

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

IN THE MATTER OF THE POSSIBLE)
FORFEITURE OF PERMIT 26810,)
CERTIFICATE 8427, FILED TO)
APPROPRIATE THE PUBLIC WATERS OF)
THE LAS VEGAS VALLEY ARTESIAN)
GROUNDWATER BASIN (212), CLARK)
COUNTY, NEVADA.)

RULING

4633

GENERAL

I.

Permit 26810 granted by the State Engineer on April 5, 1973, authorized Kay L. Adams to appropriate the underground waters of the Las Vegas Valley Artesian Groundwater Basin for irrigation and domestic purposes to serve 2 acres within a portion of the SE¼ NE¼ and the SW¼ NE¼ of Section 2, T.22S., R.61E., M.D.B. & M.¹ The point of diversion is described as being located within the SE¼ NE¼ of said Section 2.¹ After filing proof of beneficial use of the waters as allowed under the permit, the State Engineer issued Certificate 8427 on February 4, 1975, authorizing the appropriation of 0.025 cubic feet per second (cfs), not to exceed 10 acre-feet annually.¹ The land which the certificated water right is appurtenant to is 1.5 acres in the SE¼ NE¼ and 0.5 acres in the SW¼ NE¼ of said Section 2.¹

II.

By notice dated June 23, 1997, the State Engineer informed the owners of the parcels in question that a portion of the water right under Permit 26810, Certificate 8427, may be subject to forfeiture as described under Nevada Revised Statute § 534.090.²

¹ File No. 26810, official records of the office of the State Engineer, and Exhibit No. 1, public administrative hearing before the State Engineer, April 23, 1998.

² Exhibit No. 4, public administrative hearing before the State Engineer, April 23, 1998.

III.

After all parties of interest were duly noticed by certified mail,³ an administrative hearing was held with regard to the possible forfeiture of Permit 26810, Certificate 8427 on April 23, 1998, at Las Vegas, Nevada, before a representative of the office of the State Engineer.⁴

FINDINGS OF FACT

I.

The place of use under Permit 26810, Certificate 8427, at the time of the issuance of the permit was identified as one parcel of land, that being two (2) acres within a portion of the SE¼ NE¼ and the SW¼ NE¼ of Section 2, T.22S., R.61E., M.D.B. & M.⁵ The point of diversion is described as being located within the SE¼ NE¼ of said Section 2.¹ At the time the water right under Permit 26810 was issued there were two houses on the property and the permitted well served water to both houses and their associated irrigation and landscaping.⁶ Testimony was provided that the original permittee Kay Adams and his family lived in the house on the West parcel and his mother and father lived in the house on the East parcel.⁷

Today the place of use under Permit 26810, Certificate 8427, is identified as two separate parcels with a driveway type parcel

³ Exhibit No. 16, public administrative hearing before the State Engineer, April 23, 1998.

⁴ Transcript, public administrative hearing before the State Engineer, April 23, 1998.

⁵ File No. 26810, official records of the Office of the State Engineer, and Exhibit No. 1, public administrative hearing before the State Engineer, April 23, 1998.

⁶ Transcript, p. 24, public administrative hearing before the State Engineer, April 23, 1998.

⁷ Transcript, pp. 25, 31-32, 34-35, public administrative hearing before the State Engineer, April 23, 1998.

in between. The East parcel, Assessor's Parcel (APN) 177-02-603-010, is owned by Sherryl and Craig Patterson. The West parcel, APN 177-02-603-008, is owned by Gene Cline and is the parcel upon which the certificated well is located.⁸

The deed which conveyed the East parcel from the original permittee to the Pattersons did not reserve out the water right; therefore, under the appurtenance clause of the deed the State Engineer finds that the portion of the water right under Permit 26810, Certificate 8427, appurtenant to the East parcel went with the land.⁹ The State Engineer further finds that since the original permit was issued for irrigation and domestic for a total duty of 10 acre-feet annually when the original parcel of land was split into two parcels each parcel was assigned the duty associated with that land.¹⁰

II.

