

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF )  
WATER RIGHTS UNDER PERMIT 15410, CERTIFICATE )  
5157, PERMIT 18222, CERTIFICATE 6610, PERMIT )  
19916, CERTIFICATE 8120, PERMIT 19917, )  
CERTIFICATE 8119, AND PERMIT 22761, )  
CERTIFICATE 8118 FROM AN UNDERGROUND SOURCE, )  
AMARGOSA DESERT GROUNDWATER BASIN (230), NYE )  
COUNTY, NEVADA. )

RULING  
**# 4491**

GENERAL

I.

Application 15410 was filed by Wm. J. Moore, Jr. on November 27, 1953, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 15410 was approved on April 6, 1954, for 2.5 cubic foot per second (cfs) for irrigation and domestic use. Certificate 5157 under Permit 15410 was issued on August 4, 1961, for 2.5 cfs of water not to exceed 800 acre feet annually (AFA) for the irrigation of 160 acres of land, located within the NE $\frac{1}{4}$  of Section 25, T.16S., R.48E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 25.<sup>1</sup>

Application 18222 was filed by H.H. Records on August 10, 1959, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 18222 was approved on April 14, 1960, for 5.4 cfs for irrigation and domestic use. Certificate 6610 under Permit 18222 was issued on March 29, 1968, for 5.4 cfs of water not to exceed 1342.5 AFA for the irrigation of 268.5 acres of land located within the N $\frac{1}{2}$  Section 30, T. 16S., R.49E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 30.<sup>2</sup>

Application 19916 was filed by H.H. Records on June 12, 1961, to change the underground waters already appropriated from the

<sup>1</sup> File No. 15410, official records in the Office of the State Engineer.

<sup>2</sup> File No. 18222, official records in the Office of the State Engineer.

Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 19916 was approved on September 20, 1965, for 2.5 cfs for irrigation and domestic use. Certificate 8120 under Permit 19916 was issued on August 1, 1973, for 2.5 cfs of water not to exceed 800 AFA for the irrigation of 160 acres of land located within the NE $\frac{1}{4}$  Section 24, T. 16S., R.48E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 24.<sup>3</sup>

Application 19917 was filed by Robert B. Records on June 12, 1961, to change the underground waters already appropriated from the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 19917 was approved on November 17, 1966, for 2.5 cfs for irrigation and domestic use. Certificate 8119 under Permit 19917 was issued on August 1, 1973, for 2.5 cfs of water not to exceed 800 AFA for the irrigation of 160 acres of land located within the SE $\frac{1}{4}$  Section 24, T. 16S., R.48E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 24.<sup>4</sup>

Application 22761 was filed by Kenneth R. Davis on September 7, 1965, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 22761 was approved on October 27, 1966, for 2.7 cfs for irrigation and domestic use. Certificate 8118 under Permit 22761 was issued on August 1, 1973, for 0.28 cfs of water not to exceed 202.65 AFA for the irrigation of 160 acres of land located within the SE $\frac{1}{4}$  Section 24, T. 16S., R.48E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 24.<sup>5</sup> Permit 19917, Certificate 8119 and Permit 22761, Certificate 8118 are supplemental.

The current owner of record of all the above certificated water rights is the DeLee Family.<sup>1,2,3,4,5</sup>

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<sup>3</sup> File No. 19916, official records in the Office of the State Engineer.

<sup>4</sup> File No. 19917, official records in the Office of the State Engineer.

<sup>5</sup> File No. 22761, official records in the Office of the State Engineer.

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.<sup>6</sup> About the same time, ARI filed applications to appropriate approximately 25,000 AFA of water from the Amargosa Desert Groundwater Basin. The certificated water rights described above are 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.<sup>7</sup>

On October 22, 1996, a hearing was held to consider the possible forfeiture of the DeLee water rights described above.<sup>8</sup> The petitioner, ARI, did not appear at the hearing.<sup>9</sup>

IV.

At the hearing, administrative notice was taken of the record developed at the foundation hearing, May, 1994, and of the record developed at all the previous hearings on the individual water rights.<sup>10</sup> Administrative notice was also taken of the records in the Office of the State Engineer.<sup>11</sup>

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<sup>6</sup> Exhibit No's. 1 and 2, Public Administrative Hearing before the State Engineer May 16-18, 1994.

<sup>7</sup> Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

<sup>8</sup> Exhibit No. 260, Public Administrative Hearing before the State Engineer October 22, 1996.

<sup>9</sup> Transcript p. 7, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>10</sup> Transcript pp. 12-13, Public Administrative Hearing before the State Engineer October 22, 1996.

<sup>11</sup> Transcript p. 12, Public Administrative Hearing before the State Engineer, October 22, 1996.

V.

Mr. Bill Quinn, who performed the pumpage inventory in Amargosa Valley in 1990, is no longer an employee of the Division of Water Resources. The water right holders had the opportunity to submit questions for Mr. Quinn prior to the hearing, that would be answered in writing and be made a part of the record.<sup>12</sup> No questions for Mr. Quinn were submitted.

