

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

IN THE MATTER OF THE FORFEITURE OF)
PERMIT 15410, CERTIFICATE 5157,)
AND APPLICATION 57304 FILED TO)
CHANGE THE POINT OF DIVERSION,)
MANNER OF USE AND PLACE OF USE OF)
THE WATERS PREVIOUSLY APPROPRIATED)
UNDER PERMIT 15410, CERTIFICATE)
5157 WITHIN THE AMARGOSA DESERT)
HYDROGRAPHIC BASIN (230), NYE)
COUNTY, NEVADA.)

RULING

#5289

GENERAL

I.

Application 15410 was filed by Wm. J. Moore, Jr., on November 27, 1953, to appropriate the underground waters of the Amargosa Desert Hydrographic Basin, Nye County, Nevada. Permit 15410 was approved on April 6, 1954, and allowed for the diversion of 2.5 cubic feet per second, not to exceed 800 acre-feet annually, for the irrigation of 160 acres of land located within the NE¼ (northeast quarter) of Section 25, T.16S., R.48E., M.D.B.&M. The authorized period of use is February 1st through November 30th of each year. The authorized point of diversion is described as being located within the NE¼ NE¼ of said Section 25. Certificate 5157 was issued pursuant to Permit 15410 on August 4, 1961, for 2.5 cubic feet per second of water, not to exceed 800 acre-feet annually, for the irrigation of the 160 acres of land referenced above and from the point of diversion referenced above.¹

¹ File No. 15410, official records in the Office of the State Engineer. Exhibit A and Exhibit B, public administrative hearing before the State Engineer, May 15, 2003, official records in the Office of the State Engineer. Hereinafter, the transcript will be referred to by page number and exhibits from the hearing by exhibit letter.

II.

On January 29, 1982, the Morris DeLee Revocable Trust requested the State Engineer assign Permit 15410, Certificate 5157 from Morris DeLee into its name.²

III.

On March 16, 1992, the Morris DeLee Revocable Trust filed change Application 57304, which requested permission to change the point of diversion, place of use and manner of use of the water previously appropriated under Permit 15410, Certificate 5157. The proposed place of use is described as being located within the NW¼ (northwest quarter) of Section 25, T.16S., R.48E., M.D.B.&M. The proposed point of diversion is described as being located within the SE¼ NW¼ of said Section 25.³

IV.

On March 17, 1993, Amargosa Resources, Incorporated, petitioned the State Engineer to declare certain water rights forfeited.⁴ Permit 15410, Certificate 5157 was included in those water rights requested to be declared forfeited. Amargosa Resources, Incorporated, alleged a period of non-use spanning 1985 through 1992. By notice dated June 16, 1993, the State Engineer informed the Morris DeLee Revocable Trust that Permit 15410, Certificate 5157 may be subject to forfeiture.⁵ On May 16, 17, 18, 1994, the State Engineer conducted an initial hearing to allow Amargosa Resources, Incorporated, the opportunity to provide the foundation for the evidence filed in support of its petition for forfeiture.⁶ During the administrative hearings on the forfeiture

² Exhibits K and L.

³ Application 57304, official records in the Office of the State Engineer; Exhibit C.

⁴ Exhibit P.

⁵ Exhibit E.

⁶ Exhibit P.

of the DeLee water rights held on October 22, 1996, counsel for the DeLee Trust requested that Permit 15410, Certificate 5157 be removed from the hearing due to a pending lawsuit, that lawsuit being the Petition for Writ of Mandamus referenced next.⁷ The Hearing Officer granted the request noting that the possible forfeiture of the water right would be considered at a later date depending on the outcome of the lawsuit.⁸

V.

On February 21, 1995, Morris DeLee and the Morris DeLee Revocable Trust had filed a Petition for Writ of Mandamus in the Fifth Judicial District Court requesting the Court order the State Engineer to either approve or deny Application 57304.⁹ The State Engineer filed an answer to the petition in March 1995. The applicant has not taken any further action as to the petition since the original filing in 1995.

FINDINGS OF FACT

I.

