

ORIGINAL

STATE OF NEVADA
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
BEFORE R. MICHAEL TURNIPSEED, STATE ENGINEER

IN RE:

4851

27614 and 28629.

TRANSCRIPT OF PROCEEDINGS
PUBLIC HEARING
TUESDAY, FEBRUARY 8, 2000
CARSON CITY, NEVADA

APPEARANCES:

For the State:

PAUL TAGGART
Deputy Attorney General
Carson City, Nevada

For the Petitioners:

BROOKE & SHAW
Attorneys at Law
BY: MICHAEL L. MATUSKA
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Minden, Nevada

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Church:

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1 any time water being applied to beneficial use to this
2 property. That includes the time during which forfeiture
3 occurred and also during the time in which a cure could have
4 occurred.

5 Further, it's clear that the applicant or the
6 Petitioners could have filed a change application or an
7 application for an extension of time, neither of which was
8 done.

9 In terms of permits 58842 and 43, it's the State's
10 position that those permits are not relevant to this case,
11 that the bottom line is that permits 27614 and 28629 have
12 been forfeited. Whose water that is is not an issue for
13 this tribunal.

14 If there's a debate between people about who owns
15 that water and they want to litigate that to determine who
16 it is that has this water, who's responsible for not filing
17 the change applications, that should happen somewhere else.

18 But the only issue that needs to be decided by
19 this tribunal or any appeal that will follow is whether or
20 not those two permits have been forfeited, and the evidence
21 is clear that they have been.

22 THE STATE ENGINEER: Thank you. Well, let me see
23 if I can iterate what's before me. Permit 27614 was granted
24 in 1973 and then sometime after that a change application
25 was filed, 28629 which changed a portion of permit 27614

1 that was granted in 1975.

2 Both went to beneficial use and were issued a
3 certificate in 1983. There was a bankruptcy pending in
4 1986. Jerry Coppa, trustee for the bankruptcy court, issued
5 a deed to CSY Investments in May of 1989. There are letters
6 in the file that the time clock starts anew for the nonuse
7 that was recognized by CSY Investments, that they
8 acknowledged that the time clock had begun.

9 Number 3. On May 20th, 1993 change applications
10 58842 and 58843 were filed to change permits 27614 and
11 28629. Before applications 58842 and 58843 were approved,
12 150 acre feet were withdrawn from the applications by letter
13 dated October 6th, 1993 which reduced the amount of water
14 involved in the two change applications from 547.6 acre feet
15 to 397.6 acre feet and the permit reflects that.

16 The letter also was filed by the agent who filed
17 the applications in the first instance. The letter also
18 states that the water could be withdrawn from the southwest
19 quarter of section 35, I believe it is.

20 The owner at the time must have been cognizant
21 that the forfeiture time was running because on May 3rd,
22 1994 no one filed an extension of time to prevent the
23 working of the forfeiture. That was granted extending the
24 time of the forfeiture until May 15th, 1995.

25 The two change applications minus the 150 acre.

1 feet were granted on August 8th, 1995, like I said earlier,
2 for the reduced amount of 397.6 acre feet, and those are
3 still in good standing and not in dispute here today.

4 Then on April 29th, 1999 a forfeiture letter was
5 sent to Mr. Abdo, Mr. Hanley, Douglas County, Gardnerville
6 Ranchos General Improvement District, I'm not sure if I'm
7 saying this correctly, but Novasel & Schwarte Investments,
8 Incorporated. Those were the owners of record we had they
9 each owned a portion of the 150 acre feet.

10 For findings of fact. There's unrefuted evidence
11 that no water was used from either one of the wells for
12 irrigation that is the subject of these two permits from
13 1988 to present, although the bankruptcy held the forfeiture
14 for a portion of that period of time in the extension to
15 prevent the forfeiture total for one year until 1995.

16 2. 150 aquifer feet were withdrawn by the
17 property owner from change applications 58842 and 58843 and
18 it's reflected in not only the letter but in the duty of
19 water granted under those two change applications, and the
20 forfeiture proceeding began in April of 1999 beyond which no
21 cure could have occurred according to Eureka.

22 Conclusions of law: The first statute that guides
23 me is NRS 533.040 which states that, "Except as otherwise
24 provided in this section, all water used in this state for
25 beneficial purposes shall be deemed to remain appurtenant to

1 the place of use."

2 "(2) If at any time it is impracticable to use
3 water beneficially or economically at the place to which it
4 is appurtenant, the right may be severed from the place of
5 use and be simultaneously transferred and become appurtenant
6 to another place of use, in the manner provided in this
7 chapter, without losing priority of right."