VI.

At the hearing, Counsel for the water right holder moved to dismiss the petition regarding these DeLee water rights on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of these water rights.<sup>13</sup>

The Hearing Officer stated that the State Engineer has the statutory obligation to declare a forfeiture of water rights in the absence of a third party petition, pursuant to NRS 534.090, provided the evidence is sufficient to show that the forfeiture occurred. 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, on the individual parcels of land. The Hearing Officer found 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 Hearing Officer further found that the hearing should rightfully proceed. The motion to dismiss was denied.<sup>14</sup>

VII.

A motion to strike ARI's exhibits was entered, based on ARI's failure to appear and make its witnesses available for cross

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<sup>12</sup>Exhibit No. 260, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>13</sup>Transcript p. 6-7, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>14</sup>Transcript p. 7, Public Administrative Hearing before the State Engineer, October 22, 1996.

examination.<sup>15</sup> Counsel for the water right holder noted for the record that cross examination of ARI's witnesses regarding the specific water rights was not allowed at the foundation hearing. The cross examination was deferred to the hearing on the specific water right. Counsel noted that the water right holder was denied the opportunity to cross examine by ARI's failure to appear at this hearing.<sup>14</sup>

The foundation testimony was under oath and the evidence (aerial photographs, etc.) is already on the record and cannot be ignored. The State Engineer will give appropriate weight to ARI's exhibits, bearing in mind that ARI did not appear to support its exhibits or make its witnesses available for cross examination on the specific parcels involved in these permits. However, the Hearing Officer stated that the exhibits are clear and stand on their own, particularly Exhibit Nos. 19, 20, and 21, ARI's high level aerial photographs. These may be useful for qualitative determinations of water use or non-use. The motion to strike ARI's exhibits was denied.<sup>16</sup>

#### VIII.

Counsel for the DeLees moved that the forfeiture proceedings be deferred until after the State Engineer takes action on ARI's applications to appropriate.<sup>17</sup> The Hearing Officer stated that the State Engineer has determined that the forfeiture proceedings are occurring independent of ARI's applications. The State Engineer has statutory criteria to consider in evaluating ARI's applications to appropriate water,<sup>18</sup> one of which is whether there is unappropriated water at the source. The forfeiture proceedings are a necessary element in determining the status of all existing water

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<sup>15</sup>Transcript pp. 7-8, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>16</sup>Transcript pp. 8-9, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>17</sup>Transcript p. 10, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>18</sup>NRS 533.370.

rights in Amargosa Valley and whether there is unappropriated water at the source. Therefore, this motion was denied.<sup>19</sup>

IX.

Counsel for the DeLees requested that Permit 15410, Certificate 5157 be removed from this hearing because of the pending lawsuit regarding this water right in the Fifth Judicial District Court.<sup>20</sup> The Hearing Officer granted the request noting that the possible forfeiture of this water right will be considered at a later date, depending on the outcome of the lawsuit.<sup>21</sup>

X.

After evidence of the beneficial use of water under Permit 18222, Certificate 6610 was presented at the hearing, Counsel for the DeLees moved to dismiss this water right from the forfeiture petition.<sup>22</sup> Because the pumpage inventories showed that the water was used over the entire place of use for several years in the alleged forfeiture period, the Hearing Officer dismissed this water right from the forfeiture proceedings.<sup>23</sup> Thus, Permit 18222, Certificate 6610 is not declared forfeited.

The DeLee water rights remaining at issue in this ruling are Permit 19916, Certificate 8120 and supplemental water rights identified by Permit 19917, Certificate 8119, and Permit 22761, Certificate 8118.

FINDINGS OF FACT

I.

The State Engineer has taken annual pumpage inventories in the Amargosa Desert Groundwater Basin since 1983 for the purpose of

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<sup>19</sup>Transcript p. 11, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>20</sup>Transcript pp. 4-5, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>21</sup>Transcript p. 5, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>22</sup>Transcript p. 42, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>23</sup>Transcript p. 42-43, Public Administrative Hearing before the State Engineer, October 22, 1996.

overall basin management. The annual groundwater pumpage inventories for the Amargosa Desert Groundwater Basin for Permit 19916, Certificate 8120 show that 35 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 24, T. 16S., R. 48E., M.D.B.&M., were irrigated during the years 1987 through 1989. The inventory also shows that 35 acres in the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 24 were irrigated during the years 1991 through 1993. The State Engineer finds that water was used for irrigation on the 80 acres of land located within the N $\frac{1}{2}$  NE $\frac{1}{4}$  of said Section 24 during the alleged period of forfeiture.

