

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

IN THE MATTER OF THE POSSIBLE )  
FORFEITURE OF PERMIT 23797, )  
CERTIFICATE 6763, FILED TO )  
APPROPRIATE THE PUBLIC WATERS OF )  
THE AMARGOSA DESERT HYDROGRAPHIC )  
BASIN (230), NYE COUNTY, NEVADA. )

RULING

# 4916

GENERAL

I.

Permit 23797, Certificate 6763 which was granted by the State Engineer on August 28, 1967, authorized Jack A. Martin to appropriate the underground waters of the Amargosa Desert groundwater basin at a diversion rate of 1.35 cubic feet per second (cfs) for irrigation and domestic purposes on 80 acres of land within the E $\frac{1}{2}$  SW $\frac{1}{4}$  of Section 10, T.16S., R.48E., M.D.B.&M.<sup>1</sup> The point of diversion is described as being located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 10, or at a point from which the W $\frac{1}{4}$  corner of said Section 10 bears N. 43° 46' W. a distance of 1,930 feet.<sup>1</sup>

After filing proof of beneficial use of the waters as allowed under the permit and required by law, the State Engineer issued Certificate 6763 on September 17, 1968, authorizing the appropriation of 1.35 cfs, not to exceed 400 acre-feet annually.<sup>2</sup>

The land to which the certificated water right is appurtenant to is 40 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$  and 40 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 10. Title to Permit 23797, Certificate 6763, Certificate 6763, was assigned in the records of the office of the State Engineer to The Olson Family Trust on April 13, 1999.<sup>3</sup>

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<sup>1</sup> File No. 23797, official records of the office of the State Engineer.

<sup>2</sup> Exhibit Nos. 2 and 3, public administrative hearing before the State Engineer, February 29, 2000 (Hereinafter "Exhibit").

<sup>3</sup> File No. 23797, official records in the office of the State Engineer.

**II.**

On February 4, 1993, Lavonne Selbach, as agent for the then owners of record of Permit 23797, Certificate 6763, filed an Application for Extension of Time to Prevent a Forfeiture of the water right under Permit 23797, Certificate 6763 indicating: (1) the water had not been used on SE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 10, (2) there were problems with the pump for the well, (3) problems as to the purchase of wheel lines for irrigating, and (4) problems with finding someone to plant the ground. The State Engineer granted an extension of time to prevent the forfeiture through February 4, 1994.<sup>4</sup>

**III.**

On February 3, 1994, Alan Hinman, as agent for the then owners of record of Permit 23797, Certificate 6763, filed an Application for Extension of Time to Prevent a Forfeiture of the water right indicating the water had not been used on SE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 10 because extensive well work was required and they were unable to have the work done. The State Engineer granted an extension of time to prevent the forfeiture through February 4, 1995.<sup>5</sup>

**IV.**

On February 2, 1995, Ron Dahl, as agent for the then owners of record of Permit 23797, Certificate 6763, filed an Application for Extension of Time to Prevent a Forfeiture of the water right indicating the water had not been used on all of the existing place of use in said Section 10 because extensive well work was required, parts were needed to be removed from an old pump and the well needed to be cleaned. The State Engineer granted an extension of time to prevent the forfeiture through February 4, 1996.<sup>6</sup>

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<sup>4</sup> Exhibit No. 4.

<sup>5</sup> Exhibit No. 4.

<sup>6</sup> Exhibit No. 4.

**FINDINGS OF FACT**

**I.**

After a certificate is issued on a water right permit, failure for five successive years on the part of the certificate holder to use beneficially all or any part of the underground water for the purpose for which the right was acquired or claimed works a forfeiture of the right to the use of that water to the extent of the nonuse.<sup>7</sup>

1. For water rights in basins for which the state engineer keeps pumping records, if the records of the state engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of such a water right which is governed by this chapter, the state engineer shall notify the owner of the water right, as determined in the records of the office of the state engineer, by registered or certified mail that he has 1 year after the date of the notice in which to use the water right beneficially and to provide proof of such use to the state engineer or apply for relief pursuant to subsection 2 to avoid forfeiting the water right. If, after 1 year after the date of the notice, proof of beneficial use is not sent to the state engineer, the state engineer shall, unless he has granted a request to extend the time necessary to work a forfeiture of the water right, declare the right forfeited within 30 days.

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2. The state engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture. The state engineer may grant, upon request and for good cause shown, any number of extensions, but a single extension must not exceed 1 year.

When Lavonne Selbach filed an Application for Extension of Time to Prevent a Forfeiture on February 4, 1993, she recognized that the water right under Permit 23797, Certificate 6763 was close to being forfeited for non-use of the water and she was given a 1 year extension to repair the well and put the water back

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<sup>7</sup> NRS § 534.090.

to beneficial use. When Alan Hinman filed an Application for Extension of Time to Prevent a Forfeiture on February 3, 1994, he too recognized that the water right under Permit 23797, Certificate 6763 was even closer to being forfeited for non-use of the water and he was given a second 1 year extension to repair the well and put the water back to beneficial use. When Ron Dahl, the person who appeared as a witness on behalf of The Olson Family Trust at the administrative hearing, filed an Application for Extension of Time to Prevent a Forfeiture on February 2, 1995, he was fully aware that the water right under Permit 23797, Certificate 6763 was subject to being forfeited for non-use, that the certificated well needed to be repaired and the water put back to beneficial use in order to save the water right from forfeiture. The State Engineer finds when the extension of time to prevent forfeiture expired on February 4, 1996, according to NRS § 534.090, the forfeiture of the water right under Permit 23797, Certificate 6763 actually worked, but said declaration of the forfeiture was not issued by the State Engineer at that time.

## II.

In order to provide any interested parties an opportunity to present any evidence as to the forfeiture or use of water from the well under Permit 23797, Certificate 6763, all parties of interest were duly noticed by certified mail<sup>8</sup> of a public administrative hearing to be held on February 29, 2000, in Las Vegas, Nevada, before a representative of the office of the State Engineer.<sup>9</sup>

## III.

The State Engineer finds that the only authorized point of diversion of the waters of the Amargosa Desert groundwater basin under Permit 23797, Certificate 6763 is that well described as being located within the SE¼ SW¼ of said Section 10, or at a point

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<sup>8</sup> Exhibit No. 1.

<sup>9</sup> Transcript, public administrative hearing before the State Engineer, February 29, 2000 (Hereinafter "Transcript").

from which the W¼ corner of said Section 10 bears N. 43° 46' W. a distance of 1,930 feet.

#### IV.

Each year from 1994 through 1999 employees of the office of the State Engineer performed what are known as groundwater pumpage inventories which are on-site inspections for each water right permit in the groundwater basin, and which documented the use of water under Permit 23797, Certificate 6763.<sup>10</sup> The purpose of groundwater pumpage inventories is an overall basin management tool. By looking at the amount of water pumped from the groundwater basin under each permit/certificate authorized by the State Engineer, and documenting illegal uses, the State Engineer is able to approximate the amount of ground water pumped from the groundwater basin.<sup>11</sup> Groundwater pumpage inventories used in conjunction with water level measurement are used to determine the hydrologic health of a groundwater basin.

The 1994 pumpage inventory indicates that no acres had been irrigated within the certificated place of use and there was no pump or motor on the authorized well. The 1995 pumpage inventory indicates that 80 acres had been irrigated within the certificated place of use, but not from the authorized well, but rather from the well under Permit 49947, and there was no pump or motor on the well. The 1996 pumpage inventory indicates that no acres had been irrigated within the place of use, there was no pump on the well, and the well casing was open. The 1997 pumpage inventory indicates that no acres had been irrigated within the certificated place of use, there was no pump on the well, and the well casing was open. The 1998 pumpage inventory indicates that no acres had been irrigated within the certificated place of use, there was no pump on the well, and the well casing was capped. The 1999 pumpage inventory indicated that no acres had been irrigated

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<sup>10</sup> Transcript, pp. 9 - 16; Exhibit Nos. 5, 6, 7, 8, 9 and 10.

<sup>11</sup> Transcript, p. 26.

within the certificated place of use, there was no pump on the well, and the well casing was capped.

The State Engineer finds there could not have been partial irrigation from the well under Permit 23797 in the years 1992 and 1993 as indicated in the Applications for Extension of Time to Prevent a Forfeiture of the water right filed in 1993 and 1994 because those applications themselves indicate that the well authorized under Permit 23797, Certificate 6763 was not operable. The State Engineer finds that the Application for Extension of Time to Prevent a Forfeiture of the water right filed in 1995 shows that no water was used from the well because the well was not operable<sup>12</sup> and indicates a belief by the owner of the permit that the water right was subject to forfeiture. The State Engineer finds that no water was placed to beneficial use as authorized under Permit 23797, Certificate 6763, from 1994 through and including 1999, a period of 6 years.

V.

