

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 16047, CERTIFICATE)
5593 AND PERMIT 21952, CERTIFICATE 6905 FROM)
AN UNDERGROUND SOURCE, AMARGOSA DESERT)
GROUNDWATER BASIN (230), NYE COUNTY, NEVADA.)

RULING

4346

GENERAL

I.

Application 16047 was filed by Theo E. Selbach on February 7, 1955, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 16047 was approved on August 12, 1957, for 2.5 cubic feet per second (cfs) for irrigation and domestic use. Certificate 5593 under Permit 16047 was issued on August 19, 1963, for 2.005 cfs of water and not to exceed 300 acre feet annually (AFA) for the irrigation of 60 acres of land, 20 acres of which are located within the E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, T.16S., R.49E., M.D.B.&M., and 40 acres of which are located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9. The point of diversion is located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9.¹

II.

Application 21952 was filed by Theo E. Selbach on April 14, 1964, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 21952 was approved on June 24, 1966, for 1.5 cfs for irrigation and domestic use. Certificate 6905 under Permit 21952 was issued on January 20, 1969, for 0.75 cfs of water and not to exceed 100 AFA for the irrigation of 20 acres of land located within the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 9, T.16S., R.49E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 9.²

¹ File No. 16047, official records in the office of the State Engineer.

² File No. 21952, official records in the office of the State Engineer. The place of use of Permit 16047, Certificate 5593 and that of Permit 21952, Certificate 6905 are contiguous and together comprise the entire N $\frac{1}{2}$ SW $\frac{1}{4}$ Section 9, T.16S., R.49E., M.D.B.&M.

III.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.³ Permit 16047, Certificate 5593 and Permit 21952, Certificate 6905 are 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.

IV.

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.⁴ On February 8, 1996, a hearing was held to consider the possible forfeiture of Permit 16047, Certificate 5593 and Permit 21952, Certificate 6905.⁵

V.

At the hearing to consider Permit 16047, Certificate 5593 and Permit 21952, Certificate 6905, administrative notice was taken of record developed at the foundation hearing of May, 1994, and of the record developed at all the previous hearings on the individual water rights.⁶ In addition, administrative notice was taken of all records in the office of the State Engineer.⁶

FINDINGS OF FACT

I.

At the hearing, the Petitioner presented evidence and testimony supporting his case in favor of the forfeiture of Permit 16047, Certificate 5593 and Permit 21952, Certificate 6905. The State Engineer has taken annual pumpage inventories in the Amargosa

³ Exhibit No's. 1 and 2, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁴ Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁵ Exhibit No. 157, Public Administrative Hearing before the State Engineer February 8, 1996.

⁶ Transcript pp. 7-8, Public Administrative Hearing before the State Engineer February 8, 1996.

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 1993 shows that no water was used for irrigation on any of the 60 acres of land allowed under Permit 16047, Certificate 5593 and the 20 acres under Permit 21952, Certificate 6905.⁷

Dr. Robert Bement, the expert witness for ARI, reviewed the high level aerial photographs⁸ and, in conjunction with the ground photographs,⁹ determined that some creosote bushes on portions of the property were about twenty years old.¹⁰ Dr. Bement stated that the property had not been irrigated for many years.¹¹ Dr. Bement acknowledged that some irrigation had occurred on a small area in the northeast corner of the property and on the windbreak trees that surround and divide the property.¹² This would amount to about four acres of land that was irrigated.¹³ The State Engineer finds that four acres of land under Permit 16047, Certificate 5593 were irrigated during the alleged period of non-use. The State Engineer further finds that the pumpage inventories, the testimony of those individuals who performed the inventories, the aerial and ground photographs, and Dr. Bement's testimony provide clear and

⁷Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994 and Transcript pp. 15-18 and 46, Public Administrative Hearing before the State Engineer, February 8, 1996.

⁸Exhibit Nos. 19, 20, and 21, Public Administrative Hearing before the State Engineer, May 16-18, 1995.

⁹Exhibit Nos. 17 and 18, Public Administrative Hearing before the State Engineer, May 16-18, 1995.

