2004, for a public administrative hearing to consider the petitioner's case in the matter of forfeiture of Permit 15410, Certificate 5157. The Court ordered remand stated in part that, "Due process dictates the hearing should have been continued ...". In accordance with the remand order, the hearing was continued on June 22, 2004. The State Engineer's evidence in this matter was presented at the May 15th, 2003 prior hearing on this matter. The purpose of continuing the hearing on June 22, 2004, was to receive evidence and testimony from the petitioner as mandated by the Court. In addition, the petitioner was given the opportunity to cross-examine the State's sole witness from the previous hearing and to object to any exhibits offered by the State.

The first objection by counsel for the Morris DeLee Revocable Trust (DeLee counsel) was to the incorporation of the prior record and evidence from May 15th, 2003 on the grounds that the DeLees were not present, and therefore, couldn't make objections to any evidence that was presented.⁶ However, at the continuation of the hearing on June 22, 2004, the petitioner's counsel was allowed to object to the State's evidence from May 15th, 2003, and the petitioner's counsel did in fact offer such objections.⁷

The State Engineer finds that the continuation of the hearing on June 22, 2004, was in accordance with the remand instructions from the Court. The State Engineer finds that the objection to the incorporation of the prior record and evidence from May 15th, 2003, on the grounds that the DeLees were denied an opportunity to object to the State's evidence to be without merit as such objections were allowed and made by the DeLee counsel; therefore, the objection is hereby overruled.

II.

The petitioner's counsel offered objections to the admission of State's exhibits H, I, F, J, R and S. Exhibit H. was objected to on the grounds, "...we didn't see the basis for the offer in terms of foundation or any relevance of the offer." Exhibit I was objected to on the grounds, "...the purposes for which they were offered at the prior hearing were not entirely clear..."

⁶ Volume II – Transcript of Proceedings, Public Hearing June 22, 2004, p. 65. Hereinafter, the transcript will be referred to by page number and exhibits from the hearing by exhibit letter and exhibit number, as appropriate.

⁷ Transcript, pp. 66-68.

Exhibit F was objected to on the grounds, "...we would object to the admissibility of the document, a public record, to the extent it does not contain an adequate basis of reliability given some of the errors that were incorporated into Mr. Quinn's work, both in the pumpage inventory itself and in other matters." The same objection was offered for Exhibit J. It should be noted that only those portions of Exhibits F and J relating to the 1990 and 1991 inventories within said exhibits were subject to the objections. Exhibits R and S were objected to on the grounds, "...we would object to the admissibility of those documents insofar as the DeLees did not have notice of those initial rulings given that they weren't the applicants until after coming into possession of the property, once again in 1988 or so."⁸ These objections are adjudicated hereinafter in the order such objections were made.

Exhibit H is a Report of Field Investigation dated June 7, 1985. The field investigation was conducted by Hugh Ricci and Bob Coache on June 3, 1985, in the matter of irrigation on various lands including land in the NW¼ of Section 25, T.16S., R.48E., M.D.B.&M. This field investigation determined that the irrigation on this quarter section of land was occurring without the benefit of a valid water right and recommended that that the State Engineer issue an Order to cease irrigation and to plug the well. By State Engineer's Order No. 858 dated June 10, 1985, the State Engineer ordered the irrigation of the NW¼ of Section 25, T.16S., R.48E., M.D.B.&M., to cease and desist and ordered that the well for which there was no valid water right to be plugged.⁹ This cease and desist order was admitted into evidence as Exhibit I.

Exhibit H and I are records from the files of the State Engineer's office. These documents are significant in verifying irrigation in the NW¼ of Section 25, T.16S., R.48E., M.D.B.&M., which is outside the certificated place of use under Permit 15410, Certificate 5157. The State Engineer's position is that the place of use of Permit 15410, Certificate 5157 is clearly stated in the terms of the water right and on the associated water right map as the NE¼ of Section 25, T.16S., R.48E., M.D.B.&M. The use of water in the northwest quarter is without the benefit of a water right and this illegal use of water cannot constitute beneficial use under Permit 15410, Certificate 5157. Exhibits H and I show that the State Engineer has documented and taken action to prohibit this illegal use as far back as 1985. The cease and desist order is still in effect and therefore, relevant to the matter at hand. Exhibit H is relevant because this field investigation forms the basis for the cease and desist order. The issue raised by the DeLee counsel that the DeLees were not in possession of the property in 1985 is not relevant. Michael

⁸ Transcript, pp. 65-68.

⁹ Exhibit I.

DeLee testified that the property was part of a lease purchase to Mr. Owen on which Mr. Owen eventually defaulted with the property going back into possession of the DeLees in 1988.¹⁰ More importantly, records in the Office of the State Engineer show that the Morris DeLee Revocable Trust has owned Permit 15410, Certificate 5157, since 1982 and there is no evidence on file that this ownership was ever relinquished to Mr. Owens or any other party.