Testimony was provided at the administrative hearing that the well used to irrigate the property in 1995 was that under Permit 49947 which is the well authorized to irrigate the property north of the certificated place of use at issue here.<sup>13</sup> Certificate 12435 issued under Permit 49947 only authorizes the diversion of 1.75 cfs, not to exceed 281.9 afa, and only for use on lands described as 16.38 acres in the NE¼ NW¼ and 40 acres in the SE¼ NW¼ of Section 10, T.16S., R.48E., M.D.B. & M.<sup>14</sup>

Nevada Revised Statute § 533.325 provides that any person who wishes to appropriate any of the public waters, or to change the place of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with

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<sup>12</sup> Transcript, p. 47.

<sup>13</sup> See, well marked on Exhibit No. 3, Transcript, pp. 23-24.

<sup>14</sup> File No. 49947, Certificate 12435, official records of the office of the State Engineer.

such appropriation, change in place of diversion or change in manner or place of use, apply to the state engineer for a permit to do so.

Testimony was provided by a staff member of the Division of Water Resources at the administrative hearing that a person can replace a well within a 300-foot radius of the original point of diversion for the drilling of a new well without procuring a new permit provided the new well is within the same quarter-quarter section of land as the permitted well, and the old well is plugged. If it is outside that 300-foot radius or quarter-quarter section of land it is treated as an illegal use.<sup>15</sup> The State Engineer finds that the well under Permit 49947 is 2800 feet north of the well permitted under 23797 and is located in the NE¼ NW¼ of Section 10, T.16S., R.48E., M.D.B.&M., not in the SE¼ SW¼ of said Section 10. The State Engineer further finds no permit had been granted allowing for an additional appropriation out of the well authorized under Permit 49947, for allowing an additional place of use under Permit 49947, or to change the point of diversion of the water appropriated under Permit 23797, Certificate 6763 to the well permitted under Permit 49947. Therefore, any additional diversion out of the well under Permit 49947 for use on lands not authorized as the existing place of use under Permit 49947 was an illegal use of the waters of the State of Nevada.

#### VI.

At the public administrative hearing, the counsel for The Olson Family Trust asked that the petition for forfeiture be dismissed because notice of possible forfeiture had not been sent as provided in NRS § 534.090. As set forth above, that statute requires notice only where the records of the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years of nonuse. The legislative history of the enactment of 1995 amendments to NRS § 534.090 makes it very clear that the 4/5 year provision was specifically enacted so that water rights that had

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<sup>15</sup> Transcript, pp. 19 - 20, 28; and NAC § 534.300(2).

not been used for more than 5 consecutive years would not require notice.<sup>16</sup> In this case, extensions of time to prevent the working of the forfeiture were on file since 1983 which means that more than 5 years non-use of the water right pre-dated even the enactment of the statute requiring notice.<sup>1</sup> The Olson Family Trust alleges that the illegal use of water out of the well under Permit 49947 "cured" the nonuse of the water right under Permit 23797, Certificate 6763, and therefore, the notice of forfeiture should have been sent out under NRS § 534.090. The State Engineer finds and concludes below that the permittee under Permit 23797, Certificate 6763 could not cure nonuse of the water right under that permit by the illegal use of water out of another well over ½ mile away. Therefore, the State Engineer finds a 4-year nonuse notice was not required in this case.

#### VII.

As to the notice provisions under NRS § 534.090, it only requires the State Engineer to notify the owner of water rights as determined in the records of the State Engineer. Ron Dahl and Mr. Lowe, another witness who appeared on behalf of The Olson Family Trust, alleged that The Olson Family Trust should have received notice of the possible forfeiture. However, a request for assignment of Permit 23797, Certificate 6763, into the name of The Olson Family Trust was not filed in the office of the State Engineer until January 5, 1999. When the extension of time to prevent forfeiture that was granted in 1995 expired in 1996 no assignment had been filed to transfer the water right into the name of The Olson Family Trust and the assignment, after being filed, was not confirmed until April 13, 1999.

Nevada Revised Statute § 533.386 provides that the State Engineer shall not consider or treat any person to whom a permit or certificate is conveyed as the owner or holder of the water right for all advisements or notices until a report of conveyance

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<sup>16</sup> Many old wells in the state may not have been used for 20 or 30 years and the legislature did not wish to have those water rights rejuvenated.

is confirmed by the State Engineer. As set forth in NRS § § 534.090 and 533.384, it is not the responsibility of the State Engineer to search the records of any county recorder to attempt to determine who might be the owner of a water right. The State Engineer finds it is the responsibility of the holder of water right to inform the State Engineer as to any conveyance of said right. The State Engineer further finds that The Olson Family Trust was given an opportunity to present testimony and evidence as to the possible forfeiture or use of water at the public administrative hearing that was scheduled by the State Engineer.

