

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

IN THE MATTER OF THE POSSIBLE FORFEITURE)  
OF WATER RIGHTS UNDER PERMIT 24369, )  
CERTIFICATE 6818, FROM AN UNDERGROUND )  
SOURCE, AMARGOSA DESERT GROUNDWATER )  
BASIN (230), NYE COUNTY, NEVADA. )

RULING

# 4547

GENERAL

I.

Application 24369 was filed by Paul P. Clement on February 14, 1968, to change the point of diversion of water previously appropriated from the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 24369 was approved on the application on May 29, 1968, for 1.8 cubic feet per second (cfs) for irrigation and domestic use. Certificate 6818 under Permit 24369 was issued on October 16, 1968, for 1.8 cfs of water, not to exceed 600 acre feet annually (afa), for the irrigation of 120 acres of land located within the NE¼ NE¼, NW¼ NE¼ and SW¼ NE¼ of Section 20, T.16S., R.49E., M.D.B.&M. The point of diversion is located within the NE¼ NE¼ of said Section 20.<sup>1</sup>

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare numerous water rights forfeited.<sup>2</sup> Permit 24369, Certificate 6818, was 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 at which the petitioner provided the foundation for the

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<sup>1</sup> File No. 24369, official records in the office of the State Engineer.

<sup>2</sup> Exhibit Nos. 1 and 2, public administrative hearing before the State Engineer, May 16-18, 1994.

evidence filed in support of its petition.<sup>3</sup> On October 11, 1996, a hearing was held to consider the possible forfeiture of Permit 24369, Certificate 6818.<sup>4</sup> The petitioner, ARI, did not appear at the hearing.<sup>5</sup> Upon request and for good cause shown, the taking of evidence and testimony relating to that portion of Permit 24369, Certificate 6818, owned by Dr. Quincy Fortier was continued to a later date.

IV.

At the hearing to consider the forfeiture of Permit 24369, Certificate 6818, administrative notice was taken of records in the office of the State Engineer and of the record developed to date related to the forfeiture petition.<sup>6</sup>

V.

At the hearing the representative for one of the water right holders moved to dismiss the petition regarding Permit 24369, Certificate 6818, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 24369, Certificate 6818.<sup>7</sup> In addition, a motion to strike Exhibit Nos. 17 through 21 and Exhibit No. 27 was made based on ARI's failure to appear and make its witnesses available for cross examination.<sup>7</sup>

In response to the motions, the Hearing Officer found as provided in NRS § 534.090 that the State Engineer has the statutory

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<sup>3</sup> Exhibit No. 7, public administrative hearing before the State Engineer, May 16-18, 1994.

<sup>4</sup> Exhibit No. 239, public administrative hearing before the State Engineer, October 11, 1996.

<sup>5</sup> Transcript, pp. 8-9, public administrative hearing before the State Engineer, October 11, 1996.

<sup>6</sup> Transcript, pp. 9-10, public administrative hearing before the State Engineer, October 11, 1996.

<sup>7</sup> Transcript, pp. 9-10, public administrative hearing before the State Engineer, October 11, 1996.

authority to declare a forfeiture of water rights in the absence of a third party petition, and that the evidence submitted at the foundation hearing 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 and denied the motion to dismiss and the motion to strike.<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 to Mr. Quinn prior to the hearing that would be answered in writing and made a part of the record.<sup>9</sup> No questions for Mr. Quinn were submitted.

FINDINGS OF FACT

I.

In 1973 the land identified as the place of use under Permit 24369, Certificate 6818, was subdivided and approved for 24 lots to be known as the Amargosa Ranch Acres.<sup>10</sup> The subdivision was approved with the domestic water supply being individual domestic wells on each parcel and water for the irrigation of any parcel to be served from the certificated well under Permit 24369.

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<sup>8</sup> Transcript, pp. 14-12 and 16-18, public administrative hearing before the State Engineer, October 9, 1996.

<sup>9</sup> Exhibit No. 239, public administrative hearing before the State Engineer, October 11, 1996.

<sup>10</sup> Exhibit No. 248, public administrative hearing before the State Engineer, October 11, 1996.

Certificate 6818.<sup>11</sup> The State Engineer finds that at the time of the administrative hearing Amargosa Ranch Acres consisted of 14 parcels of land.

II.

