

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 19034, CERTIFICATE)
6705 AND PERMIT 21584, CERTIFICATE 6661 FROM)
AN UNDERGROUND SOURCE, AMARGOSA DESERT)
GROUNDWATER BASIN (230), NYE COUNTY, NEVADA.)

RULING

4484

GENERAL

I.

Application 19034 was filed by Mary Belle Fidroeff on July 18, 1960, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 19034 was approved on April 26, 1961, for 2.5 cubic foot per second (cfs) for irrigation and domestic use. Amended Certificate 6705 under Permit 19034 was issued on December 17, 1968, for 2.5 cfs of water not to exceed 929.73 acre feet annually (AFA) for the irrigation of 185.946 acres of land, located within the portions of the NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ of Section 8, T.17S., R.49E., M.D.B.&M. The point of diversion is located within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 8.¹

Application 21584 was filed by James A. Murdoch on October 15, 1963, to appropriate the underground waters of the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 21584 was approved on October 21, 1966, for 1.51 cfs for irrigation and domestic use. Certificate 6661 under Permit 21584 was issued on May 17, 1968, for 1.51 cfs of water not to exceed 929.73 acre feet annually (AFA) for the irrigation of the same 185.946 acres of land, described above. The point of diversion is the same as that described above.² Permit 21584, Certificate 6661 and Permit 19034, Certificate 6705 are supplemental.

¹File No. 19034, official records in the office of the State Engineer.

²File No. 21584, official records in the office of the State Engineer.

The current owners of record of Permit 21584, Certificate 6661 and Permit 19034, Certificate 6705 are members of the Gilgan Family.^{1,2}

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.³ About the same time, ARI filed applications to appropriate approximately 25,000 AFA of water from the Amargosa Desert Groundwater Basin. Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 are 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 to allow the petitioner the opportunity to provide the foundation for the evidence filed in support of the petition.⁴

On October 22, 1996, a hearing was held to consider the possible forfeiture of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661.⁵ The petitioner, ARI, did not appear at the hearing.⁶

IV.

At the hearing to consider the forfeiture of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, administrative notice was taken of record developed at the foundation hearing,

³Exhibit No's. 1 and 2, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁴Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁵Exhibit No. 251, Public Administrative Hearing before the State Engineer October 22, 1996.

⁶Transcript p. 4, Public Administrative Hearing before the State Engineer, October 22, 1996.

May, 1994, and of the record developed at all the previous hearings on the individual water rights.⁷ Administrative notice was also taken of the records in the Office of the State Engineer.⁸

V.

At the hearing, Counsel for the water right holders moved to dismiss the petition regarding Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, on the grounds that ARI did not appear to present evidence and testimony supporting its petition to declare the forfeiture of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661.⁹

The Hearing Officer stated that the State Engineer has the statutory obligation to declare a forfeiture of water rights in the absence of a third party petition, pursuant to NRS 534.090, provided the evidence is sufficient to show that the forfeiture occurred. The evidence submitted at the foundation hearing is on the record, 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, on the individual parcels of land. 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. The motion to dismiss was denied.¹⁰

⁷Transcript pp. 20-21, Public Administrative Hearing before the State Engineer October 22, 1996.

⁸Transcript p. 19, Public Administrative Hearing before the State Engineer, October 22, 1996.

⁹Transcript p. 4, Public Administrative Hearing before the State Engineer, October 22, 1996.

¹⁰Transcript p. 6, Public Administrative Hearing before the State Engineer, October 22, 1996.

VI.

A motion to strike ARI's exhibits was offered, based on ARI's failure to appear and make its witnesses available for cross examination.¹¹ Counsel for the water right holder noted for the record that cross examination of ARI's witnesses regarding the specific water rights was not allowed at the foundation hearing. The cross examination was deferred to the hearing on the specific water right. Counsel noted that the water right holder was denied the opportunity at this hearing, to cross examine ARI's witnesses by ARI's failure to appear.¹²

The foundation testimony was under oath and the evidence (aerial photographs, etc.) is already on the record and cannot be ignored. The State Engineer will give appropriate weight to ARI's exhibits, bearing in mind that ARI did not appear to support its exhibits or make its witnesses available for cross examination on the specific parcels involved in these permits. The 1993 and 1994 ground photographs in ARI's Exhibit Nos. 17 and 18 were challenged on the grounds that they do not show the place of use of the water rights in question.¹³ The Hearing Officer stated that these photographs would be given very little weight. However, the Hearing Officer stated that other exhibits are clear and stand on their own, particularly Exhibit Nos. 19, 20, and 21, ARI's high level aerial photographs. These may be useful for qualitative determinations of water use or non-use. The motion to strike ARI's exhibits was denied.¹⁴

¹¹Transcript pp. 6-10, Public Administrative Hearing before the State Engineer, October 22, 1996.

¹²Transcript pp. 6-8, Public Administrative Hearing before the State Engineer, October 22, 1996.

¹³Transcript pp. 9-10 and 58, Public Administrative Hearing before the State Engineer, October 22, 1996.