By Notice dated February 10, 2003, the State Engineer set the date of March 20, 2003, for a public administrative hearing to consider the possible forfeiture of Permit 15410, Certificate 5157.¹⁰ It has been eight years since Morris DeLee and the Morris DeLee Revocable Trust filed its lawsuit. The State Engineer filed an answer to that lawsuit in March 1995 and no further action has been taken by Morris DeLee or the Morris DeLee Revocable Trust since that date. As discussed below; since 1994 the Morris DeLee Revocable Trust without the benefit of permit and in direct violation of Nevada Water Law has chosen to irrigate the northwest

⁷ Exhibit P.

⁸ Exhibit P.

⁹ Exhibit U.

¹⁰ File No. 15410, official records in the Office of the State Engineer.

quarter of Section 25. Therefore, the State Engineer finds he must take some action. Sufficient time has elapsed for the Morris DeLee Revocable Trust to prosecute its litigation and it has not done so. That litigation requested the State Engineer to act to grant or deny Application 57304. The State Engineer cannot act on change Application 57304 without first bringing to resolution whether Permit 15410, Certificate 5157 has been forfeited or not. Therefore, the State Engineer decided to proceed with the forfeiture action and then act on Application 57304.

Pursuant to a request made by John DeLee, Morris DeLee's son acting as a representative for the Morris DeLee Revocable Trust, the State Engineer twice postponed the administrative hearing ultimately setting it for May 15, 2003. Prior to the actual hearing, John DeLee on behalf of the Morris DeLee Revocable Trust physically came into the Office of the State Engineer and had a discussion with the State Engineer about the upcoming hearing and the possible forfeiture. Signed returned receipts for the certified mailing of the hearing notices were received in the Office of the State Engineer.¹¹ Prior to the hearing date, the State Engineer's Hearing Officer called the Morris DeLee Revocable Trust's counsel of record for the previously scheduled forfeiture hearing and was informed that likely no one would appear for the hearing. At the time and place of the administrative hearing, no one appeared on behalf of the Morris DeLee Revocable Trust.

The State Engineer finds that representatives of the Morris DeLee Revocable Trust and its counsel of record had actual notice of the time and place for the hearing on the possible forfeiture and failed to appear.

II.

The State Engineer finds that on May 15, 2003, the State Engineer proceeded with the scheduled hearing and established his

¹¹ File No. 15410, official records in the Office of the State Engineer.

record in the matter of the possible forfeiture of Permit 15410, Certificate 5157.¹²

III.

In 1992 and 1993, at the time change Application 57304 and Amargosa Resources, Incorporated's petition for forfeiture were filed, Nevada Revised Statute § 533.090 provided that:

1. Except as provided in subsections 2 and 3, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right, or a permitted right, and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined and determined rights to the use of that water to the extent of the nonuse.

* * *

2. The state engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture...In determining whether to grant or deny a request, the state engineer shall, among other reasons, consider:

(a) Whether the holder has shown good cause for his failure to use all or any part of the water beneficially for the purpose for which his right is acquired or claimed;

(b) The unavailability of water to put to a beneficial use which is beyond the control of the holder;

(c) Any economic conditions or natural disasters which made the holder unable to put the water to that use; and

(d) Whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

Nevada Revised Statute § 533.325 provides that an application can be filed to change the place of diversion, manner or place of

¹² Transcript and Exhibits, public administrative hearing before the State Engineer, May 15, 2003.

use of water already appropriated. Water already appropriated refers to water represented by a permit or certificate in good standing. Where a permit/certificate has not been used for five consecutive years a forfeiture has worked and the water right is not in good standing and cannot be used to support a change application.

The State Engineer finds even though the Morris DeLee Revocable Trust filed change Application 57304 on March 16, 1992, and the Amargosa Resources, Incorporated's, petition to declare certain water rights forfeited was not filed until March 17, 1993, it was within the State Engineer's discretion to review the status of the water right being requested to be changed under Application 57304 before acting on that application. This is done in order to determine if the water right was in good standing or if a forfeiture of the water right had worked; thus, rendering it not in good standing and not available for change. The State Engineer finds the filing of a change application does not preclude his performing such review. The State Engineer finds if five consecutive years of non-use of the water had run before the filing of the change application, the forfeiture had worked and there was no water right available to be changed.