The State Engineer finds that Exhibits H and I are official records on file in the Office of the State Engineer and provide important information regarding the petitioner's claim of beneficial use under Permit 15410, Certificate 5157.

III.

Exhibit F contains the Amargosa Valley pumpage inventories from 1985 to 2001 for Permit 15410, Certificate 5157. Exhibit J contains the pumpage inventories from 1986 to 2000 for the quarter section adjacent to Permit 15410, Certificate 5157, which is described as the NW¼ of Section 25, T.16S., R.48E., M.D.B.&M. Both exhibits consist of official records on file in the Office of the State Engineer. The petitioner's counsel objected to the 1990 and 1991 inventories within both exhibits. The petitioner's counsel indicated that Mr. Bill Quinn, a former employee of the Nevada Division of Water Resources (Division), conducted the 1990 or 1991 inventories and since Mr. Quinn was not available to testify, a "correct foundation" could not be established.¹¹

Past employees of the Division developed most of the records on file in the Office of the State Engineer, from the creation of the office in 1905 to present day. These employees have passed on, retired, sought employment elsewhere, etc. The State Engineer relies on these records on a daily basis and has the utmost confidence in the records developed by past employees. The State Engineer would not exclude any such records from his decision making process unless they were shown to be inaccurate. The petitioner's counsel indicated, "We have had evidence that they're inaccurate. We will produce some evidence at this hearing that they are inaccurate."¹² Exhibit F shows that zero acres were irrigated at the place of use of Permit 15410, Certificate 5157 in 1990 and 1991. In fact, the inventory shows that there was no irrigation on the place of use from 1985 to 2001. For the 1990 and 1991 inventories to be incorrect, irrigation must have taken place on the place of use in those years. An examination of the transcript and exhibits offered by the petitioner shows that no such evidence of irrigation was provided at the hearing.

¹⁰ Transcript, p. 140.

¹¹ Transcript, p. 67.

¹² Transcript, p. 69.

In addition, the petitioner's counsel specifically asked witness Michael DeLee about water use on the permitted place of use during that time frame with the following question and response:

Q. Again how about the late '80s, early '90s time frame, are you aware of water use from the permitted point of diversion in the northeast quarter for uses in the northeast quarter?

A. I know that the pump was certainly used. That's how water was given to the shop and to the people that live next to the shop occasionally. There wasn't always somebody there but there was a caretaker at some times.¹³

Mr. DeLee clearly states that during the 1990-1991 time frame water was used for a shop and caretaker's quarters on the northeast quarter not for irrigation; this reaffirms the accuracy of the 1990 and 1991 inventories indicating no irrigation. It should also be noted that the water usage described by the witness for the shop and caretaker's quarters is not allowed under the terms and conditions of Permit 15410, Certificate 5157.

Exhibit J shows that, for 1991, there was no irrigation in the northwest quarter of Section 25 and also indicates "Pivot blown over". The witness testified that in 1991 and 1992, he was given the job of renovating the irrigation machine on the northwest quarter and recalled making orders for parts to accomplish that task.¹⁴ This testimony is consistent with the 1991 inventory in Exhibit J and reaffirms the accuracy of the inventory.

The State Engineer finds that Exhibits F and J are official records in the Office of the State Engineer; the records are relevant to the time period of alleged forfeiture and the petitioner substantiated the accuracy of the inventories of both exhibits through his testimony.

IV.

Exhibits R and S are State Engineer's Ruling Nos. 3714 and 4525. The relevant portion of the rulings is the disposition of Application 36764. Application 36764 requested a new appropriation of water for the northwest quarter of Section 25, T.16S., R.48E., M.D.B.&M.¹⁵ The application was originally denied in State Engineer's Ruling No. 2793. The decision was appealed to the Fifth Judicial District Court and the matter was remanded to the State Engineer. Subsequent to the remand order, the petitioners [Morris DeLee and the Morris DeLee Revocable Trust] came into title of the land to which the application to appropriate water applied. After an administrative hearing was held the application was again denied in State Engineer's Ruling No. 3714. This decision was appealed by DeLee to the Fifth Judicial District Court and the matter

¹³ Transcript, p. 137.

¹⁴ Transcript, p. 140.

¹⁵ File No. 36764, official records in the Office of the State Engineer.

was remanded to the State Engineer. The State Engineer again denied the application in State Engineer's Ruling No. 4525. This decision was appealed by DeLee and ultimately; the Nevada Supreme Court affirmed the State Engineer's decision by order dated May 21, 2001.¹⁶

The rulings go to the crux of the petitioner's argument that they were unaware a water right permit did not exist on the northwest quarter. The DeLees were in fact well aware that Application 36764 was denied and the Nevada Supreme Court affirmed the denial, as they were the petitioner's in the appeals process. The rulings demonstrate that the DeLees knowingly and intentionally applied water to the northwest quarter without the benefit of a water right permit.