¹⁴Transcript pp. 11-12, Public Administrative Hearing before the State Engineer, October 22, 1996.

VII.

Counsel for the Gilgans made a motion for the State Engineer to take action on the Applications for Extension of Time to Prevent the Forfeiture of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661.¹⁵ The Hearing Officer denied this motion on the grounds that this forfeiture proceeding is essential before any action on the applications for extension of time can be taken.¹⁶

VIII.

Counsel for the Gilgans made a motion that the forfeiture proceedings be deferred until after the State Engineer takes action on ARI's applications to appropriate.¹⁷ The Hearing Officer stated that the State Engineer has determined that the forfeiture proceedings are occurring independent of ARI's applications. The State Engineer has statutory criteria to consider in evaluating ARI's applications to appropriate water,¹⁸ one of which is whether there is unappropriated water at the source. The forfeiture proceedings are a necessary element in determining the status of all existing water rights in Amargosa Valley and whether there is unappropriated water at the source. Therefore, this motion was denied.¹⁹

IX.

Mr. Bill Quinn, who performed the pumpage inventory in Amargosa Valley in 1990, is no longer an employee of the Division

¹⁵Transcript p. 13, Public Administrative Hearing before the State Engineer, October 22, 1996. Extension of time to prevent the working of a forfeiture as found in NRS 534.090(2).

¹⁶Transcript pp. 13-14, Public Administrative Hearing before the State Engineer, October 22, 1996.

¹⁷Transcript p. 14, Public Administrative Hearing before the State Engineer, October 22, 1996.

¹⁸NRS 533.370.

¹⁹Transcript pp. 14-16, Public Administrative Hearing before the State Engineer, October 22, 1996.

of Water Resources. The water right holders had the opportunity to submit questions for Mr. Quinn prior to the hearing, that would be answered in writing and be made a part of the record.²⁰ No questions for Mr. Quinn were submitted. Before the hearing, Counsel for the water right holder requested the State Engineer to subpoena Mr. Quinn.²¹ The State Engineer stated that Mr. Quinn's live testimony is not an essential element in determining whether the evidence of a forfeiture meets the clear and convincing standard. The State Engineer felt that the water right holders would have a full and fair hearing without Mr. Quinn's testimony. The State Engineer found that it was not warranted to subpoena Mr. Quinn. Therefore, the request for the subpoena was denied.²²

FINDINGS OF FACT

I.

The State Engineer has taken annual pumpage inventories in the Amargosa Desert Groundwater Basin since 1983 for the purpose of overall basin management. The annual groundwater pumpage inventories for the Amargosa Desert Groundwater Basin, for the years 1985 through 1989 and 1991 through 1992 show that no water was used for irrigation on any of the 185,946 acres of land shown as the place of use under Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661.²³ The testimony of the individuals who performed the inventories for those years, confirmed that no

²⁰Exhibit No. 251, Public Administrative Hearing before the State Engineer, October 22, 1996.

²¹File No. 19034, official records in the office of the State Engineer.

²²Exhibit No. 256, Public Administrative Hearing before the State Engineer, October 22, 1996.

²³Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994.

irrigation occurred.²⁴ With the exception of three acres near the house, the property was covered with natural vegetation consisting mostly of sagebrush.²⁵ The high level aerial photographs taken in 1987, 1989, and 1990 clearly show the place of use of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661.²⁶ The texture, color and shade shown in the photographs are similar to that of the surrounding native untilled land and support the inventories and the testimony of those who performed the inventories.²⁷

The 1990 pumpage inventory has an entry of 36.22 acres being irrigated in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 8. This conflicts with other evidence and testimony and must have been entered in error. First, Jason King, who viewed the property in 1991, 1992 and 1993, stated that there were about three acres around the house that had trees and a lawn. The remainder of the property was covered in natural vegetation or sagebrush.²⁸ Next, the 1990 high level aerial photograph supports Mr. King's observations that the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 8 was covered with the natural vegetation.²⁹

²⁴ Transcript pp. 23-24 and 46, Public Administrative Hearing before the State Engineer, October 22, 1996.

²⁵ Transcript pp. 41 and 49, Public Administrative Hearing before the State Engineer, October 22, 1996.

²⁶ Exhibit Nos. 19, 20, and 21, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

²⁷ Exhibit Nos. 19, 20, and 21, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

²⁸ Transcript p. 49, Public Administrative Hearing before the State Engineer, October 22, 1996.

²⁹ Exhibit No. 21, Public Administrative Hearing before the State Engineer, May 16-18, 1996.

Finally, the low level aerial photographs, taken in 1994, rebut the entry in the 1990 inventory, showing very clearly that the 36.22 acres had not been irrigated in many years.³⁰

The three acres around the house were continuously irrigated during the alleged period of non-use.³¹ This use was not considered irrigation in the inventories but was counted as domestic use.³²

The State Engineer finds that the pumpage inventories, the eye-witness testimony of those who performed the inventories, the sagebrush coverage over the entire property, except for the 3 acres around the house, and the aerial photographs taken in 1987, 1989, and 1990, provide clear and convincing evidence that the majority of water was not used under Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 during the years 1985 through 1992. The State Engineer further finds that 182.946 acres out of the certificated 185.946 acres were not irrigated during the alleged forfeiture period.

