

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 20162, CERTIFICATE)
6236 FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

#4497

GENERAL

I.

Application 20162 was filed by E.D. McCoy on November 21, 1961, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 20162 was approved on April 24, 1962, for 2.7 cubic feet per second (cfs) for irrigation and domestic use. Certificate 6236 under Permit 20162 was issued on March 22, 1967, for 1.0 cfs of water not to exceed 280 acre feet annually (AFA) for the irrigation of 70 acres of land, located within the N $\frac{1}{2}$ of Section 35, 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 35.¹ A portion of Permit 20162, Certificate 6236 was changed by Permit 28828.² More specifically, 120 AFA of water appurtenant to 20 acres located in the W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 10 acres located in the E $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 35 were changed by Permit 28828. Therefore, in this ruling, the remaining portion of Permit 20162, Certificate 6236, consisting of 160 AFA appurtenant to 40 acres, is considered. The 40 acres are described as follows: 10 acres located in the E $\frac{1}{2}$ E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, 20 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ (the 10 acres and the 20 acres combine to form one 30 acre parcel which can also be identified as APN 19-641-13) and 10 acres in the W $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 35 (APN 19-641-17).

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights

¹File No. 20162, official records in the office of the State Engineer.

²File 28828, official records in the Office of the State Engineer.

forfeited.³ Permit 20162, Certificate 6236 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.⁴

On October 23, 1996, a hearing was held to consider the possible forfeiture of Permit 20162, Certificate 6236.⁵ The petitioner, ARI, did not appear at the hearing.⁶

IV.

At the hearing to consider the forfeiture of Permit 20162, Certificate 6236, administrative notice was taken of records in the office of the State Engineer and of the record developed at the pre-hearing conference, February, 1994, at the foundation hearing, May, 1994, and at all the previous hearings on the individual water rights.⁷

V.

At the hearing, the water right holder moved to dismiss the petition regarding Permit 20162, Certificate 6236, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 20162,

³Exhibit No's. 1 and 2, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁴Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁵Exhibit No. 272, Public Administrative Hearing before the State Engineer October 23, 1996.

⁶Transcript p. 5, Public Administrative Hearing before the State Engineer, October 23, 1996.

⁷Transcript pp. 10-11, Public Administrative Hearing before the State Engineer October 23, 1996.

Certificate 6236.⁸ In addition, a motion to strike ARI's exhibits was entered, based on ARI's failure to appear and make its witnesses available for cross examination.⁷

The Hearing Officer stated that the State Engineer has the statutory authority to declare a forfeiture of water rights in the absence of a third party petition, as provided in NRS 534.090. 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 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 and the motion to strike were denied.⁹

VI.

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.¹⁰ No questions for Mr. Quinn were submitted.

FINDINGS OF FACT

I.

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

⁸Transcript pp. 5-6, Public Administrative Hearing before the State Engineer, October 23, 1996.

⁹Transcript pp. 6-7, Public Administrative Hearing before the State Engineer, October 23, 1996.

¹⁰Exhibit No. 272, Public Administrative Hearing before the State Engineer, October 23, 1996.

through 1991 shows that no irrigation occurred under Permit 20162, Certificate 6236.¹¹ The inventory also shows that one acre was irrigated in the years 1992 and 1993. The inventory refers to domestic use and a small field that was irrigated in 1992 and 1993.¹¹

The high level aerial photographs from 1989 and 1990 clearly show the place of use of Permit 20162, Certificate 6236.¹² The color, shading, and texture of the 10 acres identified as APN 19-641-17 in the photographs is the same as the surrounding uncultivated land, indicating that it had not been irrigated for many years. The photographs show that portions of the 30 acres identified as APN 19-641-13 were cleared.

The Settlemeyers own the 30 acre parcel identified as APN 19-641-13. Mrs. Settlemeyer testified that her husband raised about 50 head of cattle on the property from 1985 through 1989 and pigs from 1990 through 1995.¹³ In 1987, her husband planted about 400 fruit, chestnut, and pistachio trees.¹² The property was surrounded by a chain link fence and flood irrigated from the certificated well with a diesel powered pump.¹⁴

The State Engineer finds that the evidence and testimony regarding the use or non-use of water on the Settlemeyer property (APN 19-641-13), is inconclusive. The State Engineer further finds that the pumpage inventories, the testimony of those who performed the inventories, and the aerial photographs are clear and convincing evidence that water was not used on the 10 acres identified as APN 19-641-17 during the alleged forfeiture period.

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

¹²Exhibit Nos. 19, 20, and 21, Public Administrative Hearing before the State Engineer May 16-18, 1994.

¹³Transcript p. 72, Public Administrative Hearing before the State Engineer, October 23, 1996.

¹⁴Transcript pp. 73-74, Public Administrative Hearing before the State Engineer, October 23, 1996.

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.

The evidence regarding the use or non-use of water on the 30 acres of land identified as APN 19-641-13 is inconclusive. The State Engineer concludes that this portion of Permit 20162, Certificate 6236, amounting to 120 AFA, is not declared forfeited.

V.

Regarding the remainder of Permit 20162, Certificate 6236, amounting to 40 AFA appurtenant to the 10 acres identified as APN 19-641-17, the State Engineer concludes that there is clear and convincing evidence of continuous non-use exceeding five years. The State Engineer further concludes that this remaining portion of Permit 20162, Certificate 6236 is forfeited.

¹⁵NRS Chapters 533 and 534.

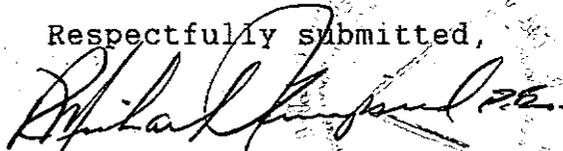
¹⁶NRS 534.090.

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

RULING

The right to beneficially use the water appropriated under that portion of Permit 20162, Certificate 6236 appurtenant to 30 acres of land identified as APN 19-641-13 amounting to 120 AFA is not declared forfeited. The right to beneficially use the water appropriated under the remaining portion of Permit 20162, Certificate 6236, amounting to 40 AFA appurtenant to APN 19-641-17 is hereby declared forfeited on the grounds that the water was not placed to beneficial use for a continuous period of time exceeding five years.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 14th day of
February, 1997.