

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

IN THE MATTER OF THE FORFEITURE OF )  
PERMIT 18948, CERTIFICATE 6362, )  
PERMIT 24091, CERTIFICATE 6669, )  
FILED TO APPROPRIATE THE PUBLIC )  
WATERS OF THE STATE OF NEVADA AND )  
APPLICATIONS 68034 AND 68035-T )  
FILED TO CHANGE THE POINT OF )  
DIVERSION OF A PORTION OF THE )  
WATERS PREVIOUSLY APPROPRIATED )  
UNDER PERMIT 24091, CERTIFICATE )  
6669 WITHIN THE ANTELOPE VALLEY )  
HYDROGRAPHIC BASIN (057), LANDER )  
COUNTY, NEVADA. )

**RULING**

**#5337**

**GENERAL**

**I.**

Application 18948 was filed by Samuel Bernard Cohen on June 20, 1960, to appropriate the underground waters of the Antelope Valley Hydrographic Basin, Lander County, Nevada. Permit 18948 was approved on May 23, 1961, and allowed for the diversion of 3.4 cubic feet per second (cfs), not to exceed 4.0 acre-feet per acre, for the irrigation of 200 acres of land located within the N $\frac{1}{2}$  SE $\frac{1}{4}$ , W $\frac{1}{2}$ , and the NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. The authorized period of use is January 1st through December 31st of each year. The authorized point of diversion is described as being located within the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 16. Certificate 6362 was issued pursuant to Permit 18948 on October 25, 1967, for 3.4 cfs of water, not to exceed 800 acre-feet annually (afa), for the irrigation of the 200 acres of land referenced above.<sup>1</sup>

**II.**

On September 21, 2001, Gysbert G. Bakker and JoAnn Bakker requested the State Engineer to assign Permit 18948, Certificate 6362, from the previous owner into their names.

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<sup>1</sup> File No. 18948, official records in the Office of the State Engineer.

**III.**

Application 24091 was filed by Ruth M. Cohen on September 7, 1967, to change the point of diversion of the underground waters of the Antelope Valley Hydrographic Basin, Lander County, Nevada, previously appropriated under Permit 18949. Permit 24091 was approved on February 8, 1968, and allowed for the diversion of 4.0 cfs, not to exceed 4.0 acre-feet per acre, for the irrigation of 227.9 acres of land located within the E½ NW¼, and the NE¼ of Section 16, T.25N., R.41E., M.D.B.&M. The authorized period of use is January 1st through December 31st of each year. The authorized point of diversion is described as being located within the NE¼ NW¼ of said Section 16. Certificate 6669 was issued pursuant to Permit 24091 on May 21, 1968, for 4.0 cfs of water, not to exceed 911.6 afa, for the irrigation of the 227.9 acres of land referenced above.<sup>2</sup>

**IV.**

On September 21, 2001, Gysbert G. Bakker and JoAnn Bakker requested the State Engineer to assign Permit 24091, Certificate 6669 from the previous owner into their names.

**V.**

On September 21, 2001, Gysbert G. Bakker and JoAnn Bakker filed Application 68034, which requested permission to change the point of diversion and place of use of a portion of the water previously appropriated under Permit 24091, Certificate 6669. The proposed point of diversion is described as being located within the SE¼ NW¼ of Section 16, T.25N., R.41E., M.D.B.&M.<sup>3</sup>

**VI.**

On September 21, 2001, Gysbert G. Bakker and JoAnn Bakker filed Application 68035-T, which requested permission to change

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<sup>2</sup> File No. 24091, official records in the Office of the State Engineer.

<sup>3</sup> File No. 68034, official records in the Office of the State Engineer.

the point of diversion and place of use of a portion of the water previously appropriated under Permit 24091, Certificate 6669. The proposed point of diversion is described as being located within the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M.<sup>4</sup>

**VII.**

On July 1, 2003, the State Engineer sent a letter to the owners of record of Permit 18948, Certificate 6362 informing them that as provided in Nevada Revised Statute § 534.090(1), a portion of this water right may be subject to forfeiture due to five consecutive years of non-use. The letter stated that information in this office indicated that water had not been put to beneficial use since at least 1981 on 80 acres of land located within the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. The owners were given 60 days from July 1, 2003 to submit any information they might have to refute the State Engineer's information that water has not been used on the 80 acres. If no such information was received within the time frame referenced above, the portion of the water right under Permit 18948, Certificate 6362, being 320 afa appurtenant to the 80 acres referenced above, would be declared forfeited.<sup>5</sup>

**VIII.**

On July 1, 2003, the State Engineer sent a letter to the owners of record of Permit 24091, Certificate 6669 informing them that as provided in Nevada Revised Statute § 534.090(1), this water right may be subject to forfeiture due to five consecutive years of non-use. The letter stated that information in this office indicated that water had not been put to beneficial use under this water right since at least 1981. The owners were given 60 days from July 1, 2003, to submit any information they might have to refute the State Engineer's information that water has not

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<sup>4</sup> File No. 68035-T, official records in the Office of the State Engineer.

