

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

IN THE MATTER OF FORFEITURE OF WATER )  
RIGHTS UNDER PERMIT 29327, CERTIFICATE )  
8725, APPROPRIATED FROM AN UNDERGROUND )  
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND- )  
WATER BASIN (162), NYE COUNTY, NEVADA. )

RULING

# 4389

GENERAL

I.

Application 29327 was filed by Charles W. Connely on April 3, 1975, to change the point of diversion of the underground waters of the Pahrump Valley Artesian Groundwater Basin previously appropriated under Permit 26787 for irrigation and domestic purposes on 8.3 acres within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, T.20 S., R.53 E., M.D.B.&M. The point of diversion is described as being located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 16. A permit was issued under Application 29327 on July 14, 1975, for 0.2 cubic feet per second (cfs) of water.<sup>1</sup> After Proof of Beneficial Use of the waters as allowed under the permit was filed in the Office of the State Engineer, on February 10, 1976, the State Engineer issued Certificate 8725 allowing for the diversion of 0.18 cfs of water, not to exceed 41.5 acre-feet annually (afa), for the irrigation of 8.3 acres within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 16.<sup>2</sup>

II.

Documents were submitted to the Office of the State Engineer which assigned ownership of Permit 29327, Certificate 8725, to Kaye E. Slack.<sup>1</sup>

III.

The State Engineer initially described and designated a portion of the Pahrump Valley Artesian Groundwater Basin on March

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<sup>1</sup>File No. 29327, official records in the Office of the State Engineer.

<sup>2</sup>Exhibit No. 10, public administrative hearing before the State Engineer, June 7, 1990. (Hereinafter "Exhibit No. 10".)

11, 1941.<sup>3</sup> The State Engineer subsequently extended the boundaries of the designated area of the Pahrump Valley Artesian Groundwater Basin on January 15, 1948,<sup>4</sup> and on January 23, 1953.<sup>5</sup>

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 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 on June 7, 1990, with regard to the forfeiture of Permit 29327, Certificate 8725, at Pahrump, Nevada, before representatives of the Office of the State Engineer.<sup>6</sup>

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<sup>3</sup>State Engineer's Order No. 176, dated March 11, 1941, official records in the Office of the State Engineer.

<sup>4</sup>State Engineer's Order No. 193, dated January 15, 1948, official records in the Office of the State Engineer.

<sup>5</sup>State Engineer's Order No. 205, dated January 23, 1953, official records in the Office of the State Engineer.

<sup>6</sup>Transcript, public administrative hearing before the State Engineer, June 7, 1990. (Hereinafter "Transcript".)

FINDINGS OF FACT

I.

Testimony and evidence presented at the administrative hearing showed that each year from 1982 through 1987 employees of the Office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as groundwater pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 8725.<sup>7</sup> For the years 1982 through 1987 the pumpage inventories indicated no water had been used for irrigation within the certificated place of use.

Testimony further indicated that the water right was passed from the permittee to his ex-wife upon divorce.<sup>8</sup> The records of the State Engineer indicate that the property was conveyed from the permittee to Atha Connely in 1973.<sup>1</sup> Mrs. Connely (now Mrs. Young) testified that "it has been used for beneficial use such as fruit trees and watering livestock since I have owned it, but my pump went out and I didn't want to spend a whole bunch of money replacing it, you know and buying seed and stuff."<sup>9</sup> Mrs. Young also submitted a handwritten statement from Alvia Bells which provided "I observed Atha Reed farming her 10 acres in 1984 as I gave her 40 1½ tubes to farm this land." The State Engineer finds that Mr. Bells' statement did not have a notarized signature, was not in the form of a sworn affidavit, nor was Mr. Bells present for cross-examination; thus, the written statement does not carry much weight. The State Engineer further finds that Mrs. Young's non-specific statement that water was used does not carry much

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<sup>7</sup>State's Exhibit No. 10.

<sup>8</sup>Transcript, p. 62.

<sup>9</sup>Transcript, p. 63.

weight as it does not provide any information as to when water was used, if it was between 1982 through 1987, or the quantity of water used.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>10</sup>

#### II.

The State Engineer concludes 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> To establish a fact by clear and convincing evidence a party must persuade the

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<sup>10</sup>NRS Chapters 533 and 534.

<sup>11</sup>NRS 533.410.

<sup>12</sup>NRS 534.090.

<sup>13</sup>1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

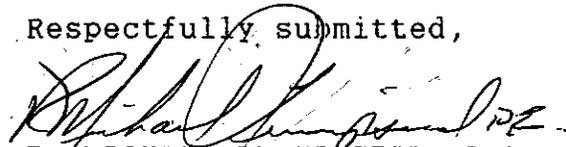
trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.<sup>14</sup>

The State Engineer concludes clear and convincing evidence showing non-use of the water right as allowed under Permit 29327, Certificate 8725, for five successive years is found in the testimony and evidence regarding the pumpage inventories, visits to Pahrump Valley Artesian Groundwater Basin, failure of the permittee to present sufficient evidence of any water use, resulting in the forfeiture of 0.18 cfs of water, 41.5 afa, for the irrigation of 8.3 acres within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 16.

RULING

The right to beneficially use 0.18 cfs, 41.5 acre feet of water under Permit 29327, Certificate 8725, appurtenant to 8.3 acres within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, T.20 S., R.53 E., M.D.B.&M. is hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to beneficially use the water for the purposes for which the subject water right was acquired. No water right remains in existence under Certificate 8725.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/ab

Dated this 2nd day of  
August, 1996.

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<sup>14</sup>Id. at 239.