Documents were submitted to the office of the State Engineer which transferred ownership of portions of Permit 26810 from the original permittee to Gene Cline, and Sherryl and Craig Patterson.¹ The State Engineer finds that the water right appurtenant to the

⁸ Exhibit Nos. 1 and 3, public administrative hearing before the State Engineer, April 23, 1998.

⁹ Nevada Revised Statute § 533.040 (all water used in this state for beneficial purposes shall remain appurtenant to the place of use). Cf. Zolezzi v. Jackson, 72 Nev. 150, 297 P.2d 1081 (1956) (where defendants conveyed land on which they had acquired water rights by use prior to enactment of water laws recognizing the doctrine of appurtenance, and no water rights were expressly granted or expressly excluded, water was appurtenant to land and passed under defendants' deed conveying land, "together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining...", because doctrine of appurtenance had been established law of this state since waters were first appropriated to beneficial use.)

¹⁰ Exhibit Nos. 2, 6 and 7, public administrative hearing before the State Engineer, April 23, 1998.

West parcel (5.19 acre-feet annually) was assigned to Gene Cline,¹¹ and the water right appurtenant to the East parcel (4.81 acre-feet annually) was assigned to Sherryl and Craig Patterson.¹²

III.

Each year from 1992 through 1997 employees of the office of the State Engineer performed what are known as groundwater pumpage inventories which documented through meters readings the use of water under Permit 26810, Certificate 8427.¹³ For each of the years from 1992 through 1996, the pumpage inventory indicated that maximum quantity of water used under the permit was 4.4 acre-feet annually. By the notice of possible forfeiture dated June 23, 1997, the State Engineer informed Mr. Cline and Mr. and Mrs. Patterson that a portion of the water right under Permit 26810, Certificate 8427, may be subject to forfeiture as described under Nevada Revised Statute § 534.090,¹⁴ and that the basis of the State Engineer's determination of a possible forfeiture was the water use inventory supported by site specific meter readings conducted by the staff of the office of the State Engineer in Las Vegas, and that the water use inventory showed that a maximum of 4.4 acre-feet was pumped within the last five years, that year being 1992. The State Engineer finds the notice also informed the permittees if they had any information to show water use in excess of the 4.4 acre-feet they had an opportunity to submit that information to the State Engineer.

¹¹ Exhibit No. 6, public administrative hearing before the State Engineer, April 23, 1998.

¹² Exhibit No. 7, public administrative hearing before the State Engineer, April 23, 1998.

¹³ Exhibit Nos. 12 and 17, public administrative hearing before the State Engineer, April 23, 1998.

¹⁴ Exhibit No. 4, public administrative hearing before the State Engineer, April 23, 1998.

IV.

In response to the State Engineer's notice of possible forfeiture, Mr. Cline filed information with the State Engineer to cause him to re-evaluate the total quantity of water used up to the date of the notice of possible forfeiture.¹⁵ The State Engineer finds the largest total quantity of water used in any one year between 1992 and the June 23, 1997, notice of possible forfeiture from the certificated well was 5.0 acre-feet per year and this determination was not refuted with any evidence that pre-dates the notice of possible forfeiture. The State Engineer finds that any water use after the June 23, 1997, notice of possible forfeiture is not considered in a forfeiture proceeding.¹⁶

V.

Testimony was provided that the original permittee Kay Adams and his family lived in the house on the West parcel which is now the Cline property, and his mother and father lived in the house on the East parcel which is now the Patterson property, and that after his father passed away in 1989 the house on the East parcel sat vacant until the Pattersons bought it and took occupancy in March 1993.¹⁷ Further testimony was provided that around 1989 or 1990 Kay Adams placed a valve in the line between the Cline property and the Patterson property and turned off the water to the Patterson property;¹⁸ however, the valve is operable and water can be turned

¹⁵ Exhibit Nos. 5 and 14, public administrative hearing before the State Engineer, April 23, 1998.