The State Engineer finds that at the time of the notice of possible forfeiture the subdivided parcels were owned as listed below:

APN<sup>12</sup> 19-311-01 (Fortier); 19-311-02 (Fortier); 19-311-03 (Albitre); 19-311-04 (Rodman); 19-311-05 (Koerwitz); 19-311-06 (O'Hara); 19-311-07 (Fortier); 19-311-08 (Fortier); 19-311-09 (Fortier); 19-321-01 (Goldstrom); 19-321-02 (Avery); 19-321-03 (Howard and Archer); 19-321-04 (Junius); and 19-321-05 (Fortier).<sup>13</sup>

III.

The State Engineer finds that the notice of possible forfeiture was mailed by the State Engineer's office on June 16, 1993, and received by the owners of the subject subdivided parcels between June 17, 1993, and June 26, 1993.

IV.

The certificated well under Permit 24369, Certificate 6818, is located on what was originally identified as Lot 3 of the Amargosa Ranch Acres, which is now part of Assessor Parcel Number 19-311-02 (Fortier).<sup>14</sup> No evidence was presented that since the subdivision approval in 1973 irrigation water was ever supplied to any of the 14 parcels in Amargosa Ranch Acres from the certificated well. The

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<sup>11</sup> Exhibit No. 247, public administrative hearing before the State Engineer, October 11, 1996.

<sup>12</sup> APN stands for Assessor Parcel Number.

<sup>13</sup> Exhibit Nos. 243 and 244, public administrative hearing before the State Engineer, October 11, 1996.

<sup>14</sup> Exhibit Nos. 243 and 248, public administrative hearing before the State Engineer, October 11, 1996.

State Engineer finds that the only evidence as to any use of water within the certificated place of use, prior to the notice of possible forfeiture, on any of the parcels of land was some use from a well on APN 19-311-03 (Albitre), which is not the certificated well.

V.

The Amargosa Ranch Acres subdivision was approved in 1973 and the evidence presented showed that only one lot had been developed prior to the notice of possible forfeiture.<sup>15</sup> The State Engineer finds that the approval of the subdivision does not protect the water right from a forfeiture for non-use.

VI.

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 of water under Permit 24369, Certificate 6818, among other permits.<sup>16</sup> The State Engineer finds that the annual groundwater pumpage inventory for the Amargosa Desert Groundwater Basin for the years 1985 through 1992 shows that no water was used from the certificated well as authorized pursuant to the subdivision approval for irrigation on any of the 120 acres of land shown as the place of use under Permit 24369, Certificate 6818, within the Amargosa Ranch Acres subdivision.

VII.

In an affidavit, Mr. Albitre, owner of APN 19-311-03,<sup>17</sup> stated that he lived on the property from 1981 through 1992 and that he

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<sup>15</sup> Exhibit No. 242, public administrative hearing before the State Engineer, October 11, 1996.

<sup>16</sup> Exhibit No. 10, public administrative hearing before the State Engineer, May 16, 1994.

<sup>17</sup> At the public administrative hearing the State Engineer was informed by a Mr. Michael DeLee that this parcel is now owned by someone named Lilly. Transcript, p. 6, public administrative hearing before the State Engineer, October 11, 1996.

grew peach, pomegranate and apricot trees, grapes, asparagus, a vegetable garden, tree line and pasture. According to the affidavit the tree line covered 5 acres and a substantial portion of the property was cultivated at any given time.<sup>18</sup> Mr. Albitre did not appear at the administrative hearing.

The State Engineer finds that the contention that the tree line covered 5 acres and that a substantial portion of the property was cultivated at any given time is not supported by photographs submitted by the owner of APN 19-321-01.<sup>19</sup> The photographs comprising Exhibit No. 242 show some use of water on APN 19-311-03; however, the use shown and described by Mr. Albitre is considered domestic use.<sup>20</sup> The State Engineer further finds the evidence does not support the contention that a "substantial" portion of the property was cultivated at any given time as Exhibit No. 242 indicates that less than one acre of land had any vegetation on it.

VIII

On May 2, 1994, Mr. Goldstrom, the owner of APN 19-321-01, provided the State Engineer with five (5) photographs and a letter stating that domestic use was obvious in photograph #1 and agricultural use in photograph #2. Photograph #1 shows a few trees around a residence and photograph #2 shows those same trees and some cleared land as of 1994, a year after the notice of possible forfeiture. The State Engineer finds there is no evidence that APN 19-321-01 is anything other than desert covered by sagebrush and

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<sup>18</sup> Exhibit No. 250, public administrative hearing before the State Engineer, October 11, 1995.