<sup>5</sup> File No. 18948, official records in the Office of the State Engineer.

been used under this water right. If no such information was received within the time frame referenced above, the water right under Permit 24091, Certificate 6669, being 911.6 acre-feet annually appurtenant to the 227.9 acres, would be declared forfeited.<sup>6</sup>

**FINDINGS OF FACT**

**I.**

Nevada Revised Statute § 534.090 provides that:

1. Except as otherwise provided in this section, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right, or a permitted right, and further whether the right is initiated after or before March 25, 1939, 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.

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2. The state engineer may, upon the request of the holder of any right described in subsection 1, extend the time necessary to work a forfeiture under that subsection if the request is made before the expiration of the time necessary to work a forfeiture...In determining whether to grant or deny a request, the state engineer shall, among other reasons, consider:

(a) Whether the holder has shown good cause for his failure to use all or any part of the water beneficially for the purpose for which his right is acquired or claimed;

(b) The unavailability of water to put to a beneficial use which is beyond the control of the holder;

(c) Any economic conditions or natural disasters which made the holder unable to put the water to that use; and

(d) Whether the holder has demonstrated efficient ways of using the water for agricultural purposes, such as center-pivot irrigation.

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<sup>6</sup> File No. 24091, official records in the Office of the State Engineer.

Nevada Revised Statute § 533.325 provides that an application can be filed to change the point of diversion, manner or place of use of water already appropriated. Water already appropriated refers to water represented by a permit or certificate in good standing. Where a permit/certificate has not been used for five consecutive years a forfeiture has worked and the water right is not in good standing and cannot be used to support a change application.

The State Engineer finds even though the Bakkers filed change Applications 68034 and 68035-T on September 21, 2001, it is within the State Engineer's discretion to review the status of the water right being requested to be changed before acting on those applications. This is done in order to determine if it is in good standing or if a forfeiture of the water right had worked; thus, rendering it not in good standing and not available for change. The State Engineer finds the filing of a change application does not preclude his performing such review. The State Engineer finds if five consecutive years of non-use of the water had run before the filing of the change applications, the forfeiture had worked and there was no water right available to be changed.

## II.

Each year from 1981 through 2002, excepting 1999, employees of the Office of the State Engineer performed what are known as groundwater pumpage inventories within the Antelope Valley Hydrographic Basin, which documented the use or non-use of water from authorized points of diversion and places of use.

These inventories show that during 1981, through 1995, no water was diverted from the well identified as the certificated point of diversion, and no water was placed to beneficial use within the certificated place of use of Permit 18948, Certificate 6362. The inventories show that during 1996 through 2002 water from the well identified as the certificated point of diversion was used to irrigate lands within the NE¼ and possibly the NW¼ of

Section 16, T.25N., R.41E., M.D.B.&M., which is not within the certificated place of use of this permit. During 2002, the inventories show that land within the SW $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. was irrigated via a pivot irrigation system, most of which is within the certificated place of use of Permit 18948, Certificate 6362.

The State Engineer finds that during 1981 through 2002, no water was placed to beneficial use on a portion of the authorized place of use under Permit 18948, Certificate 6362, that being 80 acres within the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M., in excess of five consecutive years.

### III.

The Antelope Valley Groundwater Pumpage Inventories show that during 1981 through 2002 no water was placed to beneficial use from the well identified as the certificated point of diversion under Permit 24091, Certificate 6669. During 1996 through 2002, the inventories show that a portion of the certificated place of use under Permit 24091, Certificate 6669 was irrigated from the well identified as the certificated point of diversion under Permit 18948, Certificate 6362. The State Engineer finds no water from the authorized point of diversion was placed to beneficial use on the authorized place of use under Permit 24091, Certificate 6669 in excess of five consecutive years prior to the filing of change Applications 68034 and 68035-T.

### IV.

The State Engineer finds the Bakkers or any previous owners of Permit 18948, Certificate 6362 and Permit 24091, Certificate 6669 did not file an application for extension of time to prevent the working of the forfeiture as provided for under Nevada Revised Statute § 534.090(2).

**V.**

On August 22, 2003, the State Engineer timely received a letter from Guy Bakker in response to the State Engineer's letters of July 1, 2003, concerning non-use under Permit 18948, Certificate 6362 and Permit 24091, Certificate 6669.<sup>1</sup>

In his letter, Mr. Bakker stated that he had been irrigating the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. since the year 2000. To support his claim, he enclosed a report from the Farm Service Agency Office in Winnemucca. This report indicates that during 2002, 122.6 acres were irrigated via pivot irrigation within the SW $\frac{1}{4}$  of Section 16, and 42.5 acres were irrigated within the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. For 2003, the report indicated that the same 122.6 acres were irrigated via pivot irrigation within the SW $\frac{1}{4}$  of Section 16, and 80 acres, which includes the above-mentioned 42.5 acres, were irrigated within the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. The State Engineer finds that water under Permit 18948, Certificate 6362 was beneficially used on 80 acres of land within the N $\frac{1}{2}$  SE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. during 2003.