¹⁶ Town of Eureka v. State Engineer, 108 Nev. 163, 862 P.2d 948 (1992) (substantial use of water rights after statutory period of non-use "cures" claims of forfeiture so long as no claim or proceeding of forfeiture has begun).

¹⁷ Transcript, pp. 25, 31-32, 34-35, public administrative hearing before the State Engineer, April 23, 1998.

¹⁸ Transcript, pp. 24-25, public administrative hearing before the State Engineer, April 23, 1998.

on and off. Mr. Adams testified that he never watered the vegetation on the Pattersons side of the property from July 1989 through the sale in March 1993.¹⁹ Between 1989 and March 1993, the valve was opened and water was used from the certificated well on the Patterson's property only for approximately ten days to two weeks for the drilling of a domestic well on the Patterson property and for cleaning and toilets while the house was being prepared for the Pattersons to occupy.²⁰

Mr. Adams continued to occupy the now Cline property until November 1996 and did not believe the Pattersons used any water from the certificated well during that time period from March 1993 when they moved in until he left in 1996 based on Mr. Adams' belief that he told the Pattersons they could only use water from the certificated well in the case of an emergency.²¹ The understanding was passed along to Mr. Cline when he bought the property in December 1996.²²

However, the evidence indicates Mrs. Patterson periodically turned off her domestic well and used the certificated well to "deep water" the large trees on her property and did not use the water for domestic or any other purposes.²³ The State Engineer finds that while Mr. Adams does not believe he gave the Pattersons the right to regularly use water from the certificated well the deed which transferred the property from the Adams to the

¹⁹ Transcript, pp. 32-35, public administrative hearing before the State Engineer, April 23, 1998.

²⁰ Transcript, pp. 32-36, public administrative hearing before the State Engineer, April 23, 1998.

²¹ Transcript, pp. 39-52, public administrative hearing before the State Engineer, April 23, 1998.

²² Transcript, pp. 52-53, public administrative hearing before the State Engineer, April 23, 1998.

²³ Transcript, pp. 36, 41, 56, public administrative hearing before the State Engineer, April 23, 1998.

Pattersons did not reserve the water right appurtenant to the Patterson's property out of the transaction; therefore, under the appurtenance clause of the deed the appurtenant water right went with the land. The State Engineer finds that the Pattersons occasionally watered a few large trees on their property from the certificated well and water was used for a period of approximately ten days to two weeks in 1993 while the house was being prepared for the Pattersons to occupy. The State Engineer finds that only a very minimal quantity of water was used on the Patterson's property during the forfeiture period and the rest of the water right is lost to forfeiture.

VI.

Mr. Adams provided testimony as to the vegetation that existed on the Patterson property at the time of his father's death which consisted of a 40' by 60' vineyard, a number of fruit trees, a row of 5 to 6 pomegranate trees along the east side of the property and a row of 8-10 pomegranate trees in the middle of the south side of the property. Also, on the property were mature trees described as two mulberry trees, another pomegranate tree, a cherry tree, two mesquite trees, an olive tree, a large pine tree, an african type tree, and some pampas grass.²⁴

The testimony further indicates that since Mr. Adams did not water the Patterson property from the time of his father's death in 1989 until the property was sold to the Pattersons in 1993 all the vegetation was dead, except for a few of the large trees. All the pomegranates, the vineyard and fruit trees were dead²⁵ and Mrs. Patterson provided testimony and evidence that 20 pomegranate trees were removed for her to clear ground for a horse arena on the South

²⁴ Transcript, pp. 27-30, and Exhibit No. 18, public administrative hearing before the State Engineer, April 23, 1998.

²⁵ Transcript, p. 56, public administrative hearing before the State Engineer, April 23, 1998.

