

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

IN THE MATTER OF THE FORFEITURE)
OF WATER RIGHTS UNDER PERMIT 29327,)
CERTIFICATE 8725, APPROPRIATED FROM)
AN UNDERGROUND SOURCE WITHIN THE)
PAHRUMP VALLEY ARTESIAN GROUNDWATER)
BASIN (162), NYE COUNTY, NEVADA.)

RULING ON REMAND

#4605

GENERAL

I.

Application 29327 was filed by Charles W. Connely on April 3, 1975, to change the point of diversion of the underground waters of the Pahrump Valley Artesian Groundwater Basin previously appropriated under Permit 26787 for irrigation and domestic purposes on 8.3 acres within the NE¼ NE¼ of Section 16, T.20 S., R.53 E., M.D.B. & M. The point of diversion is described as being located within the NE¼ NE¼ of said Section 16. A permit was issued under Application 29327 on July 14, 1975, for 0.2 cubic feet per second (cfs) of water.¹ On February 10, 1976, the State Engineer issued Certificate 8725 allowing for the diversion of 0.18 cfs of water, not to exceed 41.5 acre-feet annually (afa), for the irrigation of 8.3 acres within the NE¼ NE¼ of said Section 16.²

II.

Documents were submitted to the office of the State Engineer which assigned ownership of Permit 29327, Certificate 8725, to Kaye E. Slack.¹

III.

Pursuant to State Engineer's Ruling No. 4389, the State Engineer forfeited the right to beneficially use 0.18 cfs, 41.5 acre-feet annually, of water under Permit 29327, Certificate 8725, appurtenant to 8.3 acres within the NE¼ NE¼ of Section 16, T.20 S.,

¹ File No. 29327, official records in the office of the State Engineer.

² Exhibit No. 10, public administrative hearing before the State Engineer, June 7, 1990.

R.53 E., M.D.B.& M.³ On August 19, 1996, Kaye Slack filed an appeal of the State Engineer's Ruling No. 4389 in the District Court of the Fifth Judicial District, County of Nye, State of Nevada. By Order of Remand dated July 23, 1997, the matter was remanded to the State Engineer so that Kaye Slack could present further evidence with regard to the statement of Alvin Bells.¹ The Court viewed the State Engineer's rejection of Mr. Bells evidence as a suggestion that there was less than clear and convincing evidence with regard to the forfeiture.

IV.

After all parties of interest were duly noticed by certified mail, an administrative hearing on the Order of Remand was held on November 5, 1997, with regard to the possible forfeiture of Permit 29327, Certificate 8725, in Las Vegas, Nevada, before representatives of the office of the State Engineer.⁴

FINDINGS OF FACT

I.

Testimony and evidence presented at the 1990 administrative hearing showed that each year from 1982 through 1987 employees of the office of the State Engineer physically visited the Pahrump Valley Artesian Groundwater Basin and conducted what are known as groundwater pumpage inventories which documented the use of water for irrigation purposes as allowed under Certificate 8725.⁵ For the years 1982 through 1987, the pumpage inventories indicated no water had been used for irrigation within the certificated place of use.

³ State Engineer's Ruling No. 4389, dated August 2, 1996, official records in the office of the State Engineer.

⁴ Transcript, public administrative hearing before the State Engineer, November 5, 1997.

⁵ State's Exhibit No. 10, public administrative hearing before the State Engineer, June 7, 1990.

Testimony from the 1990 administrative hearing further indicated that the water right was passed from the permittee to his ex-wife after their divorce.⁶ The records of the State Engineer indicate that the property was conveyed from the permittee to Atha Connely in 1973.¹ Mrs. Connely (now Mrs. Young) testified that "it has been used for beneficial use such as fruit trees and watering livestock since I have owned it, but my pump went out and I didn't want to spend a whole bunch of money replacing it, you know and buying seed and stuff" and that she definitely wanted to get it under cultivation again.⁷ The State Engineer finds that Mrs. Young's non-specific statement that water was used does not carry much weight as it does not provide any information if water was used between 1982 through 1987 and that her statement that she wanted to get it under cultivation again was an admission that the pump had gone out and it was not being irrigated in 1990 at the time of the public administrative hearing.

II.

At the 1997 public administrative hearing, Mr. Bells testified that in 1984 Kaye Slack's mother called him and said that she did not have any ditches, tubes or anything else to get water in the field and in response, he cut a ditch for her and delivered 40 1½" siphon tubes, but that he had no idea how much water had been used nor did he provide any evidence of payment for the 40 1½" siphon tubes.⁸ Mr. Bells also testified, based on information that he received from Kaye Slack rather than his own personal memory, that "they did run some water on in '84, because my daughter apparently

⁶ Transcript, public administrative hearing before the State Engineer, June 7, 1990, p. 62.

⁷ Transcript, public administrative hearing before the State Engineer, June 7, 1990, pp. 63-64.

