

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

IN THE MATTER OF THE FORFEITURE OF A)
PORTION OF PERMIT 21049, CERTIFICATE)
7667, LOCATED WITHIN THE PAHRUMP)
VALLEY HYDROGRAPHIC BASIN (162), NYE)
COUNTY, NEVADA.)

RULING
#6330

GENERAL

I.

Application 21049 was filed on February 14, 1963, by Floyd M. Cheek and permitted on December 18, 1963, for irrigation and domestic purposes. After filing the required proof of beneficial use, Certificate 7667 was issued on September 20, 1971, for the irrigation of 224.2 acres, not to exceed 5.0 acre-feet per acre, for a total duty of 1121 acre-feet annually (afa). The point of diversion is described as being a well located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 36, T.21S., R.53E., M.D.B.&M. The place of use is described as being 33.0 acres within the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 3.5 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 38.8 acres within the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 36.8 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, 37.2 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 37.0 acres within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, and 37.9 acres within the SE $\frac{1}{4}$ NE $\frac{1}{4}$, all within Section 36, T.21S., R.53E., M.D.B.&M.¹

II.

A portion of Permit 21049, Certificate 7667, consisting of 700.0 afa, which is the portion that is the subject of this ruling, was assigned to Southwest Desert Equities, LLC (50%) and N.G.A. #2, LLC (50%) on February 2, 2006. The 700.0 afa portion of the water right is appurtenant to 140.0 acres, specifically identified as 27.9 acres (easterly portion) within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, 37.2 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, 37.0 acres within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, and 37.9 acres within the SE $\frac{1}{4}$ NE $\frac{1}{4}$, all within Section 36, T.21S., R.53E., M.D.B.&M. This portion was later assigned to the current owner of record in the Office of the State Engineer, B-PWR, LLC on July 18, 2014.¹

¹ File No. 21049, official records in the Office of the State Engineer.

FINDINGS OF FACT

I.

The Pahrump Valley Pumpage Inventory conducted by the Office of the State Engineer for 2009 documented the irrigation of 66.80 acres under the certificated water right by all owners of the water right, including 36.8 acres in the SW¼ NW¼ and 30 out of 37.2 acres in the SE¼ NW¼, all within Section 36, T.21S., R.53E., M.D.B.&M.²

On November 24, 2009, Permit 75524 was issued, which abrogated 8.9 acres in the SW¼ NW¼ of Section 36 and reduced the area irrigated to 57.9 acres from the 66.80 acres described above.³

II.

NRS § 534.090(1) provides in relevant part that:

If the records of the State Engineer or any other documents specified by the State Engineer indicate at least 4 consecutive years, but less than 5 consecutive years, of nonuse of all or any part of a water right which is governed by this chapter, the State Engineer shall notify the owner of the water right . . . by registered or certified mail that the owner 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 [an extension of time].

The State Engineer found that there was four consecutive years of non-use from 2010-2013 on an 82.1 acre portion of the water right owned by Southwest Desert Equities, LLC and N.G.A. #2, LLC⁴; therefore, pursuant to NRS § 534.090(1), on July 16, 2013, the State Engineer served those entities with a Notification of Four Years Nonuse (Four-Year Letter). The 82.1 acre-feet portion of Permit 21049, Certificate 7667 that was subject to the Four-Year Letter included 7.2 acres in the SE¼ NW¼, 37.0 acres in the SW¼ NE¼, and 37.9 acres in the SE¼ NE¼, all within Section 36, T.21S., R.53E., M.D.B.&M.^{1,5}

III.

On July 15, 2014, Southwest Desert Equities, LLC and N.G.A. #2, LLC filed an Application for Extension of Time to Prevent Forfeiture.⁶ Question 3 of the extension request

² 2009 Ground Water Pumpage Inventory, Pahrump Valley, Basin 162, official records in the Office of the State Engineer.

³ File No. 75524, official records in the Office of the State Engineer.

⁴ 2010-2013 Ground Water Pumpage Inventory, Pahrump Valley, Basin 162, official records in the Office of the State Engineer.

⁵ At the certificated duty of 5 acre-feet per acre, the potential duty subject to forfeiture was 410.5 acre-feet (82.1x5= 410.5).

⁶ See generally, NRS § 534.090(2).

form inquired whether non-use occurred on all or a portion of the water, and the last date of beneficial use. The Permittee indicated that non-use had occurred on all of the water referred to in the Four-Year Letter, stating the last date of beneficial use was 2009. The State Engineer finds that this statement confirms the State Engineer's records that the last date of beneficial use for the portion of the water right identified in the Four-Year Letter was in 2009.¹

IV.

On July 18, 2014, a Report of Conveyance was filed to update ownership of a portion of Permit 21049, Certificate 7667 from Southwest Desert Equities, LLC and N.G.A. #2, LLC to B-PWR, LLC. The portion of water right conveyed was Southwest Desert Equities, LLC and N.G.A. #2, LLC's entire portion of the water right, which was 700.0 acre-feet per year appurtenant to 140.0 acres for irrigation and domestic purposes. The State Engineer finds that B-PWR, LLC was confirmed as owner on July 31, 2014, of the relevant portion of Permit 21049, Certificate 7667 described above.¹

V.

On January 6, 2015, B-PWR, LLC was notified by certified mail that the extension of time that was filed July 15, 2014, was granted, and that the new deadline to prevent the working of a forfeiture was July 15, 2015.¹

Nevada Revised Statute § 534.090(1) further provides that:

[i]f, after 1 year after the date of the notice, proof of resumption of beneficial use is not filed in the Office of the State Engineer, the State Engineer shall, unless the State Engineer has granted a request to extend the time necessary to work a forfeiture of the water right, declare the right forfeited within 30 days.

