IN THE SUPREME COURT OF THE STATE OF NEVADA

QUINCY E. FORTIER, M.D.,
Appellant,
vs.
THE STATE ENGINEER, THE STATE OF NEVADA,
Respondent.

No. 38036

FILED

APR 18 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant, Quincy Fortier, M.D., appeals from a district court order denying his petition for judicial review of State Engineer Ruling No. 4547.[1] That ruling declared Dr. Fortier's irrigation water rights previously appropriated pursuant to Permit No. 24369, Certificate No. 6818, forfeit for non-use over a continuous period exceeding five years.[2] Dr. Fortier claims on appeal that the ruling was not supported by clear and convincing evidence; the State Engineer should be estopped from declaring the forfeiture; and he is otherwise entitled to equitable relief.

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[1]See NRS 534.090; NRS 533.450.

[2]NRS 534.090(1) states in relevant part:

> 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 . . . 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.

Factual and Procedural History

Dr. Fortier owns several parcels of land in Nye County, Nevada, within a real estate subdivision known as Amargosa Ranch Acres. The State Engineer granted water rights appurtenant to the land in question for irrigation purposes in 1968 under Permit No. 24369, Certificate No. 6818.

In December 1992, Amargosa Resources, Inc. (ARI), applied to the State Engineer to divert water from the Amargosa Groundwater Basin, but no water was available. Thus, to free water for appropriation purposes, ARI lodged a petition with the State Engineer seeking forfeiture of seventy-three water rights, including those held by Dr. Fortier, on the basis that the water rights were not used from 1985 to 1992. On June 19, 1993, Dr. Fortier received the State Engineer's notice of the commencement of forfeiture proceedings.

On October 11, 1996, a hearing officer for the State Engineer took evidence regarding Dr. Fortier's water rights, among others. Dr. Fortier did not attend the hearing for health reasons, but he requested that he be able to later submit evidence. The hearing officer granted his request.

At the hearing, State Engineer employees testified to pumpage inventories taken from 1985 to 1989 and from 1991 to the fall of 1993, all of which showed zero water use. None of the inventory witnesses documented any use of the land in the inventories except in the fall of 1993, at which time they noted sixty acres had been cleared and irrigation equipment was present. Interestingly, while the State Engineer did not present direct evidence of the 1990 inventory at the hearing, