

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF THE OWNERSHIP OF)
PERMITS 38544, 38545, 38546 AND 38547 TO)
APPROPRIATE THE PUBLIC WATERS OF THE)
STATE OF NEVADA FROM UNDERGROUND)
SOURCES IN THE HONEY LAKE VALLEY)
GROUNDWATER BASIN IN WASHOE COUNTY,)
NEVADA.)
)

RULING

GENERAL

I.

Application 38544 was filed on July 11, 1979, by Gary and Clementine Tope and Ray May of Carson City, Nevada, requesting permission to change the point of diversion and place of use of 2.7 c.f.s. of the underground waters of the State of Nevada heretofore appropriated under Permit 30457. The water to be used for irrigation and domestic purposes within a maximum of 861 acres in Sections 2 and 11, T.26N., R.18E. M.D.B.&M. The point of diversion is described as being within the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 2, T.26N., R.18E., M.D.B.&M.¹

Application 38545 was filed on July 11, 1979, by Gary and Clementine Tope and Ray May of Carson City, Nevada, requesting permission to change the point of diversion and place of use of 5.4 c.f.s. of the underground waters of the State of Nevada heretofore appropriated under Permit 30458. The water to be used for irrigation and domestic purposes within a maximum of 861 acres in Sections 2 and 11, T.26N., R.18E., M.D.B.&M. The proposed point of diversion to be in the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 2, T.26N., R.18E., M.D.B.&M.¹

Application 38546 was filed on July 11, 1979, by Gary and Clementine Tope and Ray May of Carson City, Nevada, requesting permission to change the point of diversion and place of use of 6.0 c.f.s. of the underground waters of the State of Nevada heretofore appropriated under Permit 30459. The water to be used for irrigation and domestic purposes on a maximum of 861 acres in Sections 2 and 11, T.26N., R.18E.,

¹ Public record in the office of the State Engineer and States Exhibit 4 received in Evidence at Hearing January 23, February 8 and February 9, 1989. A public administrative hearing on the matter contained herein was held before the State Engineer on January 23, 1989, continued to February 8 and completed on February 9, 1989, hereinafter referred to as "Hearing".

M.D.B.&M. The proposed well to be located in the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 11, T.26N., R.18 E., M.D.B.&M.¹

Application 38547 was filed on July 11, 1979, by Gary and Clementine Tope and Ray May of Carson City, Nevada, requesting permission to change the point of diversion and place of use of 6.0 c.f.s. of the underground waters of the State of Nevada heretofore appropriated under Permit 30460. The water to be used for irrigation and domestic purposes within a maximum of 861 acres in Sections 2 and 11, T.26N., R.18 E., M.D.B.&M. The proposed well to be located in the NE $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 11, T.26N., R.18 E., M.D.B.&M.¹

After due process, on June 23, 1981, permits were issued under Applications 38544, 38545, 38546 and 38547 for the applied for amounts but not to exceed 861 total acres to be irrigated, with a maximum duty of four acre-feet per acre per year from any and/or all sources on the 861 acres¹ (a total of 3,444 acre-feet per year). The Proofs of Completion, due on January 23, 1983, were actually filed on December 21, 1981, under all four of these permits. Proofs of Beneficial Use are due on January 23, 1990.¹

II.

By letter dated February 25, 1987² and received in the office of the State Engineer on February 25, 1987, Gary and Clementine Tope protested the transfer of ownership of the subject permits from Ray May to Fish Springs Ranch Limited Partnership (sometimes "FSR" or Fish Springs Ranch) inasmuch as they were claiming ownership in themselves. On March 2, 1988, by letter² received in the office of the State Engineer on March 7, 1988, the Topes renewed their protest and on December 19, 1988, the matter was set for hearing on January 23, 1989, in Sparks, Nevada.³ The hearing commenced on January 23, 1989, and was continued until Wednesday, February 8, 1989, and Thursday, February 9, 1989, when the hearing was completed. At the hearing evidentiary presentations were made by the parties who had standing in the matter. Post hearing briefing was allowed and the State Engineer took administrative notice of certain matters as more fully set forth in the record.⁴

² States Exhibit 2 received in Evidence at Hearing.

