

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF )  
WATER RIGHTS UNDER PERMIT 17694, CERTIFICATE )  
7194 FROM AN UNDERGROUND SOURCE, AMARGOSA )  
DESERT GROUNDWATER BASIN (230), NYE COUNTY, )  
NEVADA. )

RULING

# 4496

GENERAL

I.

Application 17694 was filed by James C. Steelman on October 29, 1958, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 17694 was approved on February 11, 1959, for 2.0 cubic foot per second (cfs) for irrigation and domestic use. Certificate 7194 under Permit 17694 was issued on November 7, 1969, for 2.0 cfs of water not to exceed 191 acre feet annually (AFA) for the irrigation of 38.2 acres of land, located within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15, T.17S., R.49E., M.D.B.&M. The point of diversion is located within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of said Section 15.<sup>1</sup>

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.<sup>2</sup> Permit 17694, Certificate 7194 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 foundation for the evidence filed in support of the petition.<sup>3</sup>

<sup>1</sup> File No. 17694, official records in the office of the State Engineer.

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

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

On October 23, 1996, a hearing was held to consider the possible forfeiture of Permit 17694, Certificate 7194.<sup>4</sup> The petitioner, ARI, did not appear at the hearing.<sup>5</sup>

IV.

At the hearing to consider the forfeiture of Permit 17694, Certificate 7194, administrative notice was taken of records in the office of the State Engineer and of the record developed at the pre-hearing conference, February, 1994, at the foundation hearing, May, 1994, and at all the previous hearings on the individual water rights.<sup>6</sup>

V.

At the hearing, the water right holder moved to dismiss the petition regarding Permit 17694, Certificate 7194, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 17694, Certificate 7194.<sup>7</sup> In addition, a motion to strike ARI's exhibits was entered, based on ARI's failure to appear and make its witnesses available for cross examination.<sup>7</sup>

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 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,

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<sup>4</sup> Exhibit No. 272, Public Administrative Hearing before the State Engineer October 23, 1996.

<sup>5</sup> Transcript p. 5, Public Administrative Hearing before the State Engineer, October 23, 1996.

<sup>6</sup> Transcript pp. 10-11, Public Administrative Hearing before the State Engineer October 23, 1996.

<sup>7</sup> Transcript pp. 5-6, Public Administrative Hearing before the State Engineer, October 23, 1996.

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.<sup>8</sup>

VI.

Mr. Bill Quinn, who performed the pumpage inventory in Amargosa Valley in 1990, is no longer an employee of the Division of Water Resources. The water right holders had the opportunity to submit questions for Mr. Quinn prior to the hearing, that would be answered in writing and be made a part of the record.<sup>9</sup> No questions for Mr. Quinn were submitted.

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 and 1987 through 1990 shows that five acres were irrigated under Permit 17694, Certificate 7194.<sup>10</sup> The inventory also shows that four acres were irrigated in the years 1991 through 1993. The inventories refer to the grape vineyard which is determined to occupy approximately five acres.<sup>11</sup> The individuals who performed the inventories for those years, noticed the rows of dense

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<sup>8</sup> Transcript pp. 6-7, Public Administrative Hearing before the State Engineer, October 23, 1996.

<sup>9</sup> Exhibit No. 272, Public Administrative Hearing before the State Engineer, October 23, 1996.

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

<sup>11</sup> Transcript pp. 13, 36-37, 56, and Exhibit Nos. 280 and 282, Public Administrative Hearing before the State Engineer, October 23, 1996.

windbreak trees and regarded other water use as domestic.<sup>12</sup> ARI's 1989 and 1990 aerial photographs confirm that no irrigation occurred on the south portion of the place of use of Permit 17694, Certificate 7194. However, there appears to have been irrigation on the north portion of the place of use.

Mr. Gilgan, the holder of this water right, testified that he planted and watered "thousands" of windbreak trees.<sup>13</sup> The aerial photographs clearly show the forty acre parcel in which the place of use of Permit 17694, Certificate 7194 is located.<sup>14</sup> Four rows of windbreak trees, of varying density, can be seen, totalling about one mile in length. If the width of each row is assumed to be 20 feet, then approximately three acres of land is covered by the windbreak trees.

Mr. Gilgan testified that he maintains a nursery in which he irrigates three acres of grapevine cuttings.<sup>15</sup> He also irrigates a pasture of about two acres.<sup>16</sup> In early 1993, before these forfeiture proceedings began, Mr. Gilgan purchased and installed sprinkler equipment and sod for a six acre parcel, which was cleared for growing sod to sell to golf courses.<sup>17</sup>

The evidence and testimony indicates that irrigation occurred in the north half of the place of use of Permit 17694, Certificate

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<sup>12</sup>Transcript pp. 16-18, and 38, Public Administrative Hearing before the State Engineer, October 23, 1996.

<sup>13</sup>Exhibit No. 279 and Transcript p. 55, Public Administrative Hearing before the State Engineer, October 23, 1996.

<sup>14</sup>Exhibit Nos. 18, 19, 20, and 21, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

<sup>15</sup>Exhibit No. 292 and Transcript pp. 62-63 and 66-67, Public Administrative Hearing before the State Engineer, October 23, 1996.

<sup>16</sup>Exhibit No. 283 and Transcript pp. 61-62, Public Administrative Hearing before the State Engineer, October 23, 1996.

<sup>17</sup>Exhibit Nos. 284, 286, and 293 and Transcript pp. 64 and 67-69, Public Administrative Hearing before the State Engineer, October 23, 1996.

7194, on the vineyard (5 acres), the windbreaks (3 acres), the nursery (3 acres), the pasture (2 acres), and the sod area (6 acres), which totals 19 acres. The State Engineer finds that 19 acres in the north half of the place of use of Permit 17694, Certificate 7194 were irrigated during the alleged period of forfeiture. The State Engineer further finds that the pumpage inventories, the testimony of those who performed the inventories, and the aerial photographs are clear and convincing evidence that water was not used under Permit 17694, Certificate 7194 on 19.2 acres within the south half of the place of use during the alleged forfeiture period.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

IV.

There is evidence showing that water was used on 19 acres within the north half of the place of use of Permit 17694, Certificate 7194. The State Engineer concludes that this portion

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<sup>18</sup> NRS Chapters 533 and 534.

<sup>19</sup> NRS 534.090.

<sup>20</sup> Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

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of Permit 17694, Certificate 7194, amounting to 95 AFA, is not declared forfeited.

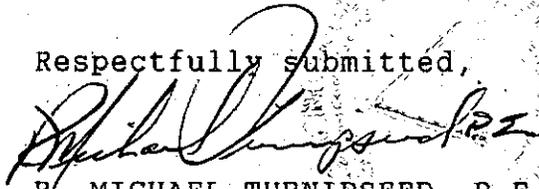
v.

Regarding the remainder of Permit 17694, Permit 7194, amounting to 96 AFA, the State Engineer concludes that there is clear and convincing evidence of continuous non-use exceeding five years. The State Engineer further concludes that this remaining portion of Permit 17694, Certificate 7194 is forfeited.

RULING

The right to beneficially use the water appropriated under that portion of Permit 17694, Certificate 7194 appurtenant to 19 acres of land within the north half of the place of use and amounting to 95 AFA is not declared forfeited. The right to beneficially use the water appropriated under the remaining portion of Permit 17694, Certificate 7194, amounting to 96 AFA is hereby declared forfeited on the grounds that the water under said certificate was not placed to beneficial use for a continuous period of time exceeding five years.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/JCP/ab

Dated this 14th day of  
February, 1997.