

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF )  
WATER RIGHTS UNDER PERMIT 22233, CERTIFICATE )  
7532 FROM AN UNDERGROUND SOURCE, AMARGOSA )  
DESERT GROUNDWATER BASIN (230), NYE COUNTY, )  
NEVADA. )

RULING

# 4347

GENERAL

I.

Application 22233 was filed by Billie Bettles on August 31, 1964, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 22233 was approved on April 18, 1966, for 1.0 cubic foot per second (cfs) for irrigation and domestic use. Certificate 7532 under Permit 22233 was issued on January 5, 1971, for 1.0 cfs of water and not to exceed 190 acre feet annually (AFA) for the irrigation of 38 acres of land, located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 36, T.16S., R.48E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 36. The owners of record of the permit are Tracy W. and Betty Smith and the owner of the property is Betty Smith Boyd.<sup>1</sup>

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.<sup>2</sup> Permit 22233, Certificate 7532 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

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<sup>1</sup> File No. 22230, official records in the office of the State Engineer.

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

foundation for the evidence filed in support of the petition.<sup>3</sup> On February 7, 1996, a hearing was held to consider the possible forfeiture of Permit 22233, Certificate 7532.<sup>4</sup>

IV.

At the hearing to consider Permit 22233, Certificate 7532, 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.<sup>5</sup>

FINDINGS OF FACT

I.

At the hearing, the Petitioner presented evidence and testimony supporting his case in favor of the forfeiture of Permit 22233, Certificate 7532. 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 1988 and 1991, shows that no water was used for irrigation on any of the 38 acres of land allowed under Permit 22233, Certificate 7532.<sup>6</sup> In 1989 and 1990, the inventory showed that 5 acres had been irrigated and in 1992, 8 acres had been irrigated.<sup>6</sup>

ARI acknowledged that, on a portion of the property consisting of 6.1 acres, grape vines were irrigated during the alleged period of forfeiture.<sup>7</sup> According to Dr. Robert Bement, ARI's plant expert, creosote and shadscale bushes were growing on the remainder

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<sup>3</sup> Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

<sup>4</sup> Exhibit No. 138, Public Administrative Hearing before the State Engineer February 7, 1996.

<sup>5</sup> Transcript p. 14, Public Administrative Hearing before the State Engineer February 7, 1996.

<sup>6</sup> Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994.

<sup>7</sup> Transcript pp. 124 and Exhibit No. 149, Public Administrative Hearing before the State Engineer, February 7, 1996.

of the property as shown on the photographs taken in 1993.<sup>8</sup> This same vegetation appears on the 1987, 1989, and 1990 aerial photographs.<sup>9</sup> Based on the vegetation pattern observed in the photographs, Dr. Bement concluded that the property, excepting the 6.1 acres, had not been irrigated since 1987, and probably longer.<sup>10</sup>

The windbreak trees on the property are irrigated and occupy an area of about 2.4 acres.<sup>11</sup> Mr. Boyd testified that the ten acres located in the southeast portion to the property were irrigated in 1987.<sup>12</sup> The power records show that 27,990 kilowatt-hours (kwh) were consumed in 1987.<sup>13</sup> The quantity of water pumped from the Boyd well, based on this power consumption, is estimated to be 94 AF,<sup>14</sup> which is enough water to irrigate about 18.8 acres. This compares favorably with the evidence and testimony that a total of 18.5 total acres, consisting of 2.4 acres of windbreak trees, 6.1 acres of fruit trees and grapevines, and ten acres in the southeast portion of the property, were irrigated in 1987.

The maximum amount of power consumed over the period of time from 1988 through 1992 is 14,100 kwh in 1991.<sup>13</sup> This correlates to about 47 AF of water pumped from the Boyd well, sufficient to

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<sup>8</sup>Exhibit No. 17, Public Administrative Hearing before the State Engineer, May 16-18, 1994 and Transcript pp. 149-151.

<sup>9</sup>Transcript pp. 151-154 and Exhibit Nos. 19, 20, and 21, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>10</sup>Transcript pp. 155-156, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>11</sup>Transcript p. 234-236, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>12</sup>Transcript p. 241, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>13</sup>Exhibit No. 146, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>14</sup>This estimate is based on a pump and electric motor efficiency of 60% and a total head of 175 feet, estimated from the well log for the Boyd well.

irrigate about nine acres. This is consistent with the evidence and testimony that the windbreak trees (2.4 acres) and the fruit trees and grapevines (6.1 acres) were irrigated during this time period. The State Engineer finds that 8.5 acres of land on the Boyd property were irrigated during the period of time from 1988 through 1992. The State Engineer further finds that Dr. Bement's testimony, the aerial and ground photographs and the power records represent clear and convincing evidence that the remainder of the certificated acreage, amounting to 29.5 acres, was not irrigated from 1988 through 1992.