The State Engineer finds that Exhibits R and S are official records in the Office of the State Engineer; the records show that the DeLees were aware that Application 36764 was denied and knowingly and intentionally applied water to the northwest quarter of Section 25 without the benefit of a water right permit.

V.

The purpose of an administrative hearing is to gather information relevant to the matter at hand in order to provide the State Engineer with a basis for issuing a ruling. The relevance of the exhibits has been demonstrated in the preceding paragraphs. Also, Exhibits H, I, F, J, R and S are copies of documents, which are official records on file in the Office of the State Engineer. If the objections to the exhibits were sustained, it would deprive the State Engineer the use of his own records. This is illogical and defeats the purpose of the administrative hearing process. The State Engineer must have the ability to use his own records at his discretion. The State Engineer finds that Exhibits H, I, F, J, R and S are official records in the Office of the State Engineer and the exhibits are relevant to this proceeding; therefore, the objections to the admission of these exhibits is overruled.

VI.

The crux of this case is whether Permit 15410, Certificate 5157 is forfeited, whether change Application 57304 has any bearing on the forfeiture, and whether the forfeiture was ever cured by resumption of water to beneficial use prior to a proceeding of forfeiture.

Under Nevada Revised Statute 534.090, failure for five successive years after April 15, 1967, to use beneficially all or part of the underground water for the purpose for which the right is acquired works a forfeiture. The period of non-use of Permit 15410, Certificate 5157 begins in 1985. The five successive years of non-use are 1985, 1986, 1987, 1988 and 1989. The non-use

¹⁶ State Engineer's Ruling No. 5289, pp. 8,9, official records in the Office of the State Engineer.

is documented in pumpage records on file in the Office of the State Engineer.¹⁷ The petitioner did not provide any testimony or evidence to contradict the pumpage records from 1985 through 1989.

The State Engineer finds that Permit 15410, Certificate 5157 was forfeited after five successive years of non-use in 1985, 1986, 1987, 1988 and 1989.

VII.

Application 57304 was filed March 16, 1992, to change the point of diversion, place of use and manner of use of Permit 15410, Certificate 5157. Nevada Revised Statute 533.325 provides that an application can be filed to change water already appropriated. Water already appropriated refers to water represented by a permit or certificate in good standing. Where a permit/certificate has not been used for five consecutive years a forfeiture has worked and the water right is not in good standing and cannot be used to support a change application. Five successive years of non-use of the water occurred before the filing of the change application; therefore, there was no water right available to be changed.

The petitioner has also raised the issue that the State Engineer should not have proceeded with the forfeiture and denial while action was pending in Court on Application 57304. On February 21, 1995, Morris DeLee and the Morris DeLee Revocable Trust had filed a Petition for Writ of Mandamus in the Fifth Judicial District Court requesting the Court order the State Engineer to either approve or deny Application 57304. The State Engineer filed an answer to the petition in March 1995. The applicant has not taken any further action as to the petition since the original filing in 1995.¹⁸

On November 7, 2003, the State Engineer, by and through his counsel, filed a motion to dismiss the Petition for Writ of Mandamus filed February 21, 1995, on the grounds that it has been rendered moot by the issuance of State Engineer's Ruling No. 5289 and that it had not been brought to trial within five years as required by Rule 41(e) of the Nevada Rules of Civil Procedure.

The State Engineer may not be enjoined from determining water rights on the ground of pending action involving the same issues. Where the State Engineer was proceeding as administrative officer to hear contests concerning water rights pursuant to ch. 140, Stats. 1913 (cf. NRS ch. 533), he could not be enjoined from proceeding on the ground that an action involving the same issues was pending, because he was only doing what the court might have

¹⁷ Exhibit F.

¹⁸ Ibid.

ordered him to do under Sec. 45 of such statute (cf. NRS 533.240), which provides that the court may transfer pending cases to the State Engineer for determination.¹⁹

The State Engineer finds that change Application 57304 was filed in 1992 on water already forfeited by statute after the fifth consecutive year of non-use in 1989, thus Nevada water law prohibits the State Engineer from considering Application 57304 for approval. The State Engineer finds that although the Petition for Writ of Mandamus was still pending when the State Engineer issued Ruling No. 5289, the State Engineer could not be enjoined from making a determination on Application 57304 as requested in said petition.

VIII.

The final issue is whether the forfeiture has been cured. The holder of a water right may cure forfeiture and revitalize the right by substantial use of the right after the statutory period of non-use, so long as no claim or proceeding of forfeiture has begun. An examination of pumpage records on file in the Office of the State Engineer show that no water was beneficially used from the point of diversion under Permit 15410, Certificate 5157 for the purposes of irrigation on the certificated place of use from 1985 through 2003. The petitioner did not provide any evidence or testimony that water was beneficially used under Permit 15410, Certificate 5157, in accordance with the terms and conditions of the water right.

