

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

IN THE MATTER OF THE POSSIBLE)
FORFEITURE OF A PORTION OF)
PERMIT 10245, CERTIFICATE 2651,)
FILED TO APPROPRIATE THE)
UNDERGROUND WATERS OF THE LAS)
VEGAS VALLEY ARTESIAN)
HYDROGRAPHIC BASIN (212), CLARK)
COUNTY, NEVADA.)

RULING
5545

GENERAL

I.

Application 10245 was filed on May 16, 1938, by Earl A. Honrath to appropriate 0.15 cubic feet per second (cfs) of the underground water of the Las Vegas Valley Artesian Hydrographic Basin for irrigation and domestic purposes within Clark County, Nevada. The proposed point of diversion was described as being located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T.20S., R.61E., M.D.B.&M. The proposed place of use was described as being located within the east 495 feet of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 28, T.20S., R.61E., M.D.B.&M.¹

II.

On August 13, 1942, Permittee Earl Honrath filed the required Proof of Application of Water to Beneficial Use upon which Certificate 2651 was issued under Permit 10245 for a diversion rate of 0.11 cfs and a total yearly duty of water not to exceed 79.72 acre-feet.² The certificate indicates that the water was distributed from the permitted well to 11 acres of land that had been divided into acreage plots. The proof of beneficial use indicated that the irrigation consisted of small garden plots, trees and shrubs.³

¹ File No. 10245, official records in the Office of the State Engineer. Exhibit No. 4, public administrative hearing before the State Engineer July 13, 2005. Hereinafter, the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

² Exhibit No. 3.

³ Exhibit No. 5.

FINDINGS OF FACT

I.

Desert Lawn Incorporated filed Application 42176 on August 25, 1980, and requested to change the point of diversion, place and manner of use of a portion of the water previously appropriated under Permit 10245, Certificate 2651. On January 19, 1981, a permit was granted under Application 42176, which changed the point of diversion, place of use and manner of use of 0.0183 cfs and 13.28 acre-feet annually leaving a diversion rate of 0.0917 cfs, not to exceed a total duty of 66.44 acre-feet, remaining under Permit 10245, Certificate 2651.

II.

The original place of use described under Application 10245 was a single parcel of land owned by Earl Honrath. The Application indicated that the proposed place of use was 15 acres to be irrigated;⁴ however, the map that accompanied Application 10245 describes a place of use consisting of 14.626 acres.⁵ The Proof of Application of Water to Beneficial Use required to be filed under Permit 10245 indicated that the water was distributed by pipe to acreage plots totaling 11 acres and that various purchasers had acquired some of the land.⁶ There is no culture map that may have accompanied the proof beneficial use found in the records of the State Engineer that would specifically identify the exact 11 acres of land that were irrigated and upon which beneficial use was proven. The State Engineer finds there is no evidence in the records of the State Engineer that specifically identifies the exact 11 acres that were irrigated within the original 14.626/15 acre parcel or which would help indicate the assessor parcel numbers covering those 11 acres. The State Engineer finds that deeds found in the Permit file indicate that as the parcels within the place of use were divided the water right was conveyed as a percentage of interest. This is most likely a reflection that the exact 11 acres on which water had been placed to beneficial use could not be determined from the historical records.

⁴ Exhibit No. 4.

⁵ Exhibit No. 13.

⁶ Exhibit No. 5.

III.

As noted, when Permit 10245 was issued, the place of use was one parcel of land. Since that time, there has been a great deal of growth in the area. Roads have been built and the land has been repeatedly subdivided. Earl Honrath noted in his Proof of Application of Water to Beneficial Use that he had sold various portions of his land, but a portion still remained in his name. As noted on Exhibit No. 6, the original place of use currently has a road called Sunny Place running north/south through the original place of use, which did not exist at the time of the original appropriation. Further, the original 14.626 or 15 acres is now covered by the following Clark County Assessor Parcel Numbers:⁷

139-28-303-001	139-28-304-002
139-28-303-002	139-28-304-003
139-28-303-003	139-28-304-004
139-28-303-004	139-28-304-005
139-28-303-005	139-28-304-009
139-28-303-006	139-28-304-010
139-28-303-010	139-28-312-001
139-28-303-011	139-28-312-002
139-28-304-001	139-28-312-003