¹⁰Transcript pp. 136-137, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹¹Transcript p. 135, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹²Transcript p. 133, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹³The windbreak trees comprise an area of two acres and the irrigated area in the northeast corner is about two acres.

convincing evidence that the remainder of the place of use of Permit 16047, Certificate 5593 (56 acres) and all of the place of use of Permit 21952, Certificate 6905 (20 acres), totaling 76 acres, has not been irrigated for a continuous period of time that exceeds five years.

II.

Mrs. Selbach testified that she visited the property in 1989 and observed patches of grain plants growing.¹⁴ However, these plants were not the result of an intentional planting and irrigation of a grain crop.¹⁵ In 1988, water from the well was pumped on the property to demonstrate to a potential buyer that the entire property could be flooded and not for the purpose of irrigating a crop.¹⁶ The well and pump were maintained and used to irrigate the windbreak trees, the area around the house, and to provide domestic water to the residence.¹⁷ The State Engineer finds that the evidence supports the earlier finding that only four acres were irrigated. The State Engineer further finds that the well was used to provide domestic water to the residence on the property.

III.

The property that is the place of use of Permit 16047, Certificate 5593 and Permit 21952, Certificate 6905, was the subject of a contested probate case that was finally resolved in June, 1993.¹⁸ After the original permittee, Theo Selbach, passed away, the Selbachs were unable to take control of the property and place the appurtenant water to beneficial use, due to the probate.

¹⁴Transcript p. 186, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹⁵Transcript p. 210 and 212, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹⁶Transcript pp. 187 and 212, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹⁷Transcript p. 196, and Exhibit No. 173, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹⁸Transcript pp. 182-183, Public Administrative Hearing before the State Engineer, February 8, 1996.

The Selbach's counsel argued that in other cases where water rights were affected by pending court cases, the courts have accepted equitable defenses and granted relief to the water right holders.¹⁹ While the courts have acknowledged equitable defenses, the State Engineer is not given the discretion to grant equitable relief in these kinds of cases.²⁰ The State Engineer finds that he lacks the authority to grant equitable relief in this case.

The relief for which the State Engineer has authority would have been for the executor of the estate to file a request for an extension of time to prevent a forfeiture.²¹ However, no such request was filed.²²

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.²³

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.²⁴

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.²⁵ The State Engineer

¹⁹Transcript pp. 243-246, Public Administrative Hearing before the State Engineer, February 8, 1996.

²⁰State Engineer v. American Nat'l. Ins. Co., 88 Nev 424 (1972).

²¹NRS 534.090(2)

²²File Nos. 16047 and 21952, Official Records in the Office of the State Engineer.

²³ NRS 533.090.

²⁴NRS 534.090.

²⁵ Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

concludes that there is clear and convincing evidence that 56 acres of the place of use of Permit 16047, Certificate 5593 and 20 acres under Permit 21952, Certificate 6905, have not been irrigated for a period of time that exceeds five years. The State Engineer further concludes that four acres of land composed of the windbreak trees and the area around the residence were irrigated during the alleged period of non-use. Therefore, 22.02 acre feet that includes the domestic component, under Permit 16047, Certificate 5593, is not forfeited while the remaining 277.98 acre feet is declared forfeited. The total quantity of 100 acre feet under Permit 21952, Certificate 6905 is also declared forfeited.

IV.

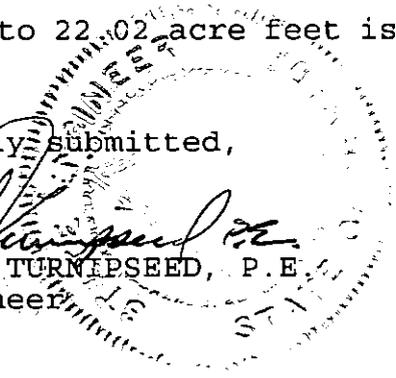
The State Engineer concludes it is not within his jurisdiction to grant equitable relief in this case.

RULING

That portion of Permit 16047, Certificate 5593 amounting to 277.98 acre feet annually, which is appurtenant to 56 acres and the entire quantity of 100 acre feet appurtenant to 20 acres under Permit 21952, Certificate 6905 is hereby declared forfeited on the grounds that the land has not been irrigated for a continuous period of time exceeding five years. The remaining portion of Permit 16047, Certificate 5593 amounting to 22.02 acre feet is not declared forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/JCP/pm

Dated this 3rd day of
May, 1996.