The petitioner has indicated he is using water for irrigation at a different location and different point of diversion than Permit 15410, Certificate 5157, without the benefit of a water right permit. In closing arguments, the petitioner's counsel stated, "The northeast quarter was subject to flooding, had a well that was going bad admittedly. The northwest quarter was better situated for agricultural use. They had tried and failed to get new water appropriated for that northwest quarter."²⁰

Under Nevada water law, any person who wishes to appropriate any of the public waters, shall, before performing any work in connection with such appropriation, apply to the State Engineer for a permit to do so.²¹ It is clear, from the petitioner's counsel's own statement, the petitioner knowingly ignored the law and proceeded to irrigate the northwest quarter from a new well after failing to obtain a water right permit. The use of water from a well located in the SE¼ NW¼ of Section 25, T.16S., R.48E., M.D.B.&M. on land located in the NW¼ of Section 25, T.16S., R.48E., M.D.B.&M. cannot constitute beneficial use under Permit 15410, Certificate

¹⁹ Pitt v. Scrugham, 44 Nev. 418, 195 Pac. 1101 (1921).

²⁰ Transcript, p. 158.

²¹ NRS § 533.325.

5157. Water under Permit 15410, Certificate 5157 may only be placed to beneficial use from a well located in the NE¼ NE¼ of Section 25, T.16S., R.48E., M.D.B.&M. and on 160 acres of land located in the NE¼ of Section 25, T.16S., R.48E., M.D.B.&M., for irrigation purposes only, as specified in Permit 15410, Certificate 5157.²²

The petitioner has also indicated that water has been used from the well drilled under Permit 15410, Certificate 5157 to support a shop and at times, a caretaker's quarters. This water use has also occurred without the benefit of a water right permit and cannot constitute a beneficial use of water under Permit 15410, Certificate 5157 because that type of use would require a quasi-municipal water right not an irrigation water right. In addition, the quantity of water used for the shop and caretaker's quarters would not rise to the level of substantial use required to cure a forfeiture and revitalize the right.²³

Water right permits are issued for a specific point of diversion, place of use and manner of use and with specific terms and conditions. Any use of water contrary to the specific limitations of a water right permit is not allowed. If a permit holder wishes to obtain a new water right or change the point of diversion, place of use and manner of use, of an existing water right, he must apply to the State Engineer for a permit to do so.²⁴

In this case, change Application 57304 was filed to change Permit 15410, Certificate 5157 but the State Engineer could not approve the change application because it was filed after the forfeiture had occurred. Also, Application 36764 was filed for a new appropriation of water for the northwest quarter, but that application was ultimately denied. The petitioner's counsel admitted the petitioner knowingly and deliberately irrigated the northwest quarter of Section 25 without the benefit of a water right permit because, "The northwest quarter was better situated for agricultural use."²⁵ A prescriptive right to the use of the water or any of the public water appropriated or unappropriated may not be acquired by adverse possession.²⁶

The petitioner's claim that the forfeiture can be cured by using water from a different well, in a different location or using water from the correct well for a different manner of use is contrary to Nevada water law.²⁷ Examining a similar hypothetical situation one can easily see the absurdity of this claim. For example, if a person owns an irrigation right that was subject to

²² File No. 15410, official records in the Office of the State Engineer.

²³ See, *Town of Eureka v. State Engineer*, 108 Nev. 163, 826 P.2d 948 (1992).

²⁴ NRS § 533.325.

²⁵ Transcript, p. 158.

²⁶ NRS § 533.060(5).

²⁷ See, NRS § 533.325.

forfeiture and decided to begin irrigating a different piece of land from a new well without a permit, can that person then claim that the forfeiture was cured? If that person files a change application, subsequent to irrigating the new land and without curing the forfeiture, can he ignore the law and continue irrigating the new place of use from the new well without the benefit of a water right permit? If a person files for a new appropriation of water on the new land and the State Engineer denies that application, can that person ignore the State Engineer's decision and continue irrigating? What if that person decides to use a small portion of his forfeited irrigation water for a shop, without first curing the forfeiture and second filing a change application to change the manner of use, does this cure that person's forfeiture? As evidenced in this ruling, the answers to these questions are "No". Nevada water law is clear. The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground belongs to the public.²⁸ Subject to existing rights all water may be appropriated for beneficial use as provided in chapter 533 of the NRS *and not otherwise* [emphasis added].²⁹ All underground waters within the boundaries of the State belong to the public, and, subject to all existing right to the use thereof, are subject to appropriation for beneficial use only under the laws of this state relating to the appropriation and use of water and not otherwise.³⁰ Any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such appropriation, change in place of diversion or change in manner or place of use, apply to the State Engineer for a permit to do so.³¹ Failure for five consecutive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right, or a permitted right, and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse.³²

The State Engineer finds that water has not been placed to beneficial use, after 1985 and before the proceeding of forfeiture, at the specified point of diversion, place of use and manner of use and in accordance with terms and conditions of Permit 15410, Certificate 5157; therefore, the forfeiture was not cured. The State Engineer finds that the petitioner must comply with

²⁸ NRS § 533.025.