The records of the State Engineer indicate the ownership of portions of the water right is in the name of the persons identified below:⁸

139-28-303-001	Raymond D. Fisk
139-28-303-002	Raymond D. Fisk
139-28-303-003	Elmer G. Young, Craig & Sonja Brooksby
139-28-303-004	Raymond D. Fisk
139-28-303-005	Raymond D. Fisk
139-28-303-006	Raymond D. Fisk
139-28-303-010	Raymond D. Fisk

⁷ Exhibit No. 6.

⁸ Exhibit Nos. 1 and 2.

139-28-303-011	Raymond D. Fisk, Mark & June Daly
139-28-304-001	William C. Morgan
139-28-304-002	Herman & Hilda Muehleisen, Desert Lawn Incorporated
139-28-304-003	Herman & Hilda Muehleisen, Desert Lawn Incorporated
139-28-304-004	Desert Lawn Incorporated
139-28-304-005	Hoffman 1988 Living Trust
139-28-304-009	Herman & Hilda Muehleisen, Desert Lawn Incorporated
139-28-304-010	Herman & Hilda Muehleisen, Desert Lawn Incorporated
139-28-312-001	William C. Morgan
139-28-312-002	William C. Morgan
139-28-312-003	William C. Morgan

At the time the State Engineer noticed the public administrative hearing, the Clark County Assessor indicated the owners of record of the land to be the persons identified below:⁹

139-28-303-001	Teola Williams
139-28-303-002	Harvey & Vivian Munford
139-28-303-003	Elmer G. Young
139-28-303-004	Macon Jackson
139-28-303-005	DFALLC
139-28-303-006	James Ray Gray
139-28-303-010	Doyne Martin Trust
139-28-303-011	DFALLC
139-28-304-001	Genzano Family Trust
139-28-304-002	Family Dollar, Inc.
139-28-304-003	Thomas & Theresa Albanese
139-28-304-004	Thomas & Theresa Albanese
139-28-304-005	Serafin Amaya
139-28-304-009	John Milk LLC

⁹ Exhibit Nos. 1 and 2.

139-28-304-010	John Milk LLC
139-28-312-001	Genzano Family Trust
139-28-312-002	Bank of America
139-28-312-003	Genzano Family Trust

The State Engineer finds, but for Elmer Young, not one owner of the parcels of land within the place of use of Permit 10245 as identified by the Clark County Assessor was an owner of record of any portion of the water right identified as Permit 10245, Certificate 2651 in the records of the Office of the State Engineer.

IV.

Nevada Revised Statutes §§ 533.382, 533.383, 533.384, 533.386 provide the law concerning the conveyance of water rights and the responsibilities of water right holders concerning those conveyances. Nevada Revised Statute § 533.386 provides that the State Engineer shall not consider or treat the person to whom an application, permit or certificate is conveyed as the owner or holder of the application, permit or certificate for the purposes of this chapter, including without limitation, all advisements and other notices required by the State Engineer until a report of conveyance is filed and confirmed by the State Engineer. When the State Engineer set the date for the administrative hearing on the possible forfeiture said notice also included the owners of the land as identified by the Clark County Assessor even though they were not owners of record of the water right in the records of the Office of the State Engineer. The State Engineer has already found that not one owner of land, except for Elmer Young, within the place of use under Permit 10245, Certificate 2651, had filed a report of conveyance indicating any ownership of any portion of the permit/certificate. The State Engineer finds that all owners of land, but for Elmer Young, were not entitled to be provided with any notices as to any action concerning the permit/certificate as not one had filed the statutorily required report of conveyance to indicate any ownership in any portion of Permit 10245, Certificate 2651. The State Engineer finds Nevada water law did not require any notice concerning Permit 10245, Certificate 2651 to the owners of the land as identified by the Clark County Assessor because they were not owners of record of the water right in the records of the Office of the State Engineer.

V.

