

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

IN THE MATTER OF APPLICATION)
83109 FILED TO CHANGE THE PUBLIC)
WATERS OF AN UNDERGROUND)
WATER SOURCE WITHIN THE WARM)
SPRINGS VALLEY HYDROGRAPHIC)
BASIN (84), WASHOE COUNTY,)
NEVADA.)

RULING
#6275

GENERAL

I.

Application 83109 was filed on September 18, 2013, by Terry Friedman to change the point of diversion and place of use of 0.035715 cubic feet per second (cfs), not to exceed 5.0 acre-feet annually (afa), a portion of the water previously appropriated under Permit 43005, Certificate 11238. The proposed manner of use of irrigation and domestic use previously permitted under Permit 43005, Certificate 11238, remains unchanged. The proposed point of diversion is described as being located within the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 18, T.22N., R.22E., M.D.B.&M. The proposed place of use is described as being 1.25 acres located within the NW $\frac{1}{4}$, SE $\frac{1}{4}$ and the SW $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 18, T.22N., R.22E., M.D.B.&M. The existing point of diversion is described as being located within the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 32, T.23N., R.21E., M.D.B.&M. The existing place of use is described as being 0.82 acres within the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 31, and 0.43 acres within the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 32, T.23N., R.21E., M.D.B.&M.¹

II.

Terry Friedman acquired a 5.0 afa portion of Permit 43005, Certificate 11238 by a water right deed dated June 14, 2005.² A Report of Conveyance was filed in the Office of the State Engineer on February 3, 2006, to reflect that Friedman was the owner of record of the 5.0 afa portion of Permit 43005, Certificate 11238. In 2006 and 2007, respectively, Applications for Extensions of Time to Prevent a Forfeiture were filed on Friedman's behalf in the Office of the State Engineer, which applications for extensions

¹ File No. 83109, official records in the Office of the State Engineer.

² File No. 43005, official records in the Office of the State Engineer.

of time were subsequently granted.² In 2008, Friedman failed to file either: a request for extension of time to prevent a forfeiture; proof of resumption to beneficial use; or, a change application, concerning his 5.0 afa portion of Permit 43005, Certificate 11238, and Friedman's 5.0 afa portion of the water right was declared forfeited as of November 3, 2008.^{2,3}

Friedman filed a petition for judicial review of the forfeiture in the Second Judicial District Court of Nevada, which was assigned Case Number CV08-03186.⁴ Prior to resolution of the petition by the District Court, Friedman and the State Engineer reached an out-of-court settlement, which was memorialized in a Settlement Agreement and Mutual Release (Settlement Agreement) signed by both parties on July 8, 2009.² By the terms of the Settlement Agreement, Friedman's 5.0 afa portion of the forfeited water right was reinstated as of November 3, 2008, and the water right was allowed to retain its priority date of February 28, 1972.

Upon reinstatement of the forfeited water right, the parties agreed that:

Friedman intends to subdivide 120.41 acres of land within Section 29, T22N, R22E, M.D.B.&M., into 3 lots. That property is identified as Washoe County Assessors Parcel No. 077-300-18. Friedman intends to relinquish the 5.0 acre-feet of Permit 43005, Certificate 11238 described in the 3 November 2008 letter⁵ in accordance with NRS 534.120(e) in order to gain approval for the subdivision of the 120.41 acre [sic] from Washoe County. The 5.0 acre-feet of Permit 43005, Certificate 11238 described in the 3 November 2008 letter must be relinquished as described above. No application to change the place of use, manner of use or point of diversion may be filed on the 5.0 acre-feet of Permit 43005, Certificate 11238 described in the 3 November 2008 letter, and the 5.0 acre-feet of water may not revert to use on the current place of use described in Permit 43005, Certificate 11238.⁶ [Emphasis added]

Subsequent to the reinstatement of Friedman's 5.0 afa portion of the water right, Friedman acted consistently with terms of the Settlement Agreement by filing Applications for Extensions of Time to Prevent a Forfeiture in 2009, 2010, 2011, 2012 and 2013, explaining ongoing efforts toward the subdivision project.² The Application

³ See NRS § 534.090.

⁴ The State Engineer finds that Friedman is a Nevada licensed attorney who filed the Petition on his own behalf.

⁵ The November 3, 2008, letter advised Friedman of the cancellation of his portion of the water right.

⁶ Settlement Agreement and Mutual Release, Page 2 ¶ 4, File No. 43005, official records in the Office of the State Engineer.

for Extension of time filed by Friedman on July 25, 2013, was granted, giving Friedman an extension to September 20, 2014.² Friedman filed Application 83109 on September 18, 2013, to change the point of diversion and place of use of his 5.0 afa portion of Permit 43005, Certificate 11238.