⁸ Transcript, public administrative hearing before the State Engineer, November 5, 1997, p. 10.

had a horse on it" and that "in '86 she had some green out there".⁹ However, Mr. Bells also testified and that he could not remember when his daughter had a horse on Kaye Slack's property.¹⁰ In fact Mr. Bells further testified that he could not say if water had been used on Kaye Slack's property.¹¹

Kaye Slack provided evidence that the property was deeded to her in 1990¹² and that she had not been using the property prior to that date. Ms. Slack further testified that she began to put the water back to beneficial use in 1993¹³; however, the documentary evidence she provided indicated that she did not buy a pump for the well until August 15, 1995, nor was it set in the well until November 5, 1995, and wheat seed was purchased for the first time on November 3, 1995.¹⁴ In light of the fact that Ms. Slack's mother, Mrs. Connely (now Mrs. Young), had testified at the 1990 public administrative hearing that "my pump went out and I didn't want to spend a whole bunch of money replacing it, you know and buying seed and stuff"¹⁵ and that they wanted to get it under

⁹ Transcript, public administrative hearing before the State Engineer, November 5, 1997, pp. 11, 21-22.

¹⁰ Transcript, public administrative hearing before the State Engineer, November 5, 1997, p. 11.

¹¹ Transcript, public administrative hearing before the State Engineer, November 5, 1997, p. 9.

¹² Exhibit No. 3, public administrative hearing before the State Engineer, November 5, 1997.

¹³ Transcript, public administrative hearing before the State Engineer, November 5, 1997, p. 18.

¹⁴ Exhibit Nos. 4, 5 and 6, public administrative hearing before the State Engineer, November 5, 1997; Transcript, public administrative hearing before the State Engineer, November 5, 1997, p. 19.

¹⁵ Transcript, public administrative hearing before the State Engineer, June 7, 1990, p. 63.

cultivation again, the State Engineer finds there is no evidence of use of the water, but rather strong evidence of non-use.

The State Engineer finds that both Mr. Bells' and Ms. Slack's testimony are wanting for credibility. Mr. Bells cannot say that water was actually used on the property and he did not have personal knowledge of any dates that his daughter may have had a horse pastured on the property, only that Kaye Slack had told him his daughter had a horse on the property in 1984. Kaye Slack's testimony is contradictory to her own documentary evidence. Her legal counsel argues that she began to put the water back to beneficial use in 1992 which is directly contradictory to the documentary evidence she provided. The only evidence the State Engineer has before him is the same evidence he had from the 1990 public administrative hearing which was that Alvin Bells says he delivered 40 1½" siphon tubes in 1984. The delivery of those tubes does not prove water use, particularly in light of the State Engineer's pumpage inventories which showed no water use, Mrs. Young's testimony that the pump went out and they didn't want to spend the money to fix it, and that they wanted to get the property under cultivation again, which means the property was not being irrigated. The State Engineer finds the evidence from the pumpage inventories is more credible than that of either Alvin Bells or Kaye Slack. The State Engineer finds no evidence was provided of use of water on the property from 1982 through 1987, and probably no water use occurred from 1983 through the replacement of the pump in 1995.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.¹⁶

¹⁶ NRS Chapters 533 and 534.

II.

The State Engineer concludes that in order for a water right permit to ripen into a water right certificate the permittee must file proof of the application of the water to beneficial use within the time frame set forth in the permit or in any extension of time granted by the State Engineer.¹⁷ After a certificate is issued on a 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.¹⁸

Forfeiture must be demonstrated by clear and convincing evidence.¹⁹ 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.²⁰ 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.²¹

The State Engineer concludes there is clear and convincing evidence showing non-use of the water right as allowed under Permit 29327, Certificate 8725, for at least five successive years found in the testimony and evidence regarding the pumpage inventories and the visits to Pahrump Valley Artesian Groundwater Basin during the performance of those pumpage inventories, the failure of the

¹⁷ NRS 533.410.

¹⁸ NRS 534.090.

¹⁹ Town of Eureka v. Office of the State Engineer, 108 Nev. 163 (1992).

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

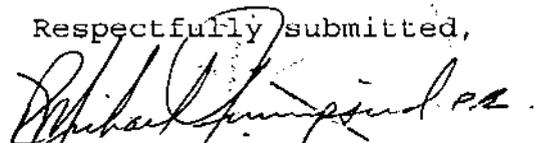
²¹ Id. at 239.

permittee to present any evidence of water use, and the statements made at the 1990 public administrative hearing that the pump had gone out and the property was not under cultivation at that time. The State Engineer further concludes that the permittee did not prove that it was highly probable that the allegations of water use are true.

RULING

The right to beneficially use 0.18 cfs, 41.5 acre feet of water under Permit 29327, Certificate 8725, appurtenant to 8.3 acres within the NE¼ NE¼ of Section 16, T.20 S., R.53 E., M.D.B.& M. is hereby declared forfeited based on the failure for a period of five successive years on the part of the holder of the right to beneficially use the water for the purposes for which the subject water right was acquired. No water right remains in existence under Certificate 8725.

Respectfully submitted,


R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/SJT/cl

Dated this 10th day of
March, 1998.