

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

IN THE MATTER OF THE POSSIBLE FORFEITURE OF)
WATER RIGHTS UNDER PERMIT 14078, CERTIFICATE)
4703 FROM AN UNDERGROUND SOURCE, AMARGOSA)
DESERT GROUNDWATER BASIN (230), NYE COUNTY,)
NEVADA.)

CORRECTED RULING

#4345

GENERAL

I.

Application 14078 was filed by Edwin H. Mankinen on February 25, 1952, to appropriate the underground waters within the Amargosa Desert Groundwater Basin, Nye County, Nevada. Permit 14078 was approved on May 4, 1954, for 4.0 cubic feet per second (cfs) for irrigation and domestic use. Certificate 4703 under Permit 14078 was issued on April 9, 1958, for 2.5 cfs of water and not to exceed 315.2 acre feet annually (AFA) for the irrigation of 78.8 acres of land, located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, T.16S., R.48E., M.D.B.&M. The point of diversion is located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 15. The owners of record of said permit are Glynn W. and Mae F. Vassar.¹

II.

On March 17, 1993, Amargosa Resources, Incorporated (ARI) petitioned the State Engineer to declare certain water rights forfeited.² Permit 14078, Certificate 4703 is 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

¹ File No. 14078, official records in the office of the State Engineer.

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

foundation for the evidence filed in support of the petition.³ On February 8, 1996, a hearing was held to consider the possible forfeiture of Permit 14078; Certificate 4703.⁴

IV.

At the hearing to consider Permit 14078, Certificate 4703, administrative notice was taken of record developed at the foundation hearing, May, 1994, and of the record developed at all the previous hearings on the individual water rights.⁵ In addition, administrative notice was taken of all records in the office of the State Engineer.⁵

FINDINGS OF FACT

I.

At the hearing, the Petitioner presented evidence and testimony supporting his case in favor of the forfeiture of Permit 14078, Certificate 4703. 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 inventory for the Amargosa Desert Groundwater Basin, for the years 1985 through 1992, shows that no water was used for irrigation on any of the 78.8 acres of land allowed under Permit 14078, Certificate 4703.⁶ Representatives of the Division of Water Resources noted that water was used to water the lawn and the trees around the house and that this was classified as domestic use.⁷

³ Exhibit No. 7, Public Administrative Hearing before the State Engineer May 16-18, 1994.

⁴ Exhibit No. 157, Public Administrative Hearing before the State Engineer February 8, 1996.

⁵ Transcript pp. 7-8, Public Administrative Hearing before the State Engineer February 8, 1996.

⁶ Exhibit No. 10, Public Administrative Hearing before the State Engineer May 16-18, 1994 and Transcript pp. 10, 16-18, 45, and 47-48, Public Administrative Hearing before the State Engineer, February 8, 1996.

⁷ Transcript pp. 18-19 and 48, Public Administrative Hearing before the State Engineer, February 8, 1996.

ARI acknowledged that a portion of the property, consisting of 1.6 acres located within the NE¼ NE¼ NE¼ of Section 15, T.16S., R.48E., M.D.B.&M, was irrigated during the alleged period of forfeiture.⁸ However, the area in the 1994 photograph appears to be larger than 1.6 acres, perhaps three or four acres.⁹

After reviewing the aerial and ground photographs and performing the ground-truthing, Dr. Robert Bement, ARI's expert, concluded that the southern portion of the property, located in the SE¼ NE¼ of said Section 15, had never been irrigated.¹⁰ The State Engineer finds that there is clear and convincing evidence that the 39.4 acres under Permit 14078, Certificate 4703, located within the SE¼ NE¼ of Section 15, T.16S., R.48E., M.D.B.&M, have not been irrigated for a period of time that exceeds five years.

II.

Regarding the north half of the place of use, Dr. Bement stated that it had been cleared in the recent past but creosote bushes were growing that indicated no irrigation occurred during the period of time that the State Engineer's representatives performed the inventories.¹¹ This land shows up much lighter than the south half on the aerial photographs, indicating that it was cleared. Dr. Bement could not say when this land was last irrigated.¹²

⁸Transcript p. 85 and Exhibit No. 165, Public Administrative Hearing before the State Engineer, February 8, 1996.