## II.

The pumpage inventory taken in June, 1993, shows that eight acres were irrigated and the inventory of October, 1993, shows that all 38 acres were being irrigated.<sup>15</sup> The thirty additional acres were planted in oats.<sup>16</sup> Mr. Boyd testified that the land was cleared and the wheel lines prepared in June, 1993.<sup>17</sup> Following this work, the irrigation began, but it is not clear from the record on which date the irrigation began.<sup>18</sup> Receipts for in excess of \$13,000 for wheel lines, water pipe, a booster pump, and related parts, are dated May and June, 1993.<sup>19</sup> Some of this equipment was observed in the photograph taken by personnel from the Division of Water Resources in June, 1993.<sup>20</sup> The new wheel lines were necessary because the old flood irrigation system,

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<sup>15</sup>Transcript p. 70, Public Administrative Hearing before the State Engineer, February 7, 1996 and Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

<sup>16</sup>Photograph No. 10 in Exhibit No. 146, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>17</sup>Transcript pp. 241-242, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>18</sup>Transcript p. 242, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>19</sup>Exhibit No. 146, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>20</sup>Exhibit No. 147 and Transcript pp. 241-242, Public Administrative Hearing before the State Engineer, February 7, 1996.

constructed in 1917, could no longer deliver water to the entire place of use.<sup>21</sup> The State Engineer finds that the initiation of the irrigation of the entire place of use of Permit 22233, Certificate 7532 began in May, 1993, and continued throughout the summer and fall, when the irrigation of the entire 38 acres was observed.

III.

The petition requesting the State Engineer to declare this water right forfeited was filed on March 17, 1993.<sup>22</sup> A certified letter was sent to the Boyds on June 16, 1993, giving notice that the forfeiture proceeding had begun. This letter was received on July 2, 1993.<sup>23</sup> The State Engineer finds that the initiation of the irrigation of the entire place of use began prior to receipt of notice that the forfeiture process had begun.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.<sup>24</sup>

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.<sup>25</sup>

III.

Because the law disfavors a forfeiture, there must be clear and convincing evidence of the statutory period of non-use, for the

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<sup>21</sup>Transcript p. 233, Public Administrative Hearing before the State Engineer, February 7, 1996.

<sup>22</sup>Exhibit Nos. 1 and 2, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

<sup>23</sup>File No. 22233, Official Records in the Office of the State Engineer. See the Postal Service return receipt card dated July 2, 1993.

<sup>24</sup> NRS Chapters 533 and 534.

<sup>25</sup>NRS 534.090.

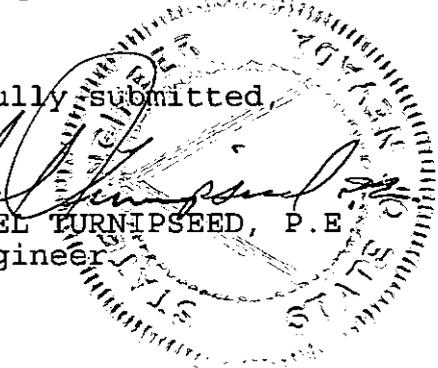
State Engineer to declare a forfeiture.<sup>26</sup> Under the rule adopted by the Nevada Supreme Court, substantial use of water rights after the statutory period of non-use "cures" claims to forfeiture so long as no claim or proceeding of forfeiture has begun.<sup>26</sup> In this case, the exact date of the actual application of water to the entire 38 acres is not known but it is known to have occurred immediately following the purchase and installation of the irrigation equipment and the preparation of the land, which did begin prior to the receipt of the notice that the forfeiture proceeding had begun. Because irrigation cannot occur without the preparation of the land and the installation of the irrigation equipment, the State Engineer concludes that these activities are necessary elements of the irrigation process. The State Engineer further concludes that the irrigation process was initiated prior to the receipt of notice that the forfeiture proceeding had begun. Therefore, the Boyds "cured" the forfeiture.

**RULING**

The right to beneficially use the water under Permit 22233, Certificate 7532 is not declared forfeited on the grounds that the water right holder cured the forfeiture prior to the notice of the forfeiture proceeding.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer



RMT/JCP/pm

Dated this 3rd day of  
May, 1996.

<sup>26</sup> Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).