II.

In late 1994 and 1995, beneficial use of the water under Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 occurred on portions of the place of use.³³ This forfeiture proceeding began in June, 1993, when the water right holder was served by certified mail, a notice that Permit 19034, Certificate

³⁰Exhibit No. 18, Public Administrative Hearing before the State Engineer, May 16-18, 1996. This exhibit was admitted into the record with certain limitations as explained later in this ruling.

³¹Transcript pp. 33-34, 47, and 61-70 and Exhibit Nos. 255 and 258, Public Administrative Hearing before the State Engineer, October 22, 1996.

³²Transcript pp. 26-30, and 47, Public Administrative Hearing before the State Engineer, October 22, 1996.

³³Transcript pp. 73-85 and Exhibit No. 258, Public Administrative Hearing before the State Engineer, October 22, 1996.

6705 and Permit 21584, Certificate 6661 were held for possible forfeiture.³⁴ The State Engineer finds that the re-use of a portion of the water under Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 occurred after the forfeiture proceeding had begun.

III.

The 1995 pumpage inventory shows that 10 acres located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T.17S., R.49E., M.D.B.&M., out of the certificated 36.2 acres and all 37.5 certificated acres located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 8, were irrigated in that year.³⁵ No other forty acre subdivisions of land were recorded as being irrigated under Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 in the 1995 inventory. The water right holder asserts that other forty acre subdivisions were irrigated in 1995 and the pumpage inventories are flawed.³⁶ He stated that the 1985 through 1989 inventories show no irrigation but water was used during those years.³⁷

In April, 1994, ARI took several ground and low level aerial photographs of the place of use of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661.³⁸ At the foundation hearing, these photographs were admitted into the record with certain

³⁴Files 19034 and 21584, official records in the office of the State Engineer.

³⁵Exhibit No. 259, Public Administrative Hearing before the State Engineer, October 22, 1996.

³⁶Transcript pp. 76-81, 86-90, and Exhibit No. 258, Public Administrative Hearing before the State Engineer, October 22, 1996.

³⁷Transcript p. 86, Public Administrative Hearing before the State Engineer, October 22, 1996.

³⁸Exhibit No. 18, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

limitations.³⁹ The 1994 photographs could only be used for ground truthing of the high level aerial photographs and for rebuttal of the water right holders' evidence. With respect to Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, the water right holder challenged the 1994 ground photographs, alleging that they do not show the correct place of use.⁴⁰ Because ARI did not appear at the hearing, no weight is given to the 1994 ground photographs. No challenge was made to the 1994 low level aerial photographs. These photographs clearly show that the great majority of the place of use of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 had not been irrigated for a long time, as of April, 1994. The 1994 photographs show the small area near the house that was recognized as being irrigated.

The State Engineer finds that the 1994 low level aerial photographs rebut the water right holder's assertion that the 1985 through 1989 inventories are flawed. The State Engineer further finds that these photographs provide clear and convincing evidence that all of the place of use of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 with the exception of the 3 acres around the house had not been irrigated for a long time preceding April, 1994.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.⁴¹

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

³⁹Transcript pp. 244-245, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

⁴⁰Transcript pp. 87-88, Public Administrative Hearing before the State Engineer, October 22, 1996.

⁴¹NRS Chapters 533 and 534.

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.⁴²

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. Under the rule adopted 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.⁴³

IV.

There is evidence showing that water was continuously used on three acres located near the house. The State Engineer concludes that this portion of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, amounting to 15 AFA, is not declared forfeited. Regarding the remainder of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, amounting to 914.73 AFA, the State Engineer concludes that there is clear and convincing evidence of continuous non-use exceeding five years. The State Engineer further concludes that this portion of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 is forfeited.

V.

Re-use of water under Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661 occurred on a portion of the place of use in late 1994 and 1995. This use of water occurred after the forfeiture proceeding had begun. Therefore, the State Engineer concludes that the forfeiture was not cured.

⁴²NRS 534.090.

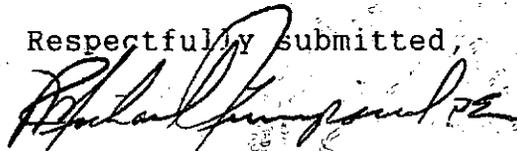
⁴³Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

Ruling
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RULING

The right to beneficially use the water appropriated under that portion of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, amounting to 15 AFA appurtenant to three acres of land, is not declared forfeited. The right to beneficially use the water appropriated under the remaining portion of Permit 19034, Certificate 6705 and Permit 21584, Certificate 6661, amounting to 914.73 AFA appurtenant to 182.946 acres, is hereby declared forfeited on the grounds that the water under said certificates 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/JCP/ab

Dated this 9th day of
January, 1997.