³ States Exhibit 1.

⁴ Transcript of Hearing, pp. 3-6, 25.

FINDINGS OF FACT

I.

Several documents received into the record at the hearing as exhibits are germane to the instant matter.

In chronological order:

March 10, 1980, a Quitclaim Deed⁵ was executed being document No. 665957 on file in the Washoe County Records between Gary Tope and Clementine Tope, Grantor and Raymond May, Grantee assigning Parcels 2 and 11 of T.26N., R.18 E. to Ray May together with all appurtenances. That document was recorded in the Washoe County Recorder's office on April 30, 1980, and received in the office of the State Engineer on November 16, 1987.

October 22, 1980, a correction deed,⁶ being the same document as Exhibit 5, was re-recorded with the word "parcel" crossed out and initialed and the word "Sections" inserted so that the property being transferred would now be Sections 2 and 11 of T.26N., R.18 E. That deed is document No. 7001788,⁶ a copy of which was received into the record at the hearing. This deed is represented as containing the correct legal description of the land being transferred.

February 15, 1983, an unnamed written instrument⁷ being Document No. 1190124 was executed with the signatures of Gary Tope and Clementine Tope acknowledging they had assigned their water right Permits No. 38544 through 38547 to Ray May in 1980. This document was recorded in the Washoe County Records on September 3, 1987, and received in the office of the State Engineer on November 16, 1987.⁷

May 5, 1986, an "Agreement"⁸ was executed between Ray May and Fish Springs Ranch indicating intent to transfer ownership of 861 acres of irrigation groundwater rights in

⁵ States Exhibit 5.

⁶ Fish Springs Ranch Exhibit 30, received in evidence at Hearing.

⁷ States Exhibit 6 received in evidence at Hearing.

⁸ States Exhibit 7 received in evidence at Hearing.

Honey Lake Valley. This document is not recorded in the Washoe County Records, but was received in the office of the State Engineer on November 30, 1988.⁸ With one exception the several water permit numbers set forth on that document are not the correct permit numbers, under consideration before the State Engineer in this matter. However, the points of diversion set forth thereon do accurately describe the well sites shown on the subject permits.

February 24, 1987, a Quitclaim deed⁹ being Document No. 1143944, was executed between Ray May the party of the first part and Harry Gray Browne the party of the second part, which purported to transfer four water right Permits none of which are the permits before the State Engineer in this proceeding. Said document was recorded on May 2, 1987 in the Washoe County Recorder's office and received by the State Engineer on November 30, 1988.

February 25, 1987, the letter from the Tope's to the State Engineer protesting the ownership transfer was received in the office of the State Engineer.²

March 2, 1988, the Tope's renewed their protest against the transfer of ownership.²

March 25, 1988, a Quitclaim Deed¹⁰ being Document No. 1239517 was executed by Ray May assigning one half the Ray May interest in Sections 2 and 11 to Gary Tope. This deed was recorded in the Washoe County Recorder's office on April 15, 1988 and received in the State Engineer's office on November 16, 1988.

October 18, 1988, a correction deed Document No. 1286940,¹¹ was executed by Ray May to Fish Springs Ranch Limited Partnership, correcting the permit numbers shown on the previous deed (Exhibit 8) from Mr. May to Mr. Browne. This Document was recorded on November 14, 1988 in the Washoe County Recorder's office and received by the State Engineer's office on November 30, 1988.

⁹ States Exhibit 8 received in evidence at Hearing.

¹⁰ States Exhibit 9 received in evidence at Hearing.

¹¹ States Exhibit 10 received in evidence at Hearing.

II.

In addition to the testimony relating to these documents at the hearing, other documents were received and testimony taken on the varying state of the Tope/May partnership.

Mr. Tope and Mr. May agreed, as much as they seem to be able to agree on anything, that in 1980, they had decided to end their partnership on their land in Honey Lake Valley. Mr. Tope took a well rig, some cash and equipment and Mr. May took the land. The deed from Mr. Tope to Mr. May⁵ was the end result of the dissolution and distribution. This deed contained the appurtenance clause and reserved no water rights. At the date of the deed the instant permits were still pending applications which later ripened into permits in 1981, as previously set forth. The later transactions which have occurred in this matter appear to be the result of misunderstandings, and/or lack of understanding due possibly to the somewhat bitter state of affairs at and after termination of the partnership.

