

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 19536, CERTIFICATE)
5994 AND PERMIT 23471, CERTIFICATE 7775 FROM)
AN UNDERGROUND SOURCE, PAHRUMP VALLEY)
GROUNDWATER BASIN (162), NYE COUNTY, NEVADA.)

RULING

4481

GENERAL

I.

Application 19536 was filed by James A. Hail on February 6, 1961, to appropriate the underground waters of the Pahrump Valley Groundwater Basin, Nye County, Nevada. Permit 19536 was approved on April 16, 1962, for 2.7 cubic feet per second (cfs) for irrigation and domestic use. Certificate 5994 under Permit 19536 was issued on March 14, 1966, for 1.8 cfs of water not to exceed 703.4 acre feet annually (AFA) for the irrigation of 140.68 acres of land, located within the SE $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12.¹

II.

Application 23471 was filed by James A. Hail on November 1, 1966, to appropriate the underground waters of the Pahrump Valley Groundwater Basin, Nye County, Nevada. Permit 23471 was approved on May 1, 1967, for 2.0 cfs for irrigation and domestic use. Certificate 7775 under Permit 23471 was issued on March 6, 1972, for 1.25 cfs of water not to exceed 686 AFA for the irrigation of 137.2 acres of land located within the SE $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. The point of diversion is located within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12.²

¹ File No. 19536, official records in the office of the State Engineer.

² File No. 23471, official records in the office of the State Engineer. The place of use of Permit 19536, Certificate 5994 and that of Permit 23471, Certificate 7775 cover the same ground located within the SE $\frac{1}{4}$ of Section 12, T.21S., R.53E., M.D.B.&M. These two water rights are considered to be supplemental. The discrepancy in the acreages can be attributed to differences in the surveys.

Permit 23471, Certificate 7775 was issued to be supplemental to the earlier Permit 19536, Certificate 5994 described above. This supplemental water right provides a second point of diversion to irrigate the same land.

III.

A third supplemental water right was obtained for a portion of the SE $\frac{1}{4}$ of said Section 12. More specifically, Permit 24689, Certificate 8143 was issued for the irrigation of 37.6 acres located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12. In State Engineer's Ruling No. 3795, dated April 15, 1991, the State Engineer found that all but 10 acres of the 37.6 acres under Permit 24689, Certificate 8143 was not irrigated for a period of time exceeding five years. This unused portion of the water right, amounting to 138 AFA appurtenant to 27.6 acres, was declared forfeited. This water right is not a part of the forfeiture action being considered in this ruling.

IV.

On September 15, 1992, a hearing was held to consider the possible forfeiture of Permit 19536, Certificate 5994 and Permit 23471, Certificate 7775.³

FINDINGS OF FACT

I.

At the hearing, Counsel for Mr. and Mrs. Lioubas, who presently own the property located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 12, T.21S., R.53E., M.D.B.&M., proposed to stipulate that water was not used on all but 10 acres of this property from 1983 through 1987, consistent with State Engineer's Ruling No. 3795.⁴ The proposed stipulation is contingent upon the approval of an application filed to replace the forfeited portion pursuant to State Engineer's Order No. 955.

³ Exhibit No. 1, Public Administrative Hearing before the State Engineer September 15, 1992.

⁴ Transcript pp. 53-55, Public Administrative Hearing before the State Engineer, September 15, 1992.

The pumpage inventories show that only 10 acres within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12 were irrigated during the years 1983 through 1988.⁵ The State Engineer finds that all but 10 acres within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12 was not irrigated for a period of time that exceeds five years. The unused portion of Permit 19536, Certificate 5994, within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12, amounts to 111.05 AFA appurtenant to 22.21 acres. The unused portion of Permit 23471, Certificate 7775, within this same 40 acre subdivision of land, amounts to 109.5 AFA appurtenant to 21.9 acres. The State Engineer further finds that the proposed stipulation meets the provisions of Order No. 955.

II.

No irrigation occurred from 1983 through 1988 on the 38.47 acres within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12, according to the pumpage inventories and the testimony of the person who performed the inventories.⁶ There is no evidence of use of water on this land during this time period. The State Engineer finds that the pumpage inventories and the eye-witness testimony of the person who performed the inventories represent clear and convincing evidence that the 38.47 acres were not irrigated, under portions of Permit 19536, Certificate 5994 and Permit 23471, Certificate 7775 during the years 1983 through 1988.

III.

The pumpage inventory indicates that 60.97 acres located in the N $\frac{1}{2}$ SE $\frac{1}{4}$ of said Section 12 were irrigated under portions of Permit 19536, Certificate 5994 and Permit 23471, Certificate 7775 during the alleged forfeiture period.⁷ More specifically, the irrigated land is located within Assessor Parcel Number (APN) 44-531-01, owned by John Batdorf. The remaining 9.03 acres were not

⁵Exhibit No. 9, Public Administrative Hearing before the State Engineer, September 15, 1992.

⁶Transcript pp. 10-13 and 26 and Exhibit No. 9, Public Administrative Hearing before the State Engineer, September 15, 1992.

⁷Exhibit No. 9, Public Administrative Hearing before the State Engineer, September 15, 1992.

irrigated during the years 1983 through 1988.⁸ The 9.03 acres are located within the W $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12, adjacent to the Batdorf property. The State Engineer finds that the pumpage inventories and the eye-witness testimony of the person who performed the inventories represent clear and convincing evidence that this 9.03 acres was not irrigated during the years 1983 through 1988.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.⁹

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.¹⁰

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.¹¹ The State Engineer concludes that there is clear and convincing evidence that 38.47 acres located within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12 and 9.03 acres located within the W $\frac{1}{2}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12, have not been irrigated for a period of time that exceeds five years. This results in a forfeiture of a total of 237.5 AFA. The State Engineer further concludes that 304.85 AFA appurtenant to 60.97 acres of land within the Batdorf property (APN 44-531-01) is not forfeited.

⁸ Transcript pp. 10-12 and 24 and Exhibit No. 9, Public Administrative Hearing before the State Engineer, September 15, 1992.

⁹ NRS 533.090.

¹⁰ NRS 534.090.

¹¹ Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

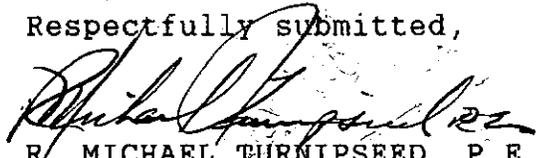
IV.

The State Engineer accepts the stipulation regarding the Lioubas property (SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 12) and concludes that 22.21 acres under Permit 19536, Certificate 5994 and 21.9 acres under Permit 23471, Certificate 7775 were not irrigated for the statutory period of time. This results in a forfeiture of 111.05 AFA and 109.5 AFA, respectively. The State Engineer further concludes that 50 AFA appurtenant to 10 acres of the Lioubas property are not forfeited.

RULING

That portion of Permit 19536, Certificate 5994 amounting to 348.55 AFA, appurtenant to 69.71 acres and that portion of Permit 23471, Certificate 7775 amounting to 347 AFA appurtenant to 69.4 acres are hereby declared forfeited on the grounds that the land has not been irrigated for a continuous period of time exceeding five years. The Batdorf water right and 50 AFA of the Lioubas water right described as portions of Permit 19536, Certificate 5994 amounting to 354.85 AFA appurtenant to 70.97 acres and portions of Permit 23471, Certificate 7775 amounting to 339 AFA appurtenant to 67.8 acres are not declared forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 20th day of
December, 1996.