²⁹ NRS § 533.030.

³⁰ NRS § 534.020(1).

³¹ NRS § 533.325.

³² NRS § 534.090

Nevada water laws, the same as any other person, and the law is clear in this matter; Permit 15410, Certificate 5157 is forfeited, Application 57304 must be denied, and the irrigation of land in the northwest quarter of Section 25 without the benefit of a water right permit must cease and desist.

IX.

In 1995, legislation was passed to amend the forfeiture statute (NRS § 534.090). The amendment requires the State Engineer to notify the owner of any water right governed by the statute after four consecutive years of non-use in basins where the State Engineer keeps pumpage records. This notification is referred to as a "four-year non-use letter". The owner then has 1 year from the date of the notice to resume beneficial use of the water or file for an extension of time to prevent forfeiture. The statute was enacted in 1995 and the State Engineer has applied the statute where the non-use occurred in 1995 or later. When the forfeiture has occurred prior to 1995, the forfeiture statute that was in place at the time of the forfeiture is enforced. In this case, the forfeiture occurred from 1985 to 1989 and the statute did not require notification prior to a forfeiture proceeding. It should be noted that the petitioners were notified of possible forfeiture of Permit 15410, Certificate 5157, in 1993.³³ As explained in a subsequent letter, the notice was sent to all parties who may have an interest in the water rights that were the subject of a petition by Amargosa Resources, Inc. , requesting the State Engineer proceed with a forfeiture action.³⁴

Under cross-examination of witness Bob Coache, the petitioner's counsel attempted to show that the State Engineer had improperly issued a four-year non-use letter under Permit 18764, Certificate 7276.³⁵ Upon examination of the permit file, it becomes clear that all the facts regarding the four-year non-use letters issued under Permit 18764, Certificate 7276 were not presented. The petitioner's counsel failed to mention to the witness that the State Engineer had issued a ruling on October 10, 1996 that stated the following.

The right to beneficially use the water under these water rights identified by the Permit Numbers 17417, 18764, 24725, and 26283, is not declared forfeited on the grounds that the evidence of the possible forfeiture is not clear and convincing, and the record shows that water was indeed used under these water rights during the alleged period of forfeiture.³⁶

In addition, the two four-year letters sent to two separate owners of the water right were dated December 19, 2003. The letters state, "Pursuant to those pumpage inventories, the State

³³ See, State Engineer's letter, June 16, 1993, File No. 15410 official records in the Office of the State Engineer.

³⁴ See, State Engineer's letter, January 20, 1994, File No. 15410 official records in the Office of the State Engineer.

³⁵ Transcript, pp. 91-94.

³⁶ State Engineer's Ruling No. 4446, October 10, 1996.

Engineer has found that a portion of the water right issued under Permit 18764, Certificate 7276, which is from an underground source, has not been put to beneficial use during the previous four years."³⁷ The letters clearly indicate that the time frame being considered is from 1999, 2000, 2001 and 2002, which is the previous four years from the date of the letter. Since the time frame being considered is after 1995, the forfeiture statute requires notification and this was correctly done.

When the petitioner's counsel questioned witness Bob Coache about the four-year letters issued on Permit 18764 Certificate 7276, counsel represented to the witness that non-use had occurred in 1990, 1991, 1992 and 1993 with partial use in 1994 and 1995. However, counsel failed to mention to the witness that the non-use prior to 1995 had already been adjudicated in favor of the permit holder. The incomplete scenario presented by counsel resulted in the witness responding to the following question in the affirmative.

Q. Provided it was duplicative or they covered the same area this four-year warning letter would be inconsistent with how 534.090 is to be applied to nonuse pre-'95, correct?

A. For a portion of it, yes.³⁸

The incorrect answer from the witness was caused by failure to disclose crucial facts contained in Permit 18764's file. However, examination of Permit 18764's file show the true facts and circumstances and confirms that the State Engineer acted in accordance with Nevada Water Law.

The State Engineer finds that the four-year letters issued under Permit 18764, Certificate 7276 were correctly issued according to the forfeiture statute, which was amended in 1995 to require notification. The State Engineer finds, in regard to notification, the forfeiture statute was correctly applied to Permit 15410, Certificate 5157, which properly did not receive a four-year letter because the period of non-use was 1985 through 1989, which is prior to the 1995 amendment and which did properly receive notification of possible forfeiture in 1993 in response to the Amargosa Resources, Inc. petition.. The State Engineer finds that when a petitioner comes before the State Engineer in an administrative hearing and creates what would be an incomplete record, the testimony and evidence presented by the petitioner that is not corroborated by records on file in the Office of the State Engineer must be viewed with skepticism.

³⁷ File No. 18764, official records in the Office of the State Engineer.

³⁸ Transcript, p. 94.

X.