While there is some confusion and contradictory testimony on the matter of when Mr. Tope gave notice that he was protesting the transfer of the water rights from May to Fish Springs Ranch, the record of evidence is that on February 25, 1987, Mr. Tope's letter² was received in the office of the State Engineer and thus became public notice. The erroneous Quitclaim Deed⁹ from May to Mr. Browne, a principle in Fish Springs Ranch was executed on February 24, 1987. The Agreement,⁹ which resulted in said deed was signed on August 5, 1986. Tope maintains that he did not mean to sell the water rights when he quitclaimed the land to Mr. May in 1980; however there is no evidence that Tope had any use for the subject water, and made no claim to the rights until some seven years later when he discovered that May was selling such water rights to Fish Springs Ranch.

III.

Nevada law is clear that the assignment of land to which a water right is appurtenant transfers such water right.¹² The Topes maintain that the 1983, instrument,⁶ cannot be bootstrapped into an assignment of water rights. This position may have merit if in fact the Topes had not assigned the water rights in 1980. The 1980 document did assign the land and all appurtenances including the applications which

¹² Zolezzi vs Jackson, 72 Nev. 150, 197 P.2d 1081 (1956).

ultimately ripened into the water rights appurtenant to the land. The well recognized after-acquired title doctrine¹³ is applicable since the rights were in place in 1979 when the applications were first filed. The statutory procedure which the State Engineer must follow before issuing a permit cannot be used in the instant matter to undo an otherwise valid transaction.

IV.

The 1983 document is in fact a confirmation of the 1980 transfer, and confirms the intent of the parties to the 1980 deed. Mr. Tope challenges the fact that he signed that particular document, however the notary testified at the hearing that the Tope's were indeed present before her and did sign the document.¹⁴ Late filed Exhibit 34 for Fish Springs Ranch, is the affidavit of handwriting expert Floyd Whiting and is unchallenged by any written response from the Tope's. Mr. Whiting's affidavit indicates that the signatures of Gary Tope and Clementine Tope on the 1983 document⁷ are in fact genuine. In fact Mr. Tope has not absolutely denied that he signed the document. Mr. Tope testified that he did not think he signed that particular document, but that he "must have signed something".¹⁵

V.

While there is evidence that Mr. Tope's labor contributed to the purchase of the water rights, the record is clear that such labor was performed before 1980. Both Mr. Tope and Mr. May testified that the dissolution of their partnership which was finalized by the March, 1980 document⁵ was an arms length transaction at which time Mr. Tope received consideration as did Mr. May. The partnership relation was over.¹⁶ The record here is that the Topes have never claimed that they did not transfer their interest in the land in 1980, and made no claim to the water from 1980 until February 25, 1987.

¹³ NRS 111.160, 23 AM Jur 2d Deeds at Sections 352 and 353.

¹⁴ Exhibit 11 for Fish Springs Ranch received in Evidence at Hearing; and testimony of Patricia Fisk, pp 18-32 Transcript of Hearing.

¹⁵ Transcript of Hearing, pp. 158-159.

¹⁶ Transcript of Hearing, at pp. 256-266.

VI.

All the evidence of record shows that in 1980 the land in Sections 2 and 11, T.26N., R.18E., M.D.B.&M. as to be used for farming when and if water could be obtained. If May was to farm he would need water. The appurtenance clause in the 1980 deed coupled with the 1983 acknowledgment clearly shows intent to transfer the subject water rights.

There is no clear evidence that Fish Springs Ranch or any of its agents had prior knowledge of the Tope challenge, at issue herein, prior to the execution of the Agreement in 1986 or the Quitclaim Deed in 1987. The evidence also shows that at least from February 25, 1987 forward, Mr. Tope did have knowledge of the May/Fish Springs Ranch transaction.

VII.

