

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 14054, CERTIFICATE)
6109 FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

RULING

4460

GENERAL

I.

Application 14054 was filed by Alexander E. Bettles on February 18, 1952, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 14054 was approved on June 7, 1961, for 1.6 cubic foot per second (cfs) for irrigation and domestic use. Certificate 6109 under Permit 14054 was issued on April 20, 1966, for 1.52 cfs of water not to exceed 127.0 acre-feet annually (AFA) for the irrigation of 25.4 acres of land, 16.7 acres of which are located within Lot 1 (NE $\frac{1}{4}$ NE $\frac{1}{4}$) and the remaining 8.7 acres are located within Lot 2 (SE $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 12, T.17S., R.48E., M.D.B.&M. The point of diversion is located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 12.¹

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.² Permit 14054, Certificate 6109 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

¹File No. 14054, official records in the office of the State Engineer.

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

foundation for the evidence filed in support of the petition.³

On October 9, 1996, a hearing was held to consider the possible forfeiture of Permit 14054, Certificate 6091.⁴ The petitioner, ARI, did not appear at the hearing.⁵

IV.

At the hearing to consider the forfeiture of Permit 14054, Certificate 6091, administrative notice was taken of record developed at the foundation hearing, May, 1994, and of the record developed at all the previous hearings on the individual water rights.⁶

V.

At the hearing, the representative for the water right holder moved to dismiss the petition regarding Permit 14054, Certificate 6019, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 14054, Certificate 6019.⁷ In addition, a motion to strike Exhibit Nos. 17 through 21 and 27 was entered, based on ARI's failure to appear and make its witnesses available for cross examination.⁸

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

³Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁴Exhibit No. 199, Public Administrative Hearing before the State Engineer October 9, 1996.

⁵Transcript p. 10, Public Administrative Hearing before the State Engineer, October 9, 1996.

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

⁷Transcript pp. 10, Public Administrative Hearing before the State Engineer, October 9, 1996.

⁸Transcript pp.10-16, Public Administrative Hearing before the State Engineer, October 9, 1996.

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

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 through 1992 shows that no water was used for irrigation on any of the 25.4 acres of land shown as the place of use under Permit 14054, Certificate 6019.¹⁰ The testimony of the individuals who performed the inventories for those years, except 1990,¹¹ confirmed that no irrigation occurred during those years.¹²

The present owner of the property on which Permit 14054, Certificate 6019 is appurtenant, submitted an evidence package related to the irrigation of the property in 1990 and 1991.¹³ The

⁹Transcript pp. 11-12 and 16-18, Public Administrative Hearing before the State Engineer, October 9, 1996.

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

¹¹The individual who performed the inventory for 1990, Mr. Bill Quinn, is no longer with the Nevada Division of Water Resources. Questions directed to Mr. Quinn could have been answered in writing if they were submitted prior to the hearing, in accordance with the Notice of Hearing. No questions for Mr. Quinn were submitted.

¹²Transcript pp. 25 and 49-50, Public Administrative Hearing before the State Engineer, October 9, 1996.

¹³Exhibit No. 207, Public Administrative Hearing before the State Engineer, October 9, 1996.

evidence package included a letter from H.H. Records stating that he supervised the irrigation of the property located within Section 12, T.17S., R.48E., M.D.B.&M., during the period September, 1990 to October, 1991. The evidence package also included electrical power records which indicated that significant power had been consumed during that time and that the power had been disconnected in October, 1991. A photograph of the property, taken on September 8, 1991, was also included in the package that showed a crop growing right up to Bettles Road, which runs along the south side of the property. Two other photographs were submitted at the hearing which showed the crop growing in the same field.¹⁴ The photographs are looking north from a point on Bettles Road.¹⁵ The land was irrigated from the certificated well that is presently in good condition and produces about 400 gallons per minute.¹⁶ Affidavits from two individuals who observed the irrigation of the property were also submitted.¹⁷

The place of use of Permit 14054, Certificate 6019 consists of 16.7 acres within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 12, T.17S., R.48E., M.D.B.M., and 8.7 acres within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 12. No portion of the water righted land lies adjacent to Bettles Road, the southern border of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 12.¹⁸ The nearest certificated land is approximately 200 feet north of Bettles Road.¹⁹ The aerial photograph taken in May, 1990,²⁰ shows a

¹⁴Exhibit No. 208, Public Administrative Hearing before the State Engineer, October 9, 1996.

¹⁵Transcript pp. 77-79 and Exhibit No.211, Public Administrative Hearing before the State Engineer, October 9, 1996.

¹⁶Transcript pp. 80, Public Administrative Hearing before the State Engineer, October 9, 1996.

¹⁷Exhibit Nos. 209 and 210, Public Administrative Hearing before the State Engineer, October 9, 1996.

¹⁸Exhibit No. 201, Public Administrative Hearing before the State Engineer, October 9, 1996.

¹⁹Exhibit No. 201, Public Administrative Hearing before the State Engineer, October 9, 1996.

continuous piece of land cleared, adjacent to Bettles Road on the south and Miner Road on the east. Comparing the location of this cleared land to the description of the location of the field in the three photographs²¹ proves they are the same land. Comparing the location of the cleared land to the place of use as shown on the culture map, shows that the land irrigated in 1990 and 1991 lies partly within the place of use and partly outside the place of use. The State Engineer finds that beneficial use of the water occurred in 1990 and 1991 but a portion of the land irrigated lies outside the place of use of Permit 14054, Certificate 6019.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.²²

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.²³

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.²⁴

IV.

There is much evidence showing that water was used from the certificated well in 1990 and 1991. However, the water was used on

²⁰Exhibit No. 21, Public Administrative Hearing before the State Engineer, May 16-18, 1996.

²¹Transcript p. 77, Public Administrative Hearing before the State Engineer, October 9, 1996.

²²NRS Chapters 533 and 534.

²³NRS 534.090.

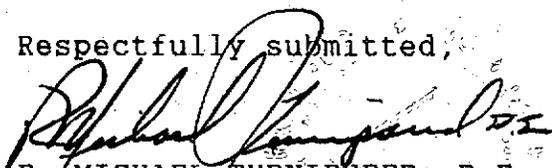
²⁴Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

a contiguous piece of land located partly within the place of use and partly outside of the place of use. The State Engineer concludes that the water under Permit 14054, Certificate 6019 was placed to beneficial use in 1990 and 1991. The State Engineer further concludes that the water rights under Permit 14054, Certificate 6019 cannot be declared forfeited. However, it must be noted that the land located outside of the place of use was not irrigated in accordance with the terms of the certificate. If the holder of the water right wishes to continue to irrigate this property, he must file an application to change the place of use and obtain a permit to do so.

RULING

The right to beneficially use the water appropriated under Permit 14054, Certificate 6019 is not declared forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/ab

Dated this 6th day of
December, 1996.