

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

IN THE MATTER OF THE FORFEITURE)
OF A PORTION OF PERMIT 20378,)
CERTIFICATE 7373, PERMIT 21596,)
CERTIFICATE 7374 AND CHANGE)
APPLICATIONS 70357 AND 70358 FILED)
TO CHANGE THE POINT OF DIVERSION)
AND PLACE OF USE OF THE WATER)
APPROPRIATED UNDER PERMITS 20378)
AND 21596, MIDDLE REESE RIVER)
VALLEY HYDROGRAPHIC BASIN (58),)
LANDER COUNTY, NEVADA.)

RULING
5896

GENERAL

I.

Application 70357 was filed on August 27, 2003, by First Baptist Church to change the point of diversion and place of use of 1.288 cubic feet per second (cfs), not to exceed 312 acre-feet annually (afa), of ground water previously appropriated under Permit 20378, Certificate 7373. The proposed point of diversion is described as being located in the NW¼ SE¼ of Section 10, T.25N., R.42E., M.D.B.&M. The proposed place of use is described as being located within the 78 acres of the N½ SE¼ of said Section 10.¹ The application was timely protested by Clair Shaw, Jr. on the grounds that the water being sought to be changed had not been used for many years thereby subjecting it to a forfeiture declaration and on the grounds that since they have not been using the water and the water table has fallen over 100 feet in the last 14 years they should not be allowed to use the water now.²

II.

Application 70358 was filed on August 27, 2003, by First Baptist Church to change the point of diversion and place of use of 0.829 cfs, not to exceed 351 afa, of

¹ File No. 70357, official records in the Office of the State Engineer. Exhibit No. 3, public administrative hearing before the State Engineer August 27, 2008. Hereinafter, the exhibits and transcript will be referred to solely by the exhibit number or transcript page.

² Exhibit No. 4.

ground water previously appropriated under Permit 21596, Certificate 7374. The proposed point of diversion is described as being located in the NW¼ SE¼ of Section 10, T.25N., R.42E., M.D.B.&M. The proposed place of use is described as being located within the 78 acres of the N½ SE¼ of said Section 10.³

III.

After all parties were duly noticed, a public administrative hearing was held before the Office of the State Engineer on August 27, 2008.⁴

FINDINGS OF FACT

I.

Application 70357 seeks to change water appropriated under Permit 20378, Certificate 7373, which was originally filed by Ernie B. Terry. Application 70358 seeks to change water appropriated under Permit 21596, Certificate 7374, which was originally filed by Daniel A. Aten. Permit 20378 was approved on April 4, 1963, for the irrigation of the E½ of Section 10, T.25N., R.42E., M.D.B.&M. The point of diversion under Permit 20378 is described as being located in the SE¼ SE¼ of said Section 10 and the Permit indicates that the amount of water appropriated is limited to a yearly duty of 4.0 acre-feet per acre of land irrigated. Application 21596 was filed on October 30, 1963, and requested to appropriate water to irrigate the exact same land as that identified under Permit 20378. The application was approved on December 24, 1964, for the irrigation of the E½ of Section 10, T.25N., R.42E., M.D.B.&M. The point of diversion under Permit 21596 is described as being located in the SW¼ NE¼ of said Section 10 and the Permit indicates that the amount of water appropriated is limited to a yearly duty of 4.5 acre-feet per acre of land irrigated.

A letter in File No. 20378 dated November 13, 1969, indicates that Permit 20378 was assigned to Daniel A. Aten on August 19, 1963; thereafter, both Permits 20378 and 21596 were then held by Daniel A. Aten.

³ Exhibit No.5.

⁴ Transcript and Exhibits, public administrative hearing August 27, 2008, official records of the Office of the State Engineer.

The Proofs of Application of Water to Beneficial Use (PBU) were filed for Permits 20378 and 21596 and both listed the identical irrigated land in the E½ of Section 10, T.25N., R.42E., M.D.B.&M., but identified different wells under each PBU.⁵ The State Engineer certificated the water rights under these permits as being supplemental to each other because the same person owned the land for both permits, and both PBUs identified the same land being irrigated. The language that identifies the supplemental nature of the certificates is found where it states that the total duty of water shall not exceed 4.0 afa for Permit 20378 and 4.5 afa for Permit 21596, from all sources. Both certificates were issued on June 17, 1970, and assigned Certificate Nos. 7373 and 7374.

II.

Nevada Revised Statute § 534.090 provides that failure for five successive years after April 15, 1967, on the part of the holder of any right to beneficially use all or any part of the underground water for the purposes for which the right is acquired or claimed, works a forfeiture of the right to use the water to the extent of the nonuse.