**VI.**

The Farm Service Agency report further indicates that during 2002, 123.4 acres were irrigated via pivot irrigation within the NE $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M., and that during 2003, this same land along with another 70 acres via pivot irrigation within the E $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M. was irrigated. This land is within the certificated place of use of Permit 24091, Certificate 6669. In his letter, Mr. Bakker stated that these crops were first planted in 1994. The State Engineer finds that even though lands within the certificated place of use of Permit 24091, Certificate 6669 were irrigated, the irrigation did not occur from the well described as the certificated point of diversion.

**VII.**

Mr. Bakker's letter further stated that the well under Permit 24091, Certificate 6669 had been replaced with a well drilled under "Permit 68034T" and that water had been applied to crops from this well. The State Engineer finds that to date, neither Application 68034 nor Application 68035-T has not been approved.

**CONCLUSIONS OF LAW**

**I.**

The State Engineer has jurisdiction over the persons and subject matter of this action and determination.<sup>7</sup>

**II.**

The State Engineer concludes that the filing of change Applications 68034 and 68035-T did not preclude his review of the status of the water right being requested to be changed.

**III.**

The State Engineer concludes that substantial use of water has occurred within the certificated place of use under Permit 18948, Certificate 6362; thus, a forfeiture of this water right has been cured. However, a portion of the land being irrigated by the pivot within the SW $\frac{1}{4}$  of Section 16, T.25N., R.41E., M.D.B.&M., being the SE $\frac{1}{4}$  of said SW $\frac{1}{4}$ , is not within the certificated place of use of Permit 18948, Certificate 6362 and cannot be irrigated under this water right. The permittee is specifically limited to the quantity and place of use authorized under the permit.

**IV.**

The State Engineer concludes there is clear and convincing evidence of more than five consecutive years of non-use of the water as authorized from the certificated point of diversion under Permit 24091, Certificate 6669; thus, a forfeiture of the water right in the amount of 911.6 acre-feet annually appurtenant to 227.9 acres has worked.

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<sup>7</sup> NRS chapters 533 and 534.

**V.**

Permittees are not allowed to change the specific conditions in their permits without the benefit of law. Nevada Revised Statute 533.325 provides that any person who wishes to change the point of diversion, manner of use or place of use of water already appropriated, shall, before performing any work in connection with such a change in point of diversion, manner or place of use apply to the State Engineer for a permit to do so. The State Engineer concludes the Bakkers did not comply with the law before changing the points of diversion and the places of use irrigated.

**VI.**

Any well drilled under Application 68034 or Application 68035-T is an illegal well since the State Engineer has not approved either application. The State Engineer concludes that any use of water for irrigation from this well would be an illegal use of that water since no permit to use the water exists.

**VII.**

The State Engineer is prohibited by law from granting a permit under a change application to appropriate the public waters where:<sup>8</sup>

- A. there is no unappropriated water at the proposed source;
- B. the proposed use or change conflicts with existing rights;
- C. the proposed use or change conflicts with protectible interests in existing domestic wells as set forth in NRS § 533.024; or
- D. the proposed use or change threatens to prove detrimental to the public interest.

**VIII.**

The State Engineer concludes that, since Permit 24091, Certificate 6669 has been forfeited, there is no water right that can be changed under Applications 68034 and 68035-T; therefore,

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<sup>8</sup> NRS chapter 533.370(3).

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they must be denied. The State Engineer concludes to grant Applications 68034 and 68035-T in these circumstances would threaten to prove detrimental to the public interest.

**RULING**

Permit 18948, Certificate 6362, in the amount of 800 acre-feet annually, appurtenant to 200 acres within the S½ of Section 16, T.25N., R.41E., M.D.B.&M., is hereby declared not forfeited. However, a change application to correct the place of use to accurately reflect the actual land being irrigated under this water right, must be filed with this office within sixty (60) days from the date of this ruling. Permit 24091, Certificate 6669, in the amount of 911.6 acre-feet annually, appurtenant to 227.9 acres within the N½ of Section 16, T.25N., R.41E., M.D.B.&M., is hereby declared forfeited. Applications 68034 and 68035-T are hereby denied on the grounds that the water right requested for transfer has been declared forfeited; therefore, there is no water available to be changed.

Respectfully submitted,

  
HUGH RICCI, P.E.  
State Engineer

HR/KE/jm

Dated this 8th day of  
March, 2004.