Each year from 1987 through 2004 employees of the Office of the State Engineer performed what are known as groundwater pumpage inventories, which documented the use of water within the place of use of Permit 10245, Certificate 2651.¹⁰ These pumpage inventories consist of a field investigation, which is an on-site physical inspection of the place of use. From the field investigation either a calculation is made as to the quantity of water being placed to beneficial use based on what is found during the investigation as to water use or if the well is equipped with a water meter, a meter reading is taken of the quantity of water used from the well.¹¹ The pumpage inventories taken as to Permit 10245, Certificate 2651 indicate that from 1987 through 1992 and in 1994 only 2.0 acre-feet annually was used as authorized under Permit 10245, Certificate 2651. The inventories indicate that only 1.0 acre-foot was used in 1993 and from 1995 through 1999 as determined by field investigation. In 2000 1.0 acre-foot was used, in 2001 5.3 acre-feet were used, in 2002 1.9 acre-feet were used, in 2003 0.7 of an acre-foot was used and in 2004 0.8 of an acre-foot was used, as determined by meter readings.¹² At the administrative hearing, the State Engineer stipulated that in 2001 5.3 acre-feet of water were used by Mr. Young on the property identified as APN 139-28-303-003.¹³ Therefore, there is no issue as to forfeiture as to 5.3 acre-feet of water appurtenant to APN 139-28-303-003. The 1993 pumpage inventory indicates that only 1 average house (AH) was connected to the well and that most homes had been disconnected from using the well for 20 plus years, and Mr. Young testified that no one else is using water from the well and there is only one line from the well and that is to his garage.¹⁴

Additional evidence provided as to lack of water use on the APNs located within the permitted place of use indicates the dates when many of the current municipal water customers opened their municipal water service accounts, and provides information as to what was physically on the lots at the time of the various inspections.¹⁵ The evidence is summarized below:

¹⁰ Exhibit No. 7, Transcript, pp. 25 -37.

¹¹ Transcript, pp. 25 - 27.

¹² Exhibit No. 7.

¹³ Exhibit Nos. 8 and 9, Transcript, pp. 84-85, 95-100.

¹⁴ Exhibit No. 7, Transcript, p. 102.

¹⁵ Exhibit Nos. 10, 11 and 12.

139-28-303-001 house connected to current municipal water account on 01/17/74
139-28-303-002 house connected to current municipal water account on 12/19/78
139-28-303-003 house connected to well under Permit 10245
139-28-303-004 house connected to current municipal water account on 04/09/90
139-28-303-005 vacant property without municipal water account
139-28-303-006 house connected to current municipal water account on 01/31/00
139-28-303-010 commercial business connected to current municipal water account on 03/05/93, previously connected to municipal water account on 11/18/84
139-28-303-011 connected to current municipal water account on 09/16/86, but property vacant as of 10/15/04, previous connection to municipal water account on 04/07/72
139-28-304-001 vacant property without municipal water account
139-28-304-002 vacant property without municipal water account, previous connection to municipal water account on 01/01/73
139-28-304-003 vacant house without municipal water account, previous connection to municipal water account
139-28-304-004 vacant house, municipal water account as of 09/20/85, but no municipal water account as of 12/04/02
139-28-304-009 property vacant as of 10/15/04, but municipal water account started on 05/02/88 and ended on 08/15/88
139-28-304-010 commercial business connected to municipal water on 06/13/02
139-28-312-001 part of area for commercial business located on parcel 134-28-312-002, but without municipal water account
139-28-312-002 commercial business connected to municipal water on 03/31/04
139-28-312-003 part of area for commercial business located on parcel 134-28-312-002, but without municipal water account.

