

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

IN THE MATTER OF FORFEITURE OF WATER )  
RIGHTS UNDER PERMIT 26786, CERTIFICATE )  
9024, APPROPRIATED FROM AN UNDERGROUND )  
SOURCE, PAHRUMP VALLEY ARTESIAN GROUND- )  
WATER BASIN (162), NYE COUNTY, NEVADA. )

RULING

# 4397

GENERAL

I.

Application 26786 was filed by Clover Burson on June 21, 1972, to change the point of diversion and place of use of the underground waters of the Pahrump Valley Artesian Groundwater Basin previously appropriated under Permit 25128 for irrigation and domestic purposes on 20 acres within the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  and 20 acres within the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 12, T.21 S., R.53 E., M.D.B.&M.<sup>1</sup> The proposed point of diversion is described as being located within the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 12. A permit was issued under Application 26786 on January 31, 1973, for 1.35 cubic feet per second (cfs). On May 4, 1977, after Proof of Beneficial Use of the waters as allowed under the permit was filed with the Division of Water Resources, the State Engineer issued Certificate 9024 allowing for the diversion of 0.69 cfs, not to exceed a total duty of 182.0 acre-feet annually (afa), for the irrigation of 18.25 acres of land within the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  and 18.15 acres of land in the N $\frac{1}{2}$  SW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 12.<sup>1</sup>

II.

Documents were submitted to the Office of the State Engineer which transferred ownership of the remaining portion of Permit 26786 appurtenant to the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  in the records of the Office of the State Engineer from the original permittee to the present owner of record Elevterio E. Rodriguez and Grace Rodriguez.<sup>1</sup> At the time of the administrative hearing held on June 7, 1990, the records of

<sup>1</sup>File No. 26786, official records in the Office of the State Engineer.

the Nye County Assessor's Office indicated that Melvin J. and Mary A. Bailey were the owners of record of the parcel of land.

III.

The State Engineer initially described and designated a portion of the Pahrump Valley Artesian Groundwater Basin on March 11, 1941.<sup>2</sup> The State Engineer subsequently extended the boundaries of the designated area of the Pahrump Valley Artesian Groundwater Basin on January 15, 1948,<sup>3</sup> and on January 23, 1953.<sup>4</sup>

On October 26, 1987, the State Engineer issued Order 955 wherein he found that the groundwater levels in the Pahrump Valley were declining and ordered that all applications filed to appropriate water from the Pahrump Valley Artesian Groundwater Basin in the east side of the basin on the Pahrump and Manse Fans would be denied; all applications for all uses except small commercial uses on the valley floor would be denied; and all applications filed to appropriate water for irrigation purposes on lands in Pahrump Valley that have had a certificated water right forfeited where the forfeiture occurred prior to January 1, 1988, would be considered for approval on an individual basis; however, such applications would only be considered if they had been filed within 60 days of the date the water right had been declared forfeited.

IV.

After all parties of interest were duly noticed by certified mail, an administrative hearing was held with regard to the forfeiture of Permit 26786, Certificate 9024, on June 7, 1990, at

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<sup>2</sup>State Engineer's Order No. 176, dated March 11, 1941, official records in the Office of the State Engineer.

<sup>3</sup>State Engineer's Order No. 193, dated January 15, 1948, official records in the Office of the State Engineer.

<sup>4</sup>State Engineer's Order No. 205, dated January 23, 1953, official records in the Office of the State Engineer.

Pahrump, Nevada, before representatives of the Office of the State Engineer.<sup>5</sup>

FINDINGS OF FACT

I.

Testimony and evidence presented at the administrative hearing showed that from 1982 through 1988 employees of the Office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as groundwater pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 9024.<sup>6</sup> From 1982 through 1987 the pumpage inventories indicated that no water had been used for irrigation as allowed under the certificate on the lands identified as the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ . The State Engineer finds that from 1982 through 1987 no irrigation took place at the certificated place of use identified as the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 12.

II.

The hearing in this matter was originally scheduled for June 6, 1990, but a request for continuance to June 7, 1990, had been lodged. Neither the permittee of record nor the owner of record of the land appeared at the June 7, 1990, public administrative hearing even though the request for continuance of the hearing by the Bailey's attorney had been granted the day before<sup>7</sup>. The State Engineer finds that no testimony or evidence was presented at the public administrative hearing which showed any use of water as authorized under the permit/certificate from 1982 through 1987 on the land identified as S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 12.

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<sup>5</sup>Transcript, public administrative hearing before the State Engineer, June 7, 1990. (Hereinafter "Transcript".)

<sup>6</sup>State's Exhibit No. 10, public administrative hearing before the State Engineer, June 7, 1990. (Hereinafter "State's Exhibit No. 10".)

<sup>7</sup>Transcript, pp. 69 - 70.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>8</sup>

II.

In order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.<sup>9</sup> After a certificate is issued on a permit, failure for five successive years on the part of the certificate holder to use beneficially all, or any part of the underground water of the State of Nevada for the purpose for which the right is acquired or claimed, works a forfeiture of the right to the use of that water to the extent of the nonuse.<sup>10</sup>

Forfeiture must be demonstrated by clear and convincing evidence.<sup>11</sup> Clear and convincing evidence is that evidence which falls somewhere between a preponderance of the evidence and the higher standard of beyond a reasonable doubt.<sup>12</sup> To establish a fact by clear and convincing evidence a party must persuade the trier of fact that the proposition is highly probable, or must produce in the mind of the fact finder a firm belief or conviction that the allegations in question are true.<sup>13</sup>

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<sup>8</sup>NRS Chapters 533 and 534.

<sup>9</sup>NRS 533.410.

<sup>10</sup>NRS 534.090.

<sup>11</sup>Town of Eureka v. Office of the State Engineer, 826 P.2d. 948 (1992).

<sup>12</sup>1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

<sup>13</sup>Id. at 239.

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The State Engineer concludes clear and convincing evidence exists as to non-use of the water from 1982 through 1987, and no evidence was provided otherwise, thereby working a forfeiture of the water right in 1986.

RULING

The right to beneficially use 0.33 cubic feet per second, 87.90 acre-feet annually, of the water right appurtenant to 17.58 acres in the S $\frac{1}{2}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 12, T.21 S., R.53 E., M.D.B.&M. under Permit 26786, Certificate 9024, is hereby declared forfeited.

Respectfully submitted,

  
R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/ab

Dated this 7th day of  
August, 1996.