½ acre of the Patterson's property²⁶ and that she has slowly been eliminating the rest of the vegetation on her property.²⁷

Various methodologies have been developed and refined over the years that quantify the amount of water actually put to beneficial use for domestic purposes. The comparison of an average sized home that has a water meter and a similar home on a domestic well in the same general vicinity indicates that water use is on the order of one acre-foot annually. The evidence in this case indicates that the Pattersons did not use the well for domestic or general landscaping, but rather used the domestic well drilled on their property. On the basis of the evidence provided by Mr. Adams and Mrs. Patterson as to water use on the Patterson's property, the State Engineer finds that 0.25 acre-foot of water is the maximum quantity of water that was used on the Patterson's property between 1989 and 1997, and further finds the remainder of the water right appurtenant to the Patterson's property is lost to forfeiture.

VII.

As to the Cline property, the State Engineer finds that the largest total quantity of water used in any one year between 1992 and the June 23, 1997, notice of possible forfeiture from the certificated well was 5.0 acre-feet per year. As the State Engineer has found that the Pattersons are entitled to 0.25 acre-foot this leaves 4.75 acre-feet remaining as actually used on the Cline property during the forfeiture period. The actual quantity of water appurtenant to the West parcel assigned to Gene Cline is 5.19 acre-feet of use per year. The State Engineer finds that Mr. Cline has substantially used the water right appurtenant to his parcel of land and there is no forfeiture of the water right appurtenant to his land and the evidence indicates that the water

²⁶ Exhibit No. 8, public administrative hearing before the State Engineer, April 23, 1998.

²⁷ Transcript, p. 58, public administrative hearing before the State Engineer, April 23, 1998.

is necessary for the vegetation and uses presently existing on Mr. Cline's property.²⁸

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.²⁹

II.

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.³⁰ Non-use must be shown by clear and convincing evidence. 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.³¹ 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.³²

The State Engineer concludes clear and convincing evidence was found in the testimony of Mr. Coache and the evidence provided through the pumpage inventories, and the evidence provided by he

²⁸ Exhibit No. 18, public administrative hearing before the State Engineer, April 23, 1998. Photographs in File No. 26810 in the permit file in the Southern Nevada Branch office of the State Engineer.

²⁹ NRS § Chapters 533 and 534.

³⁰ NRS § 534.090.

³¹ 1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

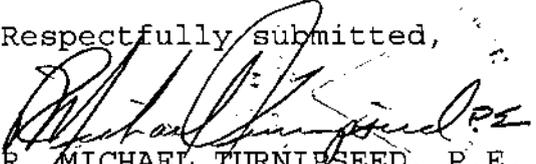
³² Id. at 239.

parties that for the five successive years from 1992 through 1997 that 4.56 acre-feet of water was not used as allowed under the permit/certificate on the East parcel portion of the certificated place of use (the Patterson property APN 177-02-603-010) and this portion of the water right is forfeited leaving 0.25 acre-foot appurtenant to the Patterson's property and in good standing as of the June 23, 1997. The State Engineer concludes there is not clear and convincing evidence that no water was used on the West parcel comprising the certificated place of use (the Cline property APN 177-02-603-08) and that none of the 5.19 acre-feet of the water right appurtenant to the Cline property is forfeited.

RULING

A portion of Permit 26810, Certificate 8427, is hereby declared forfeited because of the failure for a period exceeding five successive years on the part of the holders of the right to beneficially use the water for the purposes for which the subject water right was acquired. The portion of Permit 26810, Certificate 8427, that is forfeited is 4.56 acre-feet of water that was appurtenant to the East parcel comprising the certificated place of use (the Patterson property APN 177-02-603-010) leaving 0.25 acre-foot in good standing as of June 23, 1997, on the East parcel. The remaining 5.19 acre-foot portion of Permit 26810, Certificate 8427, appurtenant to the West parcel is not forfeited and is in good standing as of the June 23, 1997.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 4th day of
June, 1998