Crop Inventories and Ground-Water Pumpage Inventories are performed yearly in the Middle Reese River Valley Hydrographic Basin. The records of the Nevada Division of Water Resources indicate that 160 acres were irrigated in the N½ of the E½ of said Section 10, under Permits 20378 and 21596, in 1986. From 1987 through 1995, the records indicate no irrigation of land within the E½ of Section 10. The State Engineer finds there were eight years of non-use of the water under Permits 20378 and 21596 from 1987 through 1995 for the entire water right represented by these two permits. The records of the Nevada Division of Water Resources indicate that, in 1996, 135 acres of alfalfa was irrigated by a center pivot within the N½ of the E½ of Section 10, from the well permitted under Permit 21596.⁶

Nevada Revised Statute § 534.090(3) provides that if the failure to use water is because of the use of center-pivot irrigation before July 1, 1983, and such use could result in forfeiture of a portion of the right, the State Engineer shall, by registered or certified mail, send to the owner of record a notice of intent to declare a forfeiture. The State

⁵ File No. 20378 and 21596, official records in the Office of the State Engineer.

⁶ Exhibit No. 10.

Engineer finds the forfeiture period at issue here, as to the N½ of the E½ of Section 10, post-dates the July 1, 1983, notice provision and therefore, is not subject to that provision of the Nevada Revised Statute.

Change Applications 70357 and 70358 were filed in 2003. The records of the Nevada Division of Water Resources indicated that from 1997 through 2003, 125 acres of alfalfa were cultivated each year within the NE¼ of Section 10. However, there is no evidence that any water was applied to the remaining 35 acres of water-righted land in the NE¼ of Section 10 subjecting those 35 acres to a declaration of forfeiture. No water was applied for the 18 years, from 1986 through the filing of the change applications in 2003, to any of the 158 acres of water-righted land in the S½ of the E½ of Section 10 subjecting that 158 acres to a declaration of forfeiture. The State Engineer finds no evidence was provided at the administrative hearing as to water use on a total of 193 acres (158 acres + 35 acres). The State Engineer's evidence demonstrates 193 acres of land was not irrigated and the non-use was for more than the statutory five year period necessary to work a forfeiture. Therefore, the State Engineer finds that the water appurtenant to 193 acres under Permits 20378 and 21596 is subject to forfeiture.

III.

In a post-hearing argument, the Applicant First Baptist Church argues that it believed the entire water right was protected so long as any portion of the water rights were pumped, which the State Engineer finds is incorrect. Nevada Revised Statute § 534.090 provides that failure for five successive years to beneficially use all or any part of the underground water for the purposes for which the right is acquired or claimed, works a forfeiture of the right to use the water to the extent of the non-use; therefore, Nevada Water Law provides for partial forfeitures.

The Applicant argues that the beneficial use of water on 125 acres within the NE¼ of Section 10 amounts to substantial use that should cure the forfeiture as to the entire water right, another point with which the State Engineer does not agree. The State Engineer finds a substantial portion of these water rights were not used for more than the statutory five year period of non-use.

The Applicant argues that no protest alleging forfeiture was filed as to Application 70358 and therefore, requests that the taint of forfeiture be removed from Permit 21596 and the parties affected be afforded the statutory period of one year to use the water. The State Engineer finds that a forfeiture works whether or not a protestant alleges it. If the records of the State Engineer indicate non-use of the water for more than the statutory period, the law is clear that a forfeiture works.

The Applicant next requests that the State Engineer grant equitable relief because the Applicant could not obtain clear title to the water right that had been gifted to the Church and therefore, could not legally use the water right during the time forfeiture was working and because it believed the use by their neighbor protected their water rights. The State Engineer finds he does not have equitable authority and any district court cases that granted such relief only did so when there was actual beneficial use of the water, which is not the case here. The State Engineer finds the fact that the Applicant could not clear title to the gifted water right is irrelevant to the use of water. The law is very clear in that failure to use the water works a forfeiture.

IV.

The records of the Division of Water Resources indicate that First Baptist Church was not deeded portions of Permits 20378 and 21596 until January 1998 and five years of non-use of a substantial portion of the water right, the statutory period of forfeiture, had already passed prior to the Church's acquisition of the water rights. Nevada Revised Statute § 533.090(2) provides for the filing of a request for extension of time to prevent a forfeiture, but the previous holder of the water rights did not take advantage of that statutory provision. The State Engineer finds that a substantial portion of the water right under Permits 20378 and 21596 is subject to a declaration of forfeiture leaving no water available to be changed under Applications 70257 and 70358.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷

II.

The State Engineer concludes there is clear and convincing evidence that more than five years of non-use, as to 193 acres of land under Permits 20378 and 21596, have passed prior to the filing of the change applications; therefore, that portion of the rights are subject to a declaration of forfeiture.

III.

The water sought for change under Permits 20378 and 21596, Certificates 7373 and 7374, is forfeit and cannot be used as the basis for change Applications 70357 and 70358; therefore, the State Engineer concludes Applications 70357 and 70358 are subject to denial.

RULING

The water authorized for appropriation for 193 acres of land, under Permits 20378 and 21596, is hereby declared forfeited and Applications 70357 and 70358 are hereby denied.

Respectfully submitted,



TRACY TAYLOR, P.E.
State Engineer

TT/SJT/jm

Dated this 20th day of
October, 2008.

⁷ NRS chapters 533 and 534.