

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 17348, CERTIFICATE)
5877 FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

4399

GENERAL

I.

Application 17348 was filed by Joseph S. Marriott on August 8, 1957, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 17348 was approved on December 31, 1957, for 3.5 cubic foot per second (cfs) for irrigation and domestic use. Certificate 5877 under Permit 17348 was issued on March 23, 1965, for 0.313 cfs of water and not to exceed 200.0 acre feet annually (AFA) for the irrigation of 40 acres of land, located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, T.16S., R.49E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 14. The owners of record are William H. Hernstadt, Bell Telephone of Nevada, and Lisle K. Lowe.¹

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.² Permit 17348, Certificate 5877 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 foundation for the evidence filed in support of the petition.³

¹ File No. 17348, official records in the office of the State Engineer.

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

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

On May 1, 1996, a hearing was held to consider the possible forfeiture of Permit 17348, Certificate 5877.⁴ The petitioner, ARI, did not appear at the hearing.⁵

IV.

At the hearing to consider the forfeiture of Permit 17348, Certificate 5877, administrative notice was taken of record developed at the foundation hearing, May 1994, and of the record developed at all the previous hearings on the individual water rights.⁶ Objections to the taking of administrative notice of Exhibit No's. 17, 18, 19, 20, 21, 22, and 27 were noted.⁵

V.

The place of use of Permit 17348, Certificate 5877 is divided into five parcels, identified, together with the current owners, as follows:⁷

<u>Assessor's Parcel Number</u>	<u>Owner(s)</u>
19-571-01	Lisle K. Lowe
19-571-02	Nevada Bell ⁸
19-571-03	Charlotte Lane
19-571-06	Lisle K. Lowe
19-571-07	Richard and Charlotte Hill

FINDINGS OF FACT

I.

At the hearing, Counsel for the water right holders moved to dismiss the petition regarding Permit 17348, Certificate 5877, on

⁴ Exhibit No. 174, Public Administrative Hearing before the State Engineer May 1, 1996.

⁵ Transcript p. 6, Public Administrative Hearing before the State Engineer, May 1, 1996.

⁶ Transcript pp. 7-11, Public Administrative Hearing before the State Engineer May 1, 1996.

⁷ Exhibit No. 182, Public Administrative Hearing before the State Engineer, May 1, 1996.

⁸ Nevada Bell is the holder of Permit 46218, Certificate 12399 for commercial use on APN 19-571-02. This Ruling in no way affects the status of this commercial water right.

the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 17348, Certificate 5877.⁹ ARI's failure to appear was the basis for the objections to the taking of administrative notice of the exhibits enumerated above.

The State Engineer has the statutory authority to declare a forfeiture of water rights in the absence of a third party petition.¹⁰ The evidence submitted at the foundation hearing is on the record, was subject to cross examination, and stands on its own, even in the absence of expert testimony that was provided in past hearings by ARI's witnesses. The State Engineer finds that where evidence of a possible forfeiture of water rights exists, it must be pursued, regardless of who appears or does not appear to support such evidence. The State Engineer further finds that the hearing rightfully proceeded. The motion to dismiss is denied.

II.

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 1991 shows that no water was used for irrigation on any of the 40 acres of land allowed under Permit 17348, Certificate 5877.¹¹ The testimony of the individuals who performed the

⁹Transcript pp. 11-12, Public Administrative Hearing before the State Engineer, May 1, 1996.

¹⁰NRS 534.090.

¹¹Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994.

inventories for those years, except 1990,¹² confirmed that no irrigation occurred during those years.¹³

According to the inventory, approximately 11 acres of land, located within the place of use of Permit 17348, Certificate 5877, were irrigated in 1992 and 1993.¹⁴ Mr. Lisle Lowe, owner of APN 19-571-01 (one acre) and 19-571-06 (19.4 acres), testified that he irrigated 12 acres in 1992 and 1993 on a portion of the 19.4 acre parcel (APN 19-571-06) and planted 170 trees for a windbreak.¹⁵ Mr. Lowe lives on the one acre parcel (APN 19-571-01) on which the well for the irrigation and domestic uses is located.¹⁶ Mr. Lowe has planted about 50 windbreak trees, 20 pistachio trees, and other landscaping on this one acre parcel.¹⁷ The State Engineer finds that 15 acres of land¹⁸ within the place of use of Permit 17348, Certificate 5877 were irrigated in 1992 and 1993. The State Engineer further finds that the point of diversion for this irrigation is an unpermitted well located on APN 19-571-01.