IV.

Each year from 1985 through 1992 employees of the Office of the State Engineer performed what are known as groundwater pumpage inventories which documented the use or non-use of water within the authorized place of use under Permit 15410, Certificate 5157.¹³ The Amargosa Valley Groundwater Pumpage Inventories show that in 1985, 1986, 1987, 1988, 1989, 1990, 1991 and 1992 no water was placed to beneficial use on the northeast quarter of Section 25, T.16S., R.48E., M.D.B.&M.¹⁴ The State Engineer finds no water was

¹³ Exhibit F.

¹⁴ Exhibit F and Transcript, pp. 24 -35.

placed to beneficial use on the authorized place of use under Permit 15410, Certificate 5157 in excess of five consecutive years prior to the filing of change Application 57304. The State Engineer finds the Morris DeLee Revocable Trust did not file an application for extension of time to prevent the working of the forfeiture as provided for under NRS § 534.090(2).

V.

The State Engineer finds the Amargosa Valley Groundwater Pumpage Inventories show that in 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001 no water was placed to beneficial use on the northeast quarter of Section 25, T.16S., R.48E., M.D.B.&M.¹⁵

VI.

A Trustee's Deed Upon Sale dated April 6, 1977, indicates that by that date Morris DeLee owned all the land in Section 25, T.16S., R.48E., M.D.B.&M.¹⁶ Apparently, the northwest quarter of said Section 25 was either conveyed or leased to a James Owen, because on February 12, 1979, James Owen filed Application 36764 to appropriate underground water of the Amargosa Desert Hydrographic Basin to irrigate the 160 acres of land in the northwest quarter of Section 25, T.16S., R.48E., M.D.B.&M.¹⁷ The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 25, T.16S., R.48E., M.D.B.&M. Notably, this is the same land and point of diversion the Morris DeLee Revocable Trust requested to move water to under change Application 57304.¹⁸ However, sometime after the filing of Application 36764 the northwest quarter of said Section 25 is again in the ownership of Morris DeLee, because on January 6,

¹⁵ Exhibits F and G and Transcript, pp. 35 - 42.

¹⁶ Exhibit N.

¹⁷ Exhibit D.

¹⁸ Exhibit C.

1982, Morris DeLee by quitclaim deed put title to the land into the Morris DeLee Revocable Trust.¹⁹

Pursuant to State Engineer's Ruling No. 2793, dated December 15, 1982, the State Engineer denied Application 36764 on the grounds that the appropriation of underground water for irrigation purposes would conflict with and tend to impair the value of existing water rights and be detrimental to the public interest.²⁰ This ruling was appealed by James Owen in a petition for Judicial Review filed in the Fifth Judicial District Court.²¹ On May 10, 1983, an order of the Fifth Judicial District Court remanded the matter to the State Engineer for the purpose of receiving additional evidence and argument.²² "Subsequent to the remand by the District Court in Nye County, the Petitioners [Morris DeLee and Morris DeLee Revocable Trust] came into title of the land held by James Owen and Cost Reduction Engineering and to which the applications to appropriate water applied."²³ "After duly noticing all the parties of record, the State Engineer received evidence and testimony in the matter at an Administrative Hearing in Carson City, Nevada, on August 3, 1989" and again denied Application 36764.²⁴

On or about June 27, 1990, a second appeal of the State Engineer's denial of Application 36764 was filed by Morris DeLee and the Morris DeLee Revocable Trust.²⁵ By Order of the District

¹⁹ Exhibit O.

²⁰ Exhibit Q.

²¹ See, State Engineer's Ruling on Remand No. 3714, p.5, dated May 30, 1990; Exhibit R.

²² Exhibit R, p. 5.

²³ Exhibit V, p. 2.

²⁴ Exhibit R.