No evidence was provided by any holder of a portion of the water right or any owner of land within the permitted place of use to refute the State Engineer's evidence as to non-use of water on all parcels for more than five years prior to the 1995 pumpage inventory, except for APN 139-28-303-003 (Mr. Young) to which the State Engineer stipulated 5.3 acre-feet of water were used in

2001. There is not one piece of evidence that supports any water use at all other than that provided by Mr. Young. The State Engineer finds there is clear and convincing evidence of five years of non-use on all parcels located within the place of use under Permit 10245, Certificate 2651, with the exception of APN 139-28-303-003 (Elmer Young), prior to 1995. The State Engineer finds based on the stipulation, there is no issue of forfeiture as to 5.3 acre-feet of water used by Mr. Young on APN 139-28-303-00 in 2001. The State Engineer finds with the noted exception for APN 139-28-303-003, there is clear and convincing evidence of non-use of water as authorized by the permit on all remaining parcels from 1995 through 2004. The State Engineer finds there is clear and convincing evidence of non-use of water on all parcels, but Mr. Young's, from 1987 through 2004. The State Engineer finds no evidence was presented to prove water use on any parcel, with the noted exception of Mr. Young on APN 139-28-303-003, and there is no evidence to refute the findings of non-use of the water right for the statutory five year period required for forfeiture.

VI.

On March 26, 1997, the State Engineer received a letter from Elmer Young indicating his belief that he owned a greater quantity of water rights than that indicated in the records of the Office of the State Engineer and indicated he wanted the State Engineer to respond by letter recognizing a greater quantity of water ownership and use on his parcel of land. In order to address the matter, the Deputy State Engineer requested a staff member from the Southern Nevada Branch Office conduct a field investigation as to water use on the permitted place of use, which found that the only place water was being used was on Mr. Young's parcel, APN 139-28-303-003. An office memorandum found in the permit file indicates that a hearing needed to be scheduled with regard to possible forfeiture of a portion of Permit 10245, Certificate 2651.¹⁶ An additional memorandum dated September 11, 1998, again indicated that a hearing was necessary with regard to possible forfeiture, particularly since there was now a pending change application filed for a portion of the water right.¹⁷ An additional memorandum indicates the State Engineer was making further inquiry

¹⁶ Memorandum dated May 7, 1997, File No. 10245, official records in the Office of the State Engineer.

¹⁷ File No. 10245, official records in the Office of the State Engineer.

into non-use of the water under Permit 10245, Certificate 2651 in October 2004 as demonstrated by Exhibit No. 10.

Additionally, on June 11, 1997, Elmer Young filed a Request for Extension of Time to Prevent a Forfeiture as to Permit 10245, Certificate 2651.¹⁸ Mr. Young indicated in that document that non-use of the water had occurred as to the majority of the water right and the only recent water use had occurred on his property.¹⁹ Mr. Munford, the owner of Assessor's Parcel No. 139-28-303-002 in the records of the Clark County Assessor, testified at the administrative hearing that it was his belief that his questioning the State Engineer during the 2005 Legislative Session with regard to this water right was the impetus for the forfeiture hearing.²⁰ The State Engineer finds Mr. Munford's question prompted a review of the water right file. That review clearly indicated that the State Engineer had been contemplating an administrative hearing on possible forfeiture for a number of years, but had not yet actually scheduled the matter for hearing. The review clearly indicated that a determination needed to be made as to Mr. Young's request for extension of time to prevent forfeiture, as that had not been acted upon, requiring the State Engineer to set the matter for hearing. The State Engineer finds Mr. Munford's inquiry merely prompted a review of the file, which clearly indicated that a hearing on the possible forfeiture was necessary and had been contemplated for a number of years and needed to be resolved. The State Engineer finds use of water on Mr. Young's property was stipulated to at the administrative hearing; therefore, forfeiture as to that parcel is not an issue. The State Engineer finds the records indicate more than five years of non-use of the water right had occurred prior to the filing of the request for extension of time to prevent forfeiture; therefore, the request was not timely, as the time period for forfeiture had already passed.

¹⁸ Exhibit No. 14.

¹⁹ File No. 10245, official records in the Office of the State Engineer.

²⁰ Transcript, p. 50.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²¹

II.

At the beginning of the administrative hearing, legal counsel for some landowners made a motion to dismiss the proceeding on the grounds that the State Engineer had not provided notice under NRS § 534.090 that the water right might be subject to forfeiture.

Nevada Revised Statute §534.090 provides:

For water rights in basins for which the State Engineer keeps pumping records, if the records of the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the State Engineer shall notify the owner of the water right, as determined in the records of the Office of the State Engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water right beneficially and to provide proof of such use to the State Engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right.