<sup>19</sup> Exhibit No. 242, public administrative hearing before the State Engineer, October 11, 1995.

<sup>20</sup> NRS § 534.350(7) - domestic well means a well used for culinary and household purposes in a single-family dwelling, including the watering of a garden, lawn and domestic animals and where the draught does not exceed 1,800 gallons per day (2.02 acre-feet annually).

the photographs show no residence or water use on the Goldstrom parcel of land.

IX.

At the October 11, 1996, hearing, the State Engineer deferred the taking of evidence and testimony relating to the Fortier portion of Permit 24369, Certificate 6818, upon Dr. Fortier's request and for good cause shown based upon health reasons. By letter of April 9, 1997, Dr. Fortier was notified that the hearing record needed to be closed in order for the State Engineer to finalize the possible forfeiture determination.<sup>1</sup> Dr. Fortier was requested to provide evidence and testimony relating to the history of water use within his portion of the place of use under the subject permit.

On May 29, 1997, an evidence package was filed with the office of the State Engineer which consisted of affidavits from Dr. Fortier and David Stubbs, accompanied by a supplemental affidavit from Dr. Fortier which was supported by Exhibits 1 through 34. These exhibits consisted of copies of Dr. Fortier's personal checks which were drafted during the years 1982 through 1993.<sup>21</sup> It is Dr. Fortier's contention that the land had been cleared, leveled, water lines and sprinklers installed, and water applied to a developed field, prior to the June 16, 1993, notice of possible forfeiture. The State Engineer finds that Dr. Fortier received notice of the possible forfeiture on June 19, 1993.<sup>1</sup> The State Engineer further finds that Dr. Fortier's evidence package was entered into the hearing record as Exhibit No. 251. The State Engineer finds upon review of the evidence provided by Dr. Fortier that only a limited amount of it is relevant to forfeiture issues for the time period being considered.

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<sup>21</sup> Exhibit No. 251, public administrative hearing before the State Engineer, October 11, 1996.

X.

The affidavits of Dr. Fortier and David Stubbs provide a statement of general chronology of the development of the Fortier parcel. Portions of this chronology do not agree with the field observations made during the June 23 and 24, 1993, and Fall 1993 pumpage inventories or other evidence contained in the package. Contained within Exhibit No. 251 is a copy of an unsworn statement from Shane Stubbs stating that he assisted his father in May of 1993 with the leveling, planting and watering of 65 acres. This unsworn statement does not comport with the pumpage inventories, the sworn testimony of the staff of the Division of Water Resources, or in fact, Dr. Fortier's own Affidavit and evidence.

The sworn Affidavit of Mr. David Stubbs states that in May 1993 he built a bunk house on the Fortier property and that in approximately May 1993 he cleared the land, leveled and plowed it and laid out the main line, pipes, sprinkler heads and wheel lines in preparation for the use of the water.<sup>21</sup> Mr. Stubbs further stated that within two days of his seeing Dr. Fortier give a check to the power company he turned on the well and began the irrigation of the 65 acres he had prepared and planted. Exhibit No. 251 contains a copy of Dr. Fortier's check to Valley Electric, which carries a illegible issue date; however, the check was time stamped June 29, 1993, by the bank, 10 days after Dr. Fortier received notice of the possible forfeiture. Exhibit No. 251 also contains a check dated June 26, 1993, to Dave's Pump Service, a July 31, 1993, check indicating that \$350.00 dollars was paid for seed and a check of the same date indicating a tractor hire for the same property.

When the staff of the office of the State Engineer went to Amargosa Valley on June 23 and 24, 1993, they were specifically looking for any evidence such as land being cleared<sup>22</sup> and since

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<sup>22</sup> Transcript, p. 19 and Exhibit No. 10-I, public administrative hearing before the State Engineer, October 11, 1996.

nothing was noted on the pumpage inventory of that date it is more likely than not that the land was not cleared as of that date which post-dates the notice of forfeiture received by Dr. Fortier on June 19, 1993. It was not until the Fall 1993 pumpage inventory that land was showed as cleared.<sup>23</sup>