⁹Exhibit No. 18, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

¹⁰Exhibit Nos. 17, 18, 19, 20, and 21, Public Administrative Hearing before the State Engineer, May 16-18, 1994 and Transcript pp. 122-123, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹¹Transcript pp. 122-126, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹²Transcript p. 122, Public Administrative Hearing before the State Engineer, February 8, 1996,

For medical reasons, Mr. Vassar could not appear at the hearing.¹³ However, he submitted an affidavit in which he asserts that portions of the north half of the property have been irrigated throughout the years in question and in 1990, the entire 39.4 acres were irrigated.¹⁴ The electrical power records¹⁵ appear to support Mr. Vassar's affidavit. For example, the power consumed in 1987 was 3220 kilowatt hours (kwh). The quantity of water pumped from the Vassar well, based on this power consumption, is estimated to be 19 AF,¹⁶ which is enough water to irrigate about five acres. In 1989, the electrical power consumed was 18,100 kwh, the power required for the irrigation of about 32 acres. The power record for the year 1990, the year that Mr. Vassar stated that all 39.4 acres were irrigated, is not available. At that time, the Vassars leased the property to Don Haire who farmed the land.¹⁷ Mr. Haire put the electric meter for the irrigation well in his name.¹⁸

Regarding the north half of the place of use under Permit 14078, Certificate 4703, Mr. Vassar's evidence package, Mr. Vassar's affidavit, and the electrical power records conflict with the pumpage inventories and with Dr. Bement's testimony. When the entire body of evidence is considered, the State Engineer finds that there is not clear and convincing evidence of the use or non-use of water on this property.

¹³Exhibit No. 169, Public Administrative Hearing before the State Engineer, February, 8, 1996.

¹⁴Exhibit No. 170, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹⁵Exhibit No. 17, Public Administrative Hearing before the State Engineer, May 16-18, 1994.

¹⁶This estimate is based on a pump and electric motor efficiency of 60% and a total head of 100 feet, taken from an estimate provided in the Vassar Evidence Package (Exhibit No. 164).

¹⁷Exhibit Nos. 164 and 170, Public Administrative Hearing before the State Engineer, February 8, 1996.

¹⁸See letter dated March 28, 1994, from Valley Electric Association in Exhibit No. 164, Public Administrative Hearing before the State Engineer, February 8, 1996.

CONCLUSIONS

I.

The State Engineer has jurisdiction in this matter.¹⁹

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 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.²⁰

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.²¹ Regarding the 39.4 acres located within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, T.16S., R.48E., M.D.B.&M, the State Engineer concludes that there is clear and convincing evidence that this land has not been irrigated for a period of time exceeding five years.

IV.

There is conflicting testimony on the record regarding the use of water on the north half of the place of use under Permit 14078, Certificate 4703. The affidavit and the evidence package submitted by the Vassars and the electrical power records all appear credible and support the assertion that water was used on this property. On the other hand, the pumpage inventories and Dr. Bement's testimony show that this land was not irrigated for at least five years. The State Engineer concludes that the entire record is not clear and convincing regarding the use or non-use of water on the 39.4 acres located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, T.16S., R.48E., M.D.B.&M.

¹⁹ NRS 533.090.

²⁰ NRS 534.090.

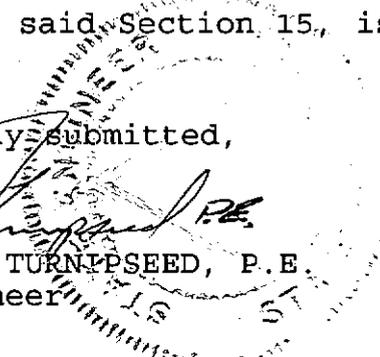
²¹ Town of Eureka v. Office of the State Eng'r of Nevada, 108 Nev, 826 P.2d 948 (1991).

RULING

The right to beneficially use 157.6 AF of water on the 39.4 acres located within the SE¼ NE¼ of Section 15, T.16S., R.48E., M.D.B.&M, under Permit 14078, Certificate 4703 is hereby declared forfeited on the grounds that the water has not been placed to beneficial use on this land for a period of time greater than five consecutive years. The 157.6 AF of water right appurtenant to the 39.4 acres located within the NE¼ NE¼ of said Section 15, is not declared forfeited.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer



RMT/JCP/pm

Dated this 3rd day of
June, 1996.