

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 17340, CERTIFICATE)
5865 FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

4400

GENERAL

I.

Application 17340 was filed by Melvyn M. Stephens on August 1, 1957, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 17340 was approved on January 9, 1958, for 3.0 cubic foot per second (cfs) for irrigation and domestic use. Certificate 5865 under Permit 17430 was issued on March 16, 1965, for 0.5 cfs of water and not to exceed 139.5 acre feet annually (AFA) for the irrigation of 27.9 acres of land, located within Lots 1 (NE $\frac{1}{4}$ SE $\frac{1}{4}$) and 8 (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 32, T.16S., R.49E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 32. The owners of record are Lawrence and Linda Bray.¹

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.² Permit 17340, Certificate 5865 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. 17340, 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 17340, Certificate 5865.⁴ The petitioner, ARI, did not appear at the hearing.⁵

IV.

At the hearing to consider the forfeiture of Permit 17340, Certificate 5865, 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

FINDINGS OF FACT

I.

At the hearing, Counsel for the water right holders moved to dismiss the petition regarding Permit 17340, Certificate 5865, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 17430, Certificate 5865.⁷ 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.⁸ The evidence submitted at the foundation hearing is on the record and 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

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

⁸ NRS 534.090.

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 1989 and 1991 through 1992 shows that no water was used for irrigation on any of the 27.9 acres of land shown as the place of use under Permit 17340, Certificate 5865.⁹ The testimony of the individuals who performed the inventories for those years, except 1990,¹⁰ confirmed that no irrigation occurred during those years.¹¹ The inventory for 1990 shows that the entire 27.9 acres were irrigated.⁹ The individuals who did the inventories for 1989, 1990, 1991, and 1992 reported that 35 acres located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ (Lot 7) of Section 32, T.16S., R.49E., M.D.B.&M., the field immediately to the west of the certificated place of use, were irrigated in those years but there was no permit for the irrigation of Lot 7.¹²

Mr. Bray testified that he first thought that the certificated place of use was the field located in Lots 2 and 7 of said Section

⁹Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994.

¹⁰The 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.

¹¹Transcript pp. 15-16 and 32-33, Public Administrative Hearing before the State Engineer, May 1, 1996.

¹²Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 16, 17, and 18, 1996, and Transcript pp. 16 and 32-33, Public Administrative Hearing before the State Engineer, May 1, 1996.

32.¹³ When he learned that he was irrigating a non-water righted field, he filed Application 61205, seeking to change the point of diversion and place of use of Permit 17340, Certificate 5865.¹⁴ This does not explain the entry in the 1990 inventory that all 27.9 acres under Permit 17340, Certificate 5865 were irrigated. It is possible that this was entered in error, but the point remains unresolved. Because of this, the State Engineer finds that there is not clear and convincing evidence of the statutory period of non-use of water under Permit 17430, Certificate 5865. The State Engineer further finds that Mr. Bray attempted to remedy the illegal use by filing Application 61205.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.¹⁵

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.¹⁶

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.¹⁷

IV.

According to the pumpage inventory for Amargosa Valley, all 27.9 certificated acres under Permit 17340, Certificate 5865 were

¹³ Transcript pp. 49-50, Public Administrative Hearing before the State Engineer, May 1, 1996.

¹⁴ Transcript pp. 52-53, Public Administrative Hearing before the State Engineer, May 1, 1996.

¹⁵ NRS Chapters 533 and 534.

¹⁶ NRS 534.090.

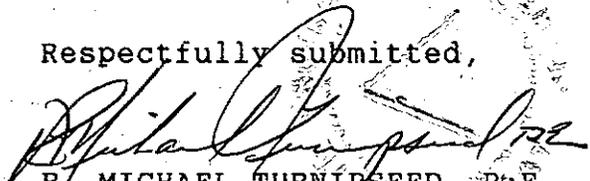
¹⁷ Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

irrigated in 1990. Whether or not this entry in the 1990 inventory is erroneous cannot be confirmed. Therefore, the State Engineer concludes that there is not clear and convincing evidence of the non-use of water under Permit 17340, Certificate 5865 for the statutory period of time. The State Engineer further concludes that the water rights under Permit 17430, Certificate 5865 cannot be declared forfeited.

RULING

The right to beneficially use the water appropriated under Permit 17340, Certificate 5865 is not declared forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 8th day of
August, 1996.