**VIII.**

At the public administrative hearing, the counsel for The Olson Family Trust asked that the State Engineer take administrative notice of State Engineer's Ruling No. 4114. Ruling 4114 covered a completely different set of circumstances. First, the forfeiture action was being brought by a third party and they had the burden of proof. Secondly, the parties were irrigating within the place of use of the original permit but were using water out of their domestic wells which require no permit. The State Engineer finds that Ruling No. 4114 has no bearing in this matter.

**IX.**

Change Application 64736 was filed on January 5, 1999, to change the point of diversion and place of use of Permit 23797, Certificate 6763, long after the time for working a forfeiture had run. The State Engineer finds the filing of a change application does not prevent the State Engineer from determining whether the water right requested for change is subject to forfeiture<sup>17</sup> nor is the filing of a change application a "use" of water that prevents a declaration of forfeiture.

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<sup>17</sup> Transcript, pp. 34-35.

### CONCLUSIONS

#### I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.<sup>18</sup>

#### II.

After a certificate is issued on a water right 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>19</sup> 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.<sup>20</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>21</sup>

The State Engineer concludes clear and convincing evidence of nonuse of the water right under Permit 23797, Certificate 6763, for the statutory 5 year period is found: (1) in the applications for extensions of time to prevent the forfeiture that expired in 1996, (2) in the testimony of Division of Water Resources employees, (3) the evidence provided through the pumpage inventories, and (4) in the evidence that the well has been inoperable since at least 1993.

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

<sup>19</sup> NRS § 534.090.

<sup>20</sup> 1 Clifford S. Fishman, Jones on Evidence Section 3:10, at 238 (7th Ed. 1992).

<sup>21</sup> Id. at 239.

III.

The State Engineer concludes that Nevada water law required the filing of an application to change the point of diversion of Permit 23797, Certificate 6763 and that a permit must have been granted by the State Engineer under such application before any person had a right to move said point of diversion and use water from that new point of diversion.<sup>22</sup>

IV.

The Olson Family Trust alleges that the use of water from the point of diversion under Permit 49947 on land within the place of use under Permit 23797, Certificate 6763, and not certificated under Permit 49947 cured any claim of nonuse of the water right under Permit 23797, Certificate 6763 citing to the decision of Town of Eureka v. Office of the State Engineer, 108 Nev. 163, 862 P.2d 948 (1992). The case of Town of Eureka stands for the proposition that substantial reuse of the water before a forfeiture claim or proceeding has been initiated cures the nonuse of the water right. The Nevada Supreme Court states in Town of Eureka "we conclude that forfeiture applies when the state proves non-use over the statutory period, unless resumed use has cured or resuscitated the defect in the water rights. (Emphasis added.) In making its ruling the Nevada Supreme Court drew on a Wyoming Case<sup>23</sup> which states "forfeiture did not apply where use had recommenced and claimant brought forfeiture action sixteen years after period of non-use. In the case of Permit 23797, Certificate 6763, use of water has never recommenced since 1993. What The Olson Family Trust in fact alleges is that illegal use from a well other than the certificated well should be allowed to be credited as use of the water to save the water right. The State Engineer does not agree with this argument.

V.

The State Engineer concludes that more than 5 consecutive years of nonuse of the water right under Permit 23797, Certificate

<sup>22</sup> NRS § 533.325.

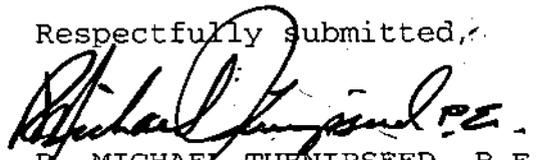
<sup>23</sup> Sturgeon v. Brooks, 281 P.2d 675, 683 (Wyo. 1955).

6763 had passed when the extension to prevent forfeiture expired in 1996, and that since the illegal use of water from the well under Permit 49947 did not cure any claim of nonuse of the water right under Permit 23797, Certificate 6763, the notice provision of NRS § 534.090 was not applicable.

**RULING**

Permit 23797, Certificate 6763, 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 permittee is ordered to have the well under Permit 23797, Certificate 6763 plugged within 120 days of the date of this ruling.

Respectfully submitted,

  
E. MICHAEL TURNIPSEED, P.E.  
State Engineer

RMT/SJT/cl

Dated this 5th day of  
May, 2000.