Exhibit 27 was offered by the petitioner to show that there may be a claim of vested right on the proposed place of use. The petitioner's counsel stated, "These rights were used first prior to 1939, it's percolating water and, therefore, we don't feel subject to forfeiture for any reason, even if a statutory argument can be made that the statute compels it." It is unclear how a claim of vested right is relevant to this case. Permit 15410, Certificate 5157 was filed November 27, 1953, as an Application for Permit to Appropriate the Public Waters of the State of Nevada and therefore, is not a claim of vested right. The issue of whether a vested claim may exist on all or a portion of the place of use is irrelevant. What's more, the statement that a vested right is not subject to forfeiture is wrong. If the petitioner makes a claim of vested right, any such vested claim will be subject to the forfeiture statute (NRS § 534.090). The forfeiture statute clearly states that forfeiture applies to adjudicated or unadjudicated rights whether the right was initiated after or before March 25, 1939.³⁹

The State Engineer finds that Permit 15410, Certificate 5157 is not a claim of vested right and the issue of whether a vested right may or may not be claimed on the place of use is irrelevant to this matter.

XI.

Exhibit 9 consists of handwritten journal entries by Michael DeLee, and equipment contracts, orders, receipts, and related correspondence from 1992 to 1995. Michael DeLee testified "...1991 to 1992 I was given the job of renovating the irrigation machine on the northwest quarter and I recall placing orders for parts and making lists of what was needed in order to do that." The issue of whether equipment was purchased and renovations made to accommodate water use on the northwest quarter from a new well is irrelevant to the issue of the forfeiture of Permit 15410, Certificate 5157. The issues are whether water was placed to beneficial use in accordance with the terms and conditions of Permit 15410, Certificate 5157 from 1985 through 1989 and whether the forfeiture was ever cured prior to the proceeding of forfeiture. The use of water at a different location from a different point of diversion has no bearing on the proceeding issues. As previously discussed in the preceding sections of this ruling, the only way to cure the forfeiture after 1989 was substantial beneficial use on the correct place of use, from the correct point of diversion, for the correct manner of use in accordance with the terms and conditions of Permit 15410, Certificate 5157.

³⁹ See, NRS § 534.090(1).

The State Engineer finds the issue of equipment purchases and renovations for irrigation in the northwest quarter irrelevant to the forfeiture of Permit 15410, Certificate 5157.

XII.

Exhibit Nos. 14, 15, 16, 17, 20, 21, 22 and 26 are prior rulings by State Engineers related to forfeiture, which were offered by the petitioner and admitted into evidence. It appears from the transcript that the petitioner's counsel introduced these exhibits in an attempt to show the DeLees were treated differently than other permit holders regarding forfeiture. However, these rulings were unable to substantiate his position, as illustrated in the following analysis of each exhibit.

Exhibit No. 14 is State Engineer's Ruling No. 4400, issued August 8, 1996, relating to Permit 17340, Certificate 5865. The ruling indicates that the period of forfeiture considered was from 1985 through 1992. Upon examination of the pumpage records in the Office of the State Engineer it was found that the 1990 inventory showed the entire place of use was irrigated. The ruling concluded:

According to the pumpage inventory for Amargosa Valley, all 27.9 certificated acres under Permit 17340, Certificate 5865 were irrigated in 1990. Whether or not this entry in the 1990 inventory is erroneous cannot be confirmed. Therefore, the State Engineer concludes that there is not clear and convincing evidence of the non-use of water under Permit 17340, Certificate 5865 for the statutory period of time. The State Engineer further concludes that the water rights under Permit 17430, Certificate 5865 cannot be declared forfeited.

An additional issue of irrigation of an adjacent parcel without the benefit of a water right permit was addressed in this ruling. It was noted that irrigation had taken place on an adjacent parcel in 1989, 1990, 1991 and 1992, for which there was no permit. The ruling noted that the permittee filed a change application, Application 61205, to correct the situation.⁴⁰

In a separate ruling, the State Engineer approved Application 61205, concluding that since the base right (Permit 17340, Certificate 5865) was not forfeited, the application may be approved.⁴¹

As noted above, State Engineer's Ruling Nos. 4400 and 4459 involve different circumstances than the issues in Permit 15410, Certificate 5157 and Application 57304. In particular, the pumpage records for Permit 15410, Certificate 5157 show no irrigation on the

⁴⁰ Exhibit No. 14.

⁴¹ State Engineer's Ruling No. 4459, December 6, 1996.

place of use from at least 1985 to 2001. The State Engineer finds that these rulings have no relevance to the matter at hand.

XIII.

