

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

IN THE MATTER OF FORFEITURE OF WATER)
RIGHTS UNDER PERMIT 23840, CERTIFICATES)
8548 AND 8549, APPROPRIATED FROM AN)
UNDERGROUND SOURCE, PAHRUMP VALLEY)
ARTESIAN GROUNDWATER BASIN (162), NYE)
COUNTY, NEVADA.)

RULING

4369

GENERAL

I.

Application 23840 was filed by Earl Burson on April 28, 1967, to appropriate the underground waters of the Pahrump Valley Artesian Groundwater Basin for irrigation and domestic purposes within the NE $\frac{1}{4}$ NW $\frac{1}{4}$; the NW $\frac{1}{4}$ NW $\frac{1}{4}$; the SW $\frac{1}{4}$ NW $\frac{1}{4}$; the SE $\frac{1}{4}$ NW $\frac{1}{4}$; the NE $\frac{1}{4}$ SW $\frac{1}{4}$; the NW $\frac{1}{4}$ SW $\frac{1}{4}$; the SW $\frac{1}{4}$ SW $\frac{1}{4}$; the SE $\frac{1}{4}$ SW $\frac{1}{4}$ all in Section 12, T.21 S., R.53 E., M.D.B.&M. The point of diversion is described as being located within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12. A permit was issued on Application 23840 on February 8, 1968, for 2.7 cubic feet per second (cfs) of water.¹ After Proof of Beneficial Use of the waters as allowed under the permit was filed in the Office of the State Engineer, on July 29, 1975, the State Engineer issued Certificate 8548 allowing for the diversion of 0.44 cfs of water, not to exceed of total duty of 92.4 acre-feet annually (afa), for the irrigation of 18.48 acres within the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.² On July 29, 1975, the State Engineer also issued Certificate 8549 allowing for the diversion of 0.44 cfs of water, not to exceed of total duty of 95.0 acre-feet annually (afa), for the irrigation of 19.00 acres within the N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.³

¹ File No. 23840, official records in the Office of the State Engineer.

²Exhibit Nos. 6 and 7, public administrative hearing before the State Engineer, June 5, 1990. (Hereinafter Exhibit No.6.)

³Exhibit Nos. 6 and 7.

II.

Documents were submitted to the Office of the State Engineer which transferred portions of the ownership of Permit 23840, in the records of the Office of the State Engineer, from the original permittee through several persons to the present owners of record.¹

On July 1, 1969, the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12, a 20-acre parcel, together with an irrigation well and a 1.35 cfs portion of the water permitted for development under Permit 23840, was conveyed by Mr. Burson to William F. Allison and Donna L. Allison as joint tenants.¹ This is the 18.48 acres certificated irrigable on July 29, 1975, under Certificate 8548 allowing for the diversion of 0.44 cfs of water, not to exceed of total duty of 92.4 acre-feet annually (afa), for the irrigation of 18.48 acres within the S $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.

On February 10, 1977, Earl Burson by quitclaim deed conveyed to G. Patrick Kennedy and Donna Kennedy a 0.212 cfs portion, not to exceed 45 afa, of the water certificated under Permit 23840, Certificate 8549, for 9 acres, in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.¹ This is the 19.00 acres certificated irrigable on July 29, 1975, under Certificate 8549 allowing for the diversion of 0.44 cfs of water, not to exceed of total duty of 95.0 acre-feet annually (afa), for the irrigation of 19.00 acres within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12. On June 9, 1980, G. Patrick Kennedy and Donna Kennedy conveyed to John E. Thein, Jr., and Theresa Ann Thein, 0.212 cfs, not to exceed 45 afa, a portion of the water certificated under Permit 23840, for the 9 acres, in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 12.¹

The Thein portion of the water rights, 45 acre-feet appurtenant to 9 acres more or less in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ was declared forfeited on December 27, 1989.⁴

⁴State Engineer's Ruling No. 3661, dated December 27, 1989, official records in the Office of the State Engineer.

The Nye County Assessor's Office indicated the owners of record of parcels of land located within the place of use identified under the permit are Ernest Stanley Lambolt (APN 4455103) (this is the land remaining in the name of Burson, at least in the records of the Office of the State Engineer, the NW¼ NE¼ SW¼), and William F. and Donna Allison (APN 4455105) (the S¼ NE¼ SW¼).⁵

III.

The State Engineer initially described and designated a portion of the Pahrump Valley Artesian Groundwater Basin on March 11, 1941.⁶ The State Engineer subsequently extended the boundaries of the designated area of the Pahrump Valley Artesian Groundwater Basin on January 15, 1948,⁷ and on January 23, 1953.⁸

On October 26, 1987, the State Engineer issued Order 955 wherein he found that the groundwater levels in the Pahrump Valley were declining and ordered that all applications filed to appropriate water from the Pahrump Valley Artesian Groundwater Basin in the east side of the basin on the Pahrump and Manse Fans would be denied; all applications for all uses except small commercial uses on the valley floor would be denied; and that all applications filed to appropriate water for irrigation purposes on lands in Pahrump Valley that have had a certificated water right forfeited where the forfeiture occurred prior to January 1, 1988, would be considered for approval on an individual basis; however, such applications would only be considered if they had been filed

⁵Exhibit No. 6.