Regarding the eighty acres of land located in the S $\frac{1}{2}$  NE $\frac{1}{4}$  of said Section 24, the pumpage inventories show that no irrigation occurred during the years 1985 through 1993. The individuals who performed the inventories for those years, did not observe any irrigation on this eighty acres during their annual inspections.<sup>24</sup>

ARI submitted high level aerial photographs taken in 1987, 1989, and 1990 that clearly show the place of use of Permit 19916, Certificate 8120.<sup>25</sup> The texture, color and shade shown in the photographs indicate that the land in the S $\frac{1}{2}$  NE $\frac{1}{4}$  of said Section 24 appeared to be cleared but was not being irrigated in those years. The 1994 low level aerial photograph, submitted by ARI, shows that the land was cleared of any vegetation but was not being irrigated.<sup>26</sup>

The State Engineer obtained electrical power records for the Amargosa Valley, specifically for the well that provides water to

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<sup>24</sup>Transcript pp. 14-17 and 33-34, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>25</sup>Exhibit Nos. 19, 20, and 21, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

<sup>26</sup>Exhibit No. 18, Public Administrative Hearing before the State Engineer, May 16-18, 1994. At the foundation hearing, Exhibit 18 was admitted into the record with certain limitations. The 1994 photographs could only be used for ground truthing of the high level aerial photographs and for rebuttal of the water right holders' evidence. The State Engineer is evaluating this evidence without the testimony of ARI's witnesses or any cross examination by the water right holders.

the NE¼ of said Section 24.<sup>27</sup> The annual electrical power consumed can be converted to the quantity of water pumped.<sup>28</sup> The records indicate a fairly constant pumping of water during the years 1985 through 1992, with a peak use of 660 acre feet of water, converted from the 159,190 kwh of electrical power, in 1987. Given the fact the orchards are irrigated with drip systems,<sup>29</sup> the 660 acre feet of water is a sufficient quantity to irrigate the entire place of use of Permit 19916, Certificate 8120. Therefore, the State Engineer finds that the evidence of non-use of water under Permit 19916, Certificate 8120, when contrasted against the power records, is not clear and convincing.

II.

The 160 acres within the SE¼ of Section 24 T.16S., R.46E., M.D.B.&M. is the place of use of Permit 19917, Certificate 8119, and Permit 22761, Certificate 8118. These two water rights are said to be supplemental. The pumpage inventory for these water rights shows that none of the 160 acres were irrigated during the years 1985 through 1990 and 40 acres were irrigated in 1991 and 1992.<sup>30</sup> Mr. Jason King, who performed the inventory in 1991 and 1992, testified that the 40 acres he observed to be irrigated are in the shape of a circle located near the center of the 160 acre field.<sup>31</sup>

Water can be sprayed on the property by an existing one-quarter mile center pivot that has been in good operating condition

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<sup>27</sup>Official records in the Office of the State Engineer. The power records were obtained in accordance with NRS 533.545.

<sup>28</sup>The conversion formula is  $AF = kwh \times 0.58 / \text{pumping depth}$ , assuming a 60% wire to water efficiency. The pumping depth of 140 feet was taken from a pump test performed on this well.

<sup>29</sup>Transcript pp. 55-57, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>30</sup>Exhibit No. 10, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

<sup>31</sup>Transcript pp. 38-39, Public Administrative Hearing before the State Engineer, October 22, 1996.

for several years.<sup>32</sup> According to live testimony and an affidavit by the person who worked in this field, alfalfa, barley, and oat crops were irrigated on the entire place of use during the alleged period of forfeiture.<sup>33</sup> ARI's aerial photographs from 1987, 1989, and 1990 show the circular pattern of the center pivot. Considering the evidence in its entirety, the State Engineer finds that the evidence of non-use under Permit 19917, Certificate 8119, and Permit 22761, Certificate 8118 is inconclusive.

#### CONCLUSIONS

##### I.

The State Engineer has jurisdiction in this matter.<sup>34</sup>

##### 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.<sup>35</sup>

##### 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.<sup>36</sup>

##### IV.

Under Permit 19916, Certificate 8120, there is evidence showing that water was continuously used on the north 80 acres of the place of use. Regarding the south 80 acres, the evidence of the non-use is not clear and convincing. Therefore, the State

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<sup>32</sup>Transcript pp. 51-52, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>33</sup>Exhibit No. 270 and Transcript pp. 67 and 72, Public Administrative Hearing before the State Engineer, October 22, 1996.

<sup>34</sup>NRS Chapters 533 and 534.

<sup>35</sup>NRS 534.090.

<sup>36</sup>Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

Engineer concludes that the right to use the entire quantity of water allowed under Permit 19916, Certificate 8120 is not forfeited.

V.

Regarding Permit 19917, Certificate 8119 and Permit 22761, Certificate 8118 the State Engineer concludes that there is not clear and convincing evidence of the non-use of water during the alleged period of forfeiture. The State Engineer further concludes that these supplemental water rights are not forfeited.

RULING

The right to beneficially use the water appropriated under Permit 18222, Certificate 6610, Permit 19916, Certificate 8120, Permit 19917, Certificate 8119, and Permit 22761, Certificate 8118 is not declared forfeited.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/JCP/ab

Dated this 29th day of  
January, 1997.