8 Another guiding statute is NRS 533.325 which
9 states, "Any person who wishes to appropriate any of the
10 public waters, or to change the place of diversion, manner
11 of use or place of use of water already appropriated, shall,
12 before performing any work in connection with such
13 appropriation, change in place of diversion or change in
14 manner or place of use, apply to the state engineer for a
15 permit to do so."

16 This was never done on this 150 acre feet portion
17 that is the subject of the permits of this hearing.

18 Just a footnote. It was known in 1998 where the
19 water was going to be coming from that would serve this
20 subdivision and change applications could have been filed
21 then and the right would still be active.

22 The last statute I'm going to refer to is NRS
23 534.090, subsection 1. "Except as otherwise provided in
24 this section, failure for 5 successive years after April
25 15th, 1967, on the part of the holder of any right, whether

1 it is an adjudicated right, an unadjudicated right, or a
2 permitted right, and further whether the right is initiated
3 before or after March 25th, 1939, to use beneficially all or
4 any part of the underground water for the purpose for which
5 the right is acquired," underline that part, the purpose for
6 which the right is acquired is for irrigation, "works a
7 forfeiture of both undetermined rights and determined rights
8 to the use of that water to the extent of the nonuse."

9 Now to Eureka. The Nevada Supreme Court drew on
10 some cases from another state, two other states actually in
11 writing the Eureka decision. One is out of Idaho, one is
12 out of Wyoming, and I will read an excerpt out of the Idaho
13 case. "(An appropriator may resume use anytime prior to a
14 third party's claim of right.)" Signed Sturgeon D. Brooks.

15 In the Wyoming case, forfeiture did not apply
16 where the user had recommenced uses and claimant brought
17 forfeiture action 16 years after the period of nonuse. In
18 this case again the right is for irrigation. There is no
19 evidence of irrigation during this entire period from 1988
20 to the present.

21 Following that the Supreme Court writes under the
22 rule we adopted, "Substantial use of the water rights after
23 the statutory period of nonuse 'cures' claims to forfeiture
24 so long as no claim or proceeding of forfeiture has begun."
25 In my mind they were drawing on the two cases, one out of

1 Wyoming, one out of Idaho, which means reuse the water for
2 which it was appropriated in the first place.

3 Therefore, I uphold my prior ruling that the 150
4 acre feet that are the subject of permits 28629 and 27614
5 are declared forfeited.

6 Are there any questions? I failed to offer for
7 admittance Exhibit 21 which is the supplement to the record
8 which is the file of 58842 and 58843. Do you have any
9 objection?

10 MR. TAGGART: I don't really object. Does it
11 contain the documents that you think weren't in it in the
12 first place?

13 MS. JOSEPH-TAYLOR: No.

14 MR. MATUSKA: No, and that's the point I
15 introduced it for.

16 MR. TAGGART: Because it's already in the record
17 if it was submitted to Judge Gamble. I don't think it's
18 necessary.

19 THE STATE ENGINEER: They're not necessary for my
20 determination because the permits are in the files. The
21 permits are not part of this supplement.

22 MR. TAGGART: So the permits are still not in the
23 record?

24 THE STATE ENGINEER: Still not in the record.

25 MR. MATUSKA: You took administrative notice of

1 all your files in the beginning, right?

2 THE STATE ENGINEER: Right.

3 MR. TAGGART: They're in. I don't see the need
4 for the supplement to be in, but I don't object.

5 THE STATE ENGINEER: Exhibit 21 is admitted.

6 Any other questions? This hearing is closed.

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8 (The proceedings concluded at 1:55 p.m.)

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1 STATE OF NEVADA,)
2 CARSON CITY.) ss.

3 I, MARY E. CAMERON, Official Court Reporter for
4 the State of Nevada, Department of Conservation and Natural
5 Resources, Division of Water Resources, do hereby certify:

6 That on Tuesday, the 8th day of February, 2000, I
7 was present at 123 West Nye Lane, Carson City, Nevada, for
8 the purpose of reporting in verbatim stenotype notes the
9 within-entitled public hearing;

10 That the foregoing transcript, consisting of pages
11 1 through 102, inclusive, includes a full, true and correct
12 transcription of my stenotype notes of said public hearing.

13
14 Dated at Carson City, Nevada, this 10th day
15 of February, 2000.

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Mary E. Cameron
MARY E. CAMERON, CCR, RPR
Nevada CCR #98