Exhibit No. 15 is State Engineer's Ruling No. 4114, issued May 18, 1994, in the matter of Permit 17657 A-01, Certificate 6978. State Engineer Turnipseed noted that the property within the place of use had been subdivided into at least 25 parcels that were being irrigated by the parcel owners through their domestic wells. Since the inventory showed no irrigation when irrigation was taking place, albeit through domestic wells, the State Engineer ruled that the State's evidence and the petitioner's evidence failed to meet the standard of clear and convincing evidence. The parcel owners were given 120 days to provide the proper deeds to show ownership of a portion of the rights under the certificate.⁴² The circumstances of this case also differ from the DeLee matter in that a third party was bringing the forfeiture action and they had the burden of proof. Also, the parties were irrigating within the place of use of the original permit but were using domestic wells, which require no permit.⁴³

The circumstances of this case differ from the DeLee case in that there is no dispute in the DeLee case regarding beneficial use of water for irrigation purposes on the correct place of use from the correct point of diversion during the period of alleged forfeiture, there are no issues of the property being subdivided and there is no third party to the forfeiture action. The State Engineer finds that this ruling has no relevance to the matter at hand.

XIV.

Exhibit No. 16 is State Engineer's Ruling No. 4460, issued December 6, 1996, in the matter of Permit 14054, Certificate 6109. In this case, the permittees presented substantial evidence of beneficial use in 1990 and 1991, including photographs of the property that showed a crop growing and affidavits from two individuals who observed irrigation of the property. State Engineer Turnipseed found that beneficial use of the water occurred on the place of use in 1990 and 1991. It was also noted that it appeared some of the use was outside the permitted place of use and the permit holder was advised to correct this situation by obtaining a permit for that area.⁴⁴

The circumstances of this case differ from the DeLee case in that there is no dispute in the DeLee case regarding beneficial use of water for irrigation purposes on the correct place of

⁴² Exhibit No. 15.

⁴³ See, State Engineer's Ruling No. 4916, p. 9, Sec. VIII, May 5, 2000.

⁴⁴ Exhibit No. 16.

use from the correct point of diversion during the period of alleged forfeiture. The DeLees have claimed that some beneficial use occurred from the correct well for use at a shop and caretaker's quarters and have claimed that irrigation on a different place of use from a different point of diversion without the benefit of a water right permit should cure the forfeiture on Permit 15410, Certificate 5157. These arguments have been addressed in this ruling and rejected. The State Engineer finds that Ruling No. 4460 has no relevance to the matter at hand.

XV.

Exhibit No. 17 is State Engineer's Ruling No. 4916, issued May 5, 2000, in the matter of Permit 23797, Certificate 6763. In this case, State Engineer Turnipseed found that a four-year non-use notice was not required as the 5 years non-use predated the enactment of the statute requiring notice. Change Application 64736 was filed on January 5, 1999, to change the point of diversion and place of use of Permit 23797, Certificate 6763, long after the time for working a forfeiture had run. The State Engineer found the filing of a change application does not prevent the State Engineer from determining whether the water right requested for change is subject to forfeiture nor is the filing of a change application a "use" of water that prevents a declaration of forfeiture. It was also noted that the illegal use of water from a different well did not cure any claim of non-use of the water right under Permit 23797, Certificate 6763.⁴⁵

Several of the issues in this ruling are similar to the issues raised in Ruling No. 4916. The findings and conclusions are consistent; notice is not required for situations when the forfeiture occurred prior to the enactment in 1995 of the notice provision in the forfeiture statute, the filing of a change application after the forfeiture had already worked does not prevent the State Engineer from making a forfeiture determination on the base right, and illegal water use from a different well does not cure forfeiture of the certificated right. The State Engineer finds Ruling No. 4916 to be consistent with the findings and conclusions contained in this ruling.

XVI.

Exhibit No. 20 is State Engineer's Ruling No. 4548, issued July 25, 1997, in the matter of Applications 58372, 58373, 58444, 58445 and 58446. This exhibit is mentioned in the transcript but the significance is unclear. The DeLee counsel offered the following questions regarding this exhibit with the answers provided by witness Bob Coache during cross examination.⁴⁶

Q. I want to look at a couple of other matters before I'm finished simply to make sure that we can make them part of the record. Would you look at tab 20, please?
Have you seen this document before?

⁴⁵ Exhibit No. 17.

⁴⁶ Transcript, p. 126.

A. Yes, I have.

Q. What is it?

A. It's a ruling denying what we refer to as the ARI applications.

Q. And that's ruling 4548?

A. Correct.

Applications 58372, 58373, 58444, 58445 and 58446 were denied in Ruling No. 4548 on the grounds that the approval of the subject applications would not be in the public interests. The applicant has no specific project in mind for any water granted under these applications, but rather is merely looking for a buyer in order to profit from the sale of the water.⁴⁷

The State Engineer finds that this ruling has no relevance to the matter at hand.

XVII.