¹²The individual who performed the inventory for 1990, Mr. Bill Quinn, is no longer with the Nevada Division of Water Resources. Questions directed to Mr. Quinn could have been answered in writing if they were submitted prior to the hearing, in accordance with the Notice of Hearing. No questions for Mr. Quinn were submitted.

¹³Transcript pp. 16-17 and 33-34; Public Administrative Hearing before the State Engineer, May 1, 1996.

¹⁴Transcript pp. 17, 22-24, 33-34; Public Administrative Hearing before the State Engineer, May 1, 1996, and Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 16-18, 1994. According to the inventory, the other 25 acres were not irrigated in 1992 and 1993.

¹⁵Transcript pp. 55-58, Public Administrative Hearing before the State Engineer, May 1, 1996.

¹⁶Transcript pp. 55-58, Public Administrative Hearing before the State Engineer, May 1, 1996. The certificated well is located on APN 19-571-03.

¹⁷Transcript pp. 59-60, Public Administrative Hearing before the State Engineer, May 1, 1996.

¹⁸The irrigated land consists of 12 acres on APN 19-571-06, two acres for the windbreak trees on this parcel, and one acre on APN 19-571-01.

The remaining 25 acres within the place of use of Permit 17348, Certificate 5877, that were not irrigated, are appurtenant to APN 19-571-02, 19-571-03, 19-571-07, and a portion of Mr. Lowe's property, APN 19-571-06.¹⁹ The State Engineer finds that there is clear and convincing evidence that this land was not irrigated during the alleged period of forfeiture, 1985 through 1992.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.²⁰

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.²¹

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.²² 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.²²

IV.

There is clear and convincing evidence that 25 acres, a portion of the place of use of Permit 17348, Certificate 5877, were not irrigated for a period of time that exceeds five years. This land is identified as APN 19-571-02, 19-571-03, 19-571-07, and a portion of APN 19-571-06. The State Engineer concludes that a

¹⁹ Exhibit No. 182, Public Administrative Hearing before the State Engineer, May 1, 1996.

²⁰ NRS Chapters 533 and 534.

²¹ NRS 534.090.

²² Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

portion of Permit 17348, Certificate 5877, amounting to 125 AFA, is forfeited.

v.

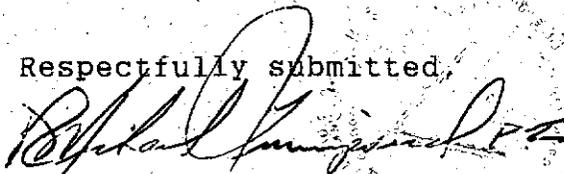
The remaining 15 acres, located within APN 19-571-01 and a portion of APN 19-571-06 was irrigated in 1992 and 1993. The State Engineer concludes that any forfeiture of water rights appurtenant to these 15 acres that may have occurred before 1992, was cured, and, therefore, is not declared forfeited.

The well that serves as the source of water for the 15 acres is not the certificated well. The State Engineer concludes that Mr. Lowe must file an application to change the point of diversion that shows the location of the current well. In this manner, Mr. Lowe can describe the land located within APN 19-571-06 that is being irrigated.

RULING

The right to beneficially use a portion of the water appropriated under Permit 17348, Certificate 5877, amounting to 125 AFA, is hereby declared forfeited on the grounds that the water was not beneficially used for a period of time that exceeds five years. The remaining 75 AFA is not declared forfeited, and Mr. Lowe must file an application to change the point of diversion within 120 days of the date of this Ruling or cease the use of water from the unpermitted well.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P. E.
State Engineer

RMT/JCP/ab

Dated this 8th day of
August, 1996.