FINDINGS OF FACT

I.

The State Engineer finds that Friedman and the State Engineer consummated a Settlement Agreement in 2009 concerning Friedman's 5.0 afa portion of Permit 43005, Certificate 11238. The State Engineer agreed to reinstate the forfeited water right, further agreeing that the water right would retain its priority date of February 28, 1972, upon the conditions that Friedman would only relinquish the water right to Washoe County and Friedman would not file a change application on his 5.0 afa portion of Permit 43005, Certificate 11238.

II.

Despite agreeing to relinquish the 5.0 afa portion of Permit 43005, Certificate 11238 to Washoe County, Friedman filed Application 83109 to change the point of diversion and place of use of the 5.0 afa portion of Permit 43005, Certificate 11238. The reinstatement of the forfeited portion of Permit 43005, Certificate 11238 was expressly conditioned upon the water right being relinquished to Washoe County to obtain subdivision approval. The State Engineer finds that he has performed his obligations under the Settlement Agreement by reinstating the water right allowing the right to retain the aforementioned priority date, while Friedman's obligations under the Agreement have yet to be performed. Notwithstanding, the State Engineer finds that Friedman has filed Application 83109 to change the water right despite expressly agreeing in 2009 not to file a change application on the water right.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁷

⁷ NRS Chapters 533 and 534.

II.

Settlement agreements are contracts and are “governed by principles of contract law.” *In re Amerco Derivative Litig. Glenbrook Capital Ltd. P'ship*, 127 Nev. Adv. Op. 17, 252 P.3d 681, (2011) (citing *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009)); and see generally, *Mack v. Estate of Mack*, 125 Nev. at 93, 206 P.3d at 109 (a settlement agreement will be an enforceable contract if there is an offer and acceptance, meeting of the minds, and consideration) (additional citation omitted); *The Power Co. v. Henry*, 130 Nev. Adv. Op. 21 at 3, ___ P.3d ___ (2014) (a binding settlement agreement may be evidenced by reducing the terms of the agreement to writing).

In arriving at a Settlement Agreement, Friedman and the State Engineer each gave consideration to the Agreement, namely the State Engineer’s agreement to reinstate Friedman’s water right with no change to the priority date - effectively allowing it to retain its value,⁸ and Friedman’s agreement to relinquish the water right to Washoe County for subdivision approval and agreement not seek a change in the water right until relinquished to Washoe County.

If the State Engineer were to grant Application 83109 now, the water right would be changed and Friedman would reap the benefit of his bargain to include reinstatement of the forfeited water right without a loss in priority, while depriving the State Engineer of the benefit of his bargain to ensure the water right would not be changed and would be relinquished by Friedman to Washoe County.

The State Engineer concludes that a valid and binding Settlement Agreement was entered into, to which, Friedman remains bound. The State Engineer concludes that granting Application 83109 would negate the consideration Friedman offered in the Settlement Agreement and granting the change application would be contrary to the parties’ prior Agreement. If Friedman were allowed to escape his obligations under the Settlement Agreement, not only would the State Engineer be deprived of the benefit of his bargain, but this conduct would undermine the State Engineer’s confidence in agreements to settle disputes to avoid protracted litigation and to promote judicial economy. This is true for the reasons set forth above, and because the judicial review

⁸ See generally, e.g., *Andersen Family Assoc. v. Ricci*, 124 Nev. 182, 179 P.3d 1201 (2008) (recognizing that loss of priority date can amount to a *de facto* loss of rights depending on water flow).

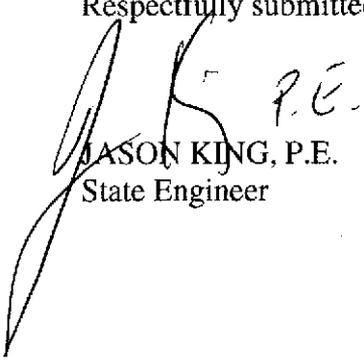
action concerning the forfeiture was dismissed and the State Engineer cannot now have a court revisit the appeal which the Settlement Agreement purportedly resolved. In short, Friedman would be permitted to realize every benefit of the Agreement while the State Engineer has realized none.

The State Engineer concludes that a binding Settlement Agreement exists between the parties which contains terms that Friedman has yet to perform. For all the foregoing reasons, the State Engineer concludes that the Settlement Agreement should be enforced requiring that Application 83109 be denied.

RULING

Application 83109 is hereby denied on the grounds that granting the Application would be contrary to the parties' prior Settlement Agreement.

Respectfully submitted,


JASON KING, P.E.
State Engineer

Dated this 5th day of
May, 2014.