Exhibit No. 21 is State Engineer's Ruling No. 4347, issued May 3, 1996, in the matter of Permit 22233, Certificate 7532 and copies of related pumpage records and photographs. In this case, State Engineer Turnipseed ruled that the water right holder cured the forfeiture prior to the notice of the forfeiture proceeding; therefore, the right was declared not forfeited. The basis of the ruling relies on the pumpage inventories, which showed 8 acres were irrigated in June 1993 and all 38 acres were irrigated by October 1993. The notice of forfeiture was received by the permittee on July 2, 1993. The exact date of the actual application of water to the entire 38 acres was not known but it was known to have occurred immediately following the purchase and installation of the irrigation equipment and the preparation of the land, which did occur prior to the notice of forfeiture proceeding. Since no evidence existed as to how many acres were being irrigated on July 2, 1993, and knowing 8 acres were irrigated in June 1993 and at some point in time all 38 acres were irrigated, as verified by the October 1993 inventory, water may have been applied to the entire acreage prior to the notice of forfeiture proceeding.⁴⁸

In this case, the forfeiture was cured by substantial use of the water on the correct place of use, from the correct point of diversion and in compliance with the terms and conditions of the water right. The State Engineer finds Ruling No. 4347 to be consistent with the findings and conclusions contained in this ruling.

XVIII.

Exhibit No. 21 is State Engineer's Ruling No. 4484, issued January 9, 1997, in the matter of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, and copies of related pumpage records. In this case, State Engineer Turnipseed found that only 3 acres within the

⁴⁷ Exhibit No. 20.

⁴⁸ Exhibit No. 21.

place of use were irrigated during the period of alleged non-use. Therefore, except for the 3 acres where irrigation occurred, the rights were declared forfeited.⁴⁹

The State Engineer finds Ruling No. 4484 to be consistent with the findings and conclusions in this ruling.

XIX.

Exhibit No. 26 is State Engineer's Ruling No. 4346, issued May 3, 1996, in the matter of Permit 16047, Certificate 5593, and Permit 21952, Certificate 6905, and copies of related pumpage inventories. In this case a third party, Amargosa Resources, Incorporated, was bringing the forfeiture action and they had the burden of proof. Dr. Robert Bement, the expert witness for Amargosa Resources, Incorporated, testified regarding aerial photographs of the property and concluded that some irrigation had occurred on a small area of the property amounting to about 4 acres of land. The State Engineer ruled that the water rights were forfeited except for the small amount placed to beneficial use, about 22.02 acre-feet.⁵⁰

The State Engineer finds Ruling No. 4346 to be consistent with the findings and conclusions in this ruling.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁵¹

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.⁵²

III.

The State Engineer is prohibited by law from granting a permit under an application to appropriate the public water where:⁵³

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;

⁴⁹ Exhibit No. 22.

⁵⁰ Exhibit No. 26.

⁵¹ NRS chapters 533 and 534.

⁵² NRS § 534.090.

⁵³ NRS § 533.370(4).

- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

IV.

According to the annual pumpage inventory for Amargosa Valley, there was no irrigation on the place of use of Permit 15410, Certificate 5157, for five consecutive years being 1985, 1986, 1987, 1988 and 1989. The State Engineer concludes that this period of five consecutive years of nonuse has worked a forfeiture of the water right, to the extent of the non-use.

V.

Application 57304 was filed to change the point of diversion, place of use and manner of use of Permit 15410, Certificate 5157. The application was filed in 1992, subsequent to the period of forfeiture under Permit 15410, Certificate 5157. An application may be filed to change the point of diversion, manner or place of use of water already appropriated.⁵⁴ Water already appropriated, in reference to a change application, refers to water represented by a water right permit or certificate in good standing.⁵⁵ Where a water right certificate has been forfeited, the water right is no longer valid; it is not in good standing and cannot be used to support a change application. The State Engineer concludes that Permit 15410, Certificate 5157 is not in good standing and cannot support change Application 57304. The State Engineer concludes Application 57304 must be denied.

VI.

The State Engineer concludes that any and all illegal use of water by the petitioner must cease and desist.

VII.

The petitioner introduced a number of past rulings as exhibits. As demonstrated in the findings, the forfeiture statute was consistently applied in each case. The State Engineer concludes the forfeiture statute has been fairly and equitably applied in this ruling based on the unique circumstances of this case and with the same consistency evidenced in prior rulings.

⁵⁴ NRS § 533.325.

⁵⁵ NRS § 533.324.

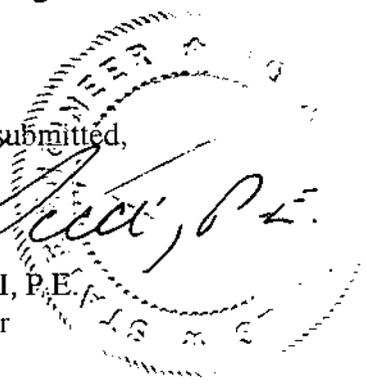
RULING

Permit 15410, Certificate 5157 is hereby declared forfeited. Application 57304 is hereby denied on the grounds that the water right requested for change has been declared forfeited; therefore, there is no water available to be changed.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer



HR/TW/jm

Dated this 11th day of

April, 2005.