²⁵ See Morris DeLee and the Morris DeLee Revocable Trust v. State Engineer, In the Fifth Judicial District Court, in and for

Court dated March 12, 1991, this appeal resulted in a second order of remand to the State Engineer. In State Engineer's Ruling No. 4525 dated May 9, 1997, the State Engineer once again denied Application 36764.²⁶ Once again, the Morris DeLee Revocable Trust filed an appeal; however, the State Engineer's decision was ultimately affirmed by the Nevada Supreme Court by Order dated May 21, 2001.²⁷

The State Engineer finds the Morris DeLee Revocable Trust was fully aware long prior to the filing of change Application 57304 that the use of water was not authorized on the northwest quarter of Section 25, T.16S., R.48E., M.D.B.&M.

VII.

By State Engineer's Order No. 858 dated June 10, 1985, the State Engineer had ordered the irrigation of the northwest quarter of Section 25, T.16S., R.48E., M.D.B.&M., to cease and desist and ordered the well for which there was no valid water right to be plugged.²⁸

VIII.

The pumpage inventories performed by the State Engineer also document the use or non-use of water on the northwest quarter of said Section 25. The 1986, 1987, 1988, 1989, 1990, 1991, 1992 and 1993 pumpage inventories note that the illegal irrigation of the northwest quarter of Section 25, T.16S., R.48E., M.D.B.&M., was discontinued pursuant to the State Engineer's Order and for the years 1989, 1991, 1992 and 1993 that the irrigation pivot was blown over.²⁹ However, the 1994 pumpage inventory indicates that

the County of Nye, Case No. 11557; See State Engineer's Ruling No.4525, p.8; Exhibits S and V.

²⁶ Exhibit S.

²⁷ Exhibit T.

²⁸ Exhibit I.

²⁹ Exhibit J.

the land was put back into production without the benefit of a water right permit, and this unauthorized irrigation has continued to today.³⁰

The State Engineer finds that the Morris DeLee Revocable Trust with full knowledge that no water right existed for the northwest quarter of Section 25, T.16S., R.48E., M.D.B.&M., and with full knowledge that their change application had not been granted due to the fact that it was subject to forfeiture ignored the law and began to illegally irrigate the northwest quarter of Section 25 in flagrant violation of Nevada's Water Law. The State Engineer finds the public policy of the state of Nevada would strongly indicate that someone should not be able to create a water right in full knowledge of violation of law, thereby eviscerating Nevada's Water Law. The State Engineer finds it was Morris DeLee and the Morris DeLee Revocable Trust who tied the issue of the change application up in litigation, which they did not pursue, thereby putting the State Engineer in limbo as to acting on the forfeiture and the change application.

CONCLUSIONS OF LAW

I.

The State Engineer has jurisdiction over the persons and subject matter of this action and determination.³¹

II.

The State Engineer concludes that the filing of change Application 57304 did not preclude his review of the status of the water right being requested to be changed.

III.

The State Engineer concludes there is clear and convincing evidence of more than five consecutive years of non-use of the

³⁰ Exhibit J.

³¹ NRS chapters 533 and 534.

water as authorized under Permit 15410, Certificate 5157; thus, a forfeiture of the water right has worked.

IV.

The State Engineer is prohibited by law from granting a permit under a change application to appropriate the public waters where:³²

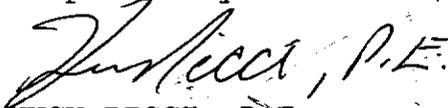
- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

The State Engineer concludes that, since Permit 15410, Certificate 5157 has been forfeited, there is no water right that can be changed under Application 57304; therefore, it must be denied. The State Engineer concludes to grant Application 57304 in these circumstances would threaten to prove detrimental to the public interest.

RULING

Permit 15410, Certificate 5157 is hereby declared forfeited. Application 57304 is hereby denied on the grounds that the water right requested for transfer has been declared forfeited; therefore, there is no water available to be changed.

Respectfully submitted,


HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 6th day of
October, 2003.

³² NRS chapter 533.370(3).