On July 16, 2015, an Application for Extension of Time to Prevent Forfeiture was submitted by the agent for B-PWR, LLC. The State Engineer finds that the attempted filing of the Application for Extension of Time to Prevent Forfeiture was past the due date of July 15, 2015, and was therefore rejected by the State Engineer as being untimely.¹

VI.

Additional relevant language of NRS § 534.090(1) states that:

[f]ailure for 5 successive years after April 15, 1967, on the part of the holder of any right . . . to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water *to the extent of the nonuse*. (Emphasis added).

The Permittee's failure to timely file its Application for Extension of Time to Prevent Forfeiture would ordinarily result in the immediate forfeiture of the portion of the water right subject to the Four-Year Letter. However, in a separate matter, on December 1, 2014, a Request to Investigate Alleged Violation (RIAV) had been filed in the Office of the State Engineer (AV-118) which requested the State Engineer investigate whether the Permittee was using water in violation of the terms of its permit. More specifically, it was alleged the water use by B-PWR, LLC was not being used beneficially and was wasteful.⁷

A site visit was conducted on December 17, 2014, by staff of the Southern Nevada Branch Office of the State Engineer (SNBO) regarding the alleged violation. Site visit observations and additional information on other site visit remarks were documented in an Office Memorandum dated January 6, 2015. Attached to this memorandum was a picture of the meter installed under Permit 21049. The McCrometer totalizing meter, Serial Number (S/N) #141382306, read 52,988,700 gallons, and indicated a flow rate of approximately 580 gallons per minute. A meter photograph was taken on January 5, 2015, to document this reading.⁸

A second field investigation was conducted on July 29, 2015, by staff of the SNBO in regard to the late filed extension of time. The State Engineer finds that a different meter, S/N #100184306, was installed that read 141,720,000 gallons and is documented in an Office Memorandum dated August 4, 2015. The Memorandum documented the last recorded meter reading from the historic meter (S/N #141382306) was 97,785,700 gallons on May 15, 2015.⁹

VII.

In August 2015, additional pumpage and historic meter information was forwarded by e-mail to the Office of the State Engineer by the agent for the Permittee.¹ The e-mail contains details on the purchase of a meter used during the prior year. The historic McCrometer S/N #141382306 meter was identified on an invoice dated July 18, 2014, and is noted starting at zero. Included in the e-mail was a table with the historic meter readings as follows:

Date	x 100 Gallons
July 18, 2014	0
September 1, 2014	0

⁷ Alleged Violation File No. 118, official records in the Office of the State Engineer.

⁸ Office Memorandum dated January 6, 2015, File No. 21049, official records in the Office of the State Engineer.

⁹ Office Memorandum dated August 4, 2015, File No. 21049, official records in the Office of the State Engineer.

September 13, 2014	7,999
October 6, 2014	119,984
October 16, 2014	195,724
November 15, 2014	372,240
December 31, 2014	505,567
February 2, 2015	576,714
March 3, 2015	656,572
March 31, 2015	797,888
May 15, 2015	975,597
May 30, 2015	090,422
June 30, 2015	232,867
July 13, 2015	254,781

VIII.

The placement of underground water over B-PWR's certificated place of use is documented in images from the Landsat 8 satellite on March 26, 2015. The State Engineer finds that in a review of other Landsat images over the course of the last growing season, it appears that the maximum place of use was under cultivation.¹ However, the State Engineer finds that irrigation at the certificated place of use is not determinative of the amount of water beneficially used.

IX.

The documentation of water use claimed in the table above was cross-referenced with other records obtained by the Office of the State Engineer. The invoice dated July 18, 2014, listed the historic McCrometer as S/N #14-13823-06. This historic meter was documented as installed and was reading 52,988 x 100 gallons on a site visit on January 5, 2015. Additionally, on May 15, 2015, this meter was documented as installed and was reading 977,857 x 100 gallons. Both of these site visit meter readings closely align with the submitted meter readings listed in the table above.

The State Engineer finds from the supplied meter readings from the agent of the Permittee from July 18, 2014, (meter reading 0) to July 13, 2015, (meter reading 254,781 x 100 gallons plus 1 turn over) a total of 125,478,100 gallons (or 385.078 acre-feet) was pumped. The certificated amount is 700.0 acre-feet, thus a difference of 314.92 acre-feet is subject to possible forfeiture due to non-use.

X.

Alleged Violation AV-118 is still open and is not the subject of this ruling.

CONCLUSIONS OF LAW

I.

If an extension of time is granted pursuant to NRS § 534.090, and before the expiration of that extension, proof of resumption of beneficial use or another request for an extension is not filed in the Office of the State Engineer, the State Engineer shall declare the water right forfeited.

The State Engineer concludes that all required notices were served on the Permittee by the State Engineer setting a deadline to prevent the working of a forfeiture and the State Engineer lacks jurisdiction to accept an untimely Application for Extension of Time to Prevent Forfeiture.

II.

Pursuant to NRS § 534.090, the failure for 5 successive years to place water to beneficial use for which the right is acquired on the part of the holder of any right for which a certificate has been issued pursuant to NRS § 533.425, is subject to forfeiture.¹⁰

The State Engineer concludes that 314.92 acre-feet, a portion of the water right under Permit 21049, Certificate 7667, in the name of B-PWR, LLC has not been placed to beneficial use for five successive years, and therefore, this portion of the water right is forfeited.

RULING

The portion of water under Permit 21049, Certificate 7667, in the name of B-PWR, LLC, being 314.92 acre-feet annually appurtenant to 62.98 acres, is hereby declared forfeited.

Respectfully submitted,

 P.E.
JASON KING, P.E.
State Engineer

Dated this 23rd day of

December, 2015.

¹⁰ NRS Chapters 533 and 534.