The 1980 Quitclaim Deed⁵ transferred whatever water rights were appurtenant to the land transferred in that particular document which at the time of the transaction were applications which ultimately ripened into the permits. That transaction, under the provisions of the relevant statute¹⁷ is binding upon the parties and not binding on anyone except the parties until filed with the State Engineer.¹⁷ Gary and Clementine Tope and Ray May are the parties to said deed. The applications which became permits were appurtenant to the property transferred in the 1980 Deed and therefore were, after that time, the sole property of Ray May.

VIII.

The Instrument of February 15, 1983⁷ acknowledged the transaction that had already occurred, and is genuine.

IX.

The Agreement of 1986⁸ and the Quitclaim Deed of 1987⁹ between May and Fish Springs Ranch clearly contained erroneous permit numbers. The numbers set forth on those documents are not situated in Honey Lake Valley and are obviously drafting or clerical errors. The agreement clearly indicates that the parties intended to purchase and sell the water rights appurtenant to Sections 2 and 11, T.26N., R.18E., M.D.B.&M., as shown on those particular documents.

¹⁷ NRS 533.385(2).

X.

There is no evidence that Fish Springs Ranch or any of its agents had knowledge, constructive or actual of the Tope claim to ownership of the instant Permits prior to February 25, 1987.

XI.

The Quitclaim Deed¹⁰ of 1988 from May to Tope did not transfer any water rights to Mr. Tope because Mr. Tope had previous knowledge of the May/Fish Springs Ranch transaction and therefore cannot be a bonafide purchaser.

XII.

The Correction Deed¹¹ dated October 19, 1988, should be effective as of the first deed⁹ (February 24, 1987) because of the fact that Mr. Tope was not a bonafide purchaser.

XIII.

The evidence of record in this matter is contrary to the Tope claim. The Tope's being the protestants herein have the burden of proving their claim; they have not done so.

XIV.

Ownership of all water rights under Permits 38544, 38545, 38546 and 38547 being 3,444 acre-feet of water per annum should be transferred to Fish Springs Ranch Limited Partnership.

CONCLUSIONS

I

The State Engineer has jurisdiction to determine the ownership of water rights of record in his office so that he may conduct the business of his office in an orderly fashion and discharge his duties properly.¹⁷

II

The Quitclaim Deed⁵ dated March 10, 1980, corrected and re-recorded on October 22 1980⁶, did in fact transfer all appurtenances, including water rights, to Ray May.

III

Fish Springs Ranch Limited Partnership, at the time of the Agreement⁸ (August of 1986) to buy the water rights evidenced by Permits 38544, 38545, 38546 and 38547 from Mr. May and at the time of execution of the Quitclaim Deed⁹ (February of 1987) were bonafide purchasers having no knowledge of Tope's contest to the water rights under consideration herein.

IV

At the time of the Quitclaim Deed¹⁰ (March of 1988) Mr. Tope was not a bonafide purchaser having had prior knowledge of the transfer from Mr. May to Fish Springs Ranch by Mr. Tope's own admission.

V

The Correction Deed¹¹ from May to Fish Springs Ranch Limited Partnership, dated October 18, 1988, therefore is valid against Mr. Tope and will transfer the 3,444 acre-feet of water to the Fish Springs Ranch Limited Partnership.

VI

The Tope Claim to ownership of the instant water rights must be rejected.

VII

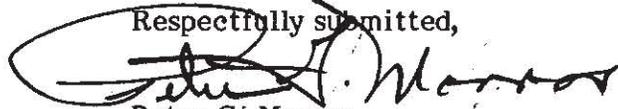
The records of the State Engineer should reflect present ownership of Permits 38544, 38545, 38546 and 38547 in the name of Fish Springs Ranch Limited Partnership.

RULING

Being fully advised in the premises it is ORDERED that;

The claim of Gary Tope and Clementine Tope to any interest in Permits 38544, 38545, 38546 and 38547 shall be and hereby is denied and the ownership of the entire 3,444 acre-feet of water rights issued under Permits 38544, 38545, 38546 and 38547 will be transferred to Fish Springs Ranch Limited Partnership, on the record of the office of the State Engineer.

Respectfully submitted,



Peter G. Morros
State Engineer

PGM/bk

Dated this 21st day of

August, 1989.