⁶State Engineer's Order No. 176, dated March 11, 1941, official records in the Office of the State Engineer.

⁷State Engineer's Order No. 193, dated January 15, 1948, official records in the Office of the State Engineer.

⁸State Engineer's Order No. 205, dated January 23, 1953, official records in the Office of the State Engineer.

within 60 days of the date the water right had been declared forfeited.

IV.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the forfeiture of Permit 23840, Certificates 8548 and 8549, on June 5, 1990, at Pahrump, Nevada, before representatives of the Office of the State Engineer.⁹

FINDINGS OF FACT

I.

The State Engineer finds that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.¹⁰ After a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to use beneficially all, or any part of, the underground water of the State of Nevada for the purpose for which the right is acquired or claimed, works a forfeiture of the right to the use of that water to the extent of the nonuse.¹¹

II.

The State Engineer finds that the permittee did not show at the time and place scheduled for the hearing on June 5, 1990; therefore, the State Engineer proceeded with the case at that time.¹² Testimony and evidence presented at the administrative hearing showed that each year from 1982 through 1988 employees of the Office of the State Engineer physically visited the Pahrump

⁹Transcript, public administrative hearing before the State Engineer, June 5, 1990. (Hereinafter Transcript, p. ___.)

¹⁰NRS 533.410.

¹¹NRS 534.090.

¹²Transcript, pp. 24-25.

Valley Artesian Groundwater Basin and conducted what are known as ground water pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificates 8548 and 8549.¹³ For the years 1982 through 1987 the pumpage inventories indicated no water had been used for irrigation within that portion of the certificate's place of use identified as the NE¼ SW¼ of said Section 12. No entry was made for 1988.

An employee of the Office of the State Engineer testified that an on-site inspection of the area showed a well as visible; however, there were no motors, pumps or any type of equipment attached to it and none had been there in the eight years before the hearing.¹⁴ Nor were there any indications of irrigation on the ground itself.

On June 6, 1990, at the request of Mr. Allison, the hearing on the possible forfeiture of Permit 23840, Certificates 8548 and 8549 was reopened.¹⁵ Mr. Allison testified at the hearing that all the State Engineer's information was correct and that Mr. Allison had not beneficially used the water right during the 1982 through 1987 time frame.¹⁶

The State Engineer finds that from the on-site inspection each year, as documented in the pumpage inventory of the groundwater basin, and the testimony and evidence, as confirmed by the permittee, that no irrigation took place within that portion of the certificate's place of use identified as the S½ NE¼ SW¼, nor within the NW ¼ NE¼ SW¼ both in Section 12, T. 21 S., R. 53 E., M.D.B. & M.

¹³Exhibit No. 6.

¹⁴Transcript, p. 25.

¹⁵Transcript, pp. 45-48, public administrative hearing before the State Engineer, June 6, 1990.

¹⁶Transcript, p. 47.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.¹⁷

II.

Forfeiture must be demonstrated by clear and convincing evidence. Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.¹⁸ To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.¹⁹

The State Engineer concludes clear and convincing evidence showing non-use of all the water rights as allow under Permit 23840, Certificates 8548 and 8549, for five successive years is found in the testimony and evidence regarding the pumpage inventories, visits to Pahrump Valley Artesian Groundwater Basin, and testimony of the water right holder, resulting in the forfeiture of the 92.4 acre feet under Certificate 8548 and the remaining 50 acre feet of water rights held under Certificate 8549, Permit 23840.

RULING

The right to beneficially use 92.4 acre feet under Permit 23840, Certificate 8548, and the right to beneficially use the remaining 50 acre feet under Permit 23840, Certificate 8549 are hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to

¹⁷NRS Chapters 533 and 534.

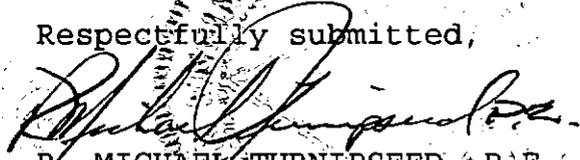
¹⁸1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

¹⁹Id. at 239.

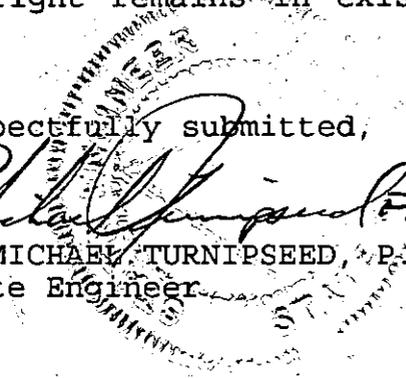
Ruling
Page 7

beneficially use the water for the purposes for which the subject water right was acquired. No water right remains in existence under either Certificate 8548 or 8549.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P. E.
State Engineer



RMT/SJT/bk

Dated this 5th day of
July, 1996.