No mention is made as to the clearing of this land or any improvement in the June 23 and 24, 1993, pumpage inventory. Dr. Fortier's evidence indicates that seed was not purchased until July 31, 1993. The Affidavit of David Stubbs indicates that irrigation of the land did not occur until July 1, 1993, and that the land was not cleared until after Dr. Fortier received notice of the forfeiture petition on June 19, 1993. While a bunk house may have been built in May 1993 that does not constitute re-use of the water. Further, Dr. Fortier's Affidavit states that after he learned of the potential forfeiture he contacted Mr. Stubbs and caused him to accelerate his work which cannot constitute re-use of the water as it post-dates Dr. Fortier's notice of possible forfeiture. The State Engineer finds that any work that occurred after June 16, 1993, cannot be considered as a possible cure of the forfeiture and that the resumed use of the water on or about July 1, 1993, cannot be considered either. The State Engineer further finds that even if some development work may have occurred during May or June of 1993 within the place of use to prepare the area for future irrigation no actual use of any of the water had occurred prior to receipt of the forfeiture notice.

KI.

The State Engineer finds that the pumpage inventories, the testimony, the fact that a sagebrush coverage extended over nearly the entire property prior to the notice of the possible

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<sup>23</sup> Exhibit No. 10, public administrative hearing before the State Engineer, May 16-18, 1994, and Transcript, pp. 17-19, public administrative hearing before the State Engineer, October 11, 1996.

forfeiture<sup>24</sup> presents clear and convincing evidence that water was not used as allowed under Permit 24369, Certificate 6818, during the alleged forfeiture period.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and of the subject matter of this action and determination.<sup>25</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>26</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>27</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>28</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

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<sup>24</sup> Exhibit Nos. 20 and 21, public administrative hearing before the State Engineer, May 16-18, 1994.

<sup>25</sup> NRS Chapters 533 and 534.

<sup>26</sup> NRS § 534.090.

<sup>27</sup> Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev. 163, 826 P.2d 948 (1992).

<sup>28</sup> 1 Clifford S. Fishman, Jones on Evidence Section 3:10 at 238 (7th Ed. 1992).

question are true.<sup>29</sup> Under the law enunciated by the Nevada Supreme Court, substantial use of water rights after the statutory period of non-use "cures" claims to forfeiture so long as no claim or proceeding of forfeiture has begun.<sup>30</sup> Dr. Fortier argues that use of water by Mr. Albitre should cure any forfeiture as to his water rights. The State Engineer finds that Mr. Albitre's use was not as authorized pursuant to the subdivision approval, was not from the certificated well as allowed under the subdivision approval, and use on perhaps 1 acre out of the 120 acres under the certificate is not substantial re-use of the water.

IV.

There is evidence showing that water diverted from a well other than the certificated well was used on less than 1 acre within APN 19-311-03 (Albitre). The State Engineer concludes that use is allowed under the domestic well exemption provided for in NRS § 534.350(7).

V.

The State Engineer concludes that there is clear and convincing evidence of continuous non-use exceeding five years resulting in the forfeiture of the water right under Permit 24369, Certificate 6818.

VI.

The 60 acres of cleared land by Dr. Fortier and the placement of sprinkler equipment are indicative of an attempt to re-use the water under Permit 24369, Certificate 6818; however, the State Engineer does not believe this work took place prior to receipt of the forfeiture notice. The record of evidence and testimony clearly establishes that substantial irrigation of the land could not have occurred prior to mid-June 1993, after forfeiture

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<sup>29</sup> Id. at 239.

<sup>30</sup> Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev. 163, 826 P.2d 948 (1992).

proceedings had begun. There were no other parcels under irrigation on Dr. Fortier's property and the activities that took place appear to have been instigated by Dr. Fortier racing to clear the land and put it into production in an attempt to claim the forfeiture had been cured. The State Engineer concludes that the forfeiture was not cured.

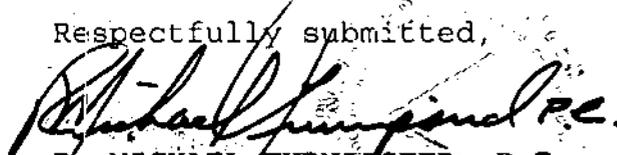
VII.

The State Engineer concludes that the owners of each of the 14 assessor parcels now identified as being within the Amargosa Ranch Acres subdivision have the right to one domestic well per assessor parcel limited to 1,800 gallons per day of water.

RULING

The right to beneficially use the water appropriated under Permit 24369, Certificate 6818, is 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/SJT/ab

Dated this 9th day of  
July, 1997.

LOW LISKE  
APPROVED  
BOARD  
STATE