The argument was raised that the State Engineer was required to notify the holders of the relevant assessors parcel numbers of the possible forfeiture one year before commencing the forfeiture proceeding. The statutory language quoted above was added to NRS § 534.090 in 1995 as Assembly Bill 435, which became effective on July 1, 1995. Accordingly, any water right for which there was more than five consecutive years of complete or partial non-use on the effective date of the notice provision, July 1, 1995, is not entitled to notice by the express terms of the statute. As to Permit 10245, Certificate 2651, most of the water right had not been used for more than five consecutive years before the notice provision was enacted in 1995. Therefore, the holders of the water right were not entitled to notice of possible forfeiture before said notice was provided in the hearing notice. Such an interpretation is clear from the express provisions of the statute. The plain language of the statute lends itself to only one possible interpretation: any water right or

²¹ NRS chapters 533 and 534.

portion of water right that had not been put to beneficial use for five years or more when the notice provision became effective is not entitled to notice. The permittees' argument can only be accepted if the phrase "but less than 5 consecutive years" is ignored.

Such an interpretation would not only be inconsistent with the express language of NRS § 534.090, but would give retroactive effect to the statute when the legislative history clearly intended the notice provision not apply retroactively. According to Assemblyman Neighbors, one of the sponsors of Assembly Bill 435, "there are no retroactive provisions in [A.B. 435]."²² In testimony regarding A.B. 435, the State Engineer stated, "this office has taken the position that if 5 years have already past [sic], those non-users of water rights are not to be notified. Under the measure, it is only the ones where 4 years of non-use of water rights have occurred, but not yet 5."²³ The reason A.B. 435 was not applied to existing rights that had not been used for five years or more was that such a requirement would have placed a tremendous burden on the State Engineer's office. The State Engineer commented that "probably 4,000 water rights in the state . . . are subject to forfeiture."²⁴

Accordingly, the Legislature understood from one of the drafters of A.B. 435 that the notice provision was not intended to be applied in situations where five years of non-use had already occurred prior to the enactment of the law and thereby resurrect rights that were already subject to forfeiture. Generally, a statute will only be interpreted to have prospective effect unless there is a clear expression of legislative intent that it applies retroactively.²⁵ Here not only has the Legislature not stated an intention that the notice provision of NRS § 534.090(1) apply retroactively, they specifically indicated in both the language of the statute and the legislative history that the notice provision was not intended to be retroactive.

The State Engineer concludes that, since more than five consecutive years of non-use of water under Permit 10245, Certificate 2651, had passed prior to the enactment of the notice

²² *Hearing on A.B. 435 Before the Senate Committee on Natural Resources*, 1995 Leg., 68th Sess. 2 (June 7, 1995).

²³ *Id.* at Sess. 4.

²⁴ *Id.*

²⁵ *See, Nevada Power Co. v. Metropolitan Development Co.*, 104 Nev. 684, 686, 765 P.2d 1162 (1988).

provision of NRS § 534.090 he was not required to provide one-year notice as set forth in NRS § 545.090. Therefore, the motion to dismiss was properly denied by the Hearing Officer. The State Engineer further concludes that the persons raising the argument are not owners of record of the water right in the records of the Office of the State Engineer, as they have never complied with the provisions of NRS §§ 533.382, 533.383, 533.384 and 533.386 for having the water right assigned into their names, they were not entitled under the law to any notices provided by the State Engineer in reference to Permit 10245, Certificate 2651.

III.

The State Engineer concludes there is clear and convincing evidence of more than five years of non-use of all of the water right, except for Mr. Young's parcel, subjecting all but the 5.3 acre-foot stipulated to in reference to APN 139-28-303-003 to a declaration of forfeiture.

RULING

The water authorized for appropriation under Permit 10245 Certificate 2651 is hereby declared forfeited, except for 5.3 acre-feet appurtenant to APN 139-28-303-003 that was used and is in good standing as of the date of this ruling.

Respectfully submitted,



HUGH RICCI, P.E.
State Engineer

HR/SJT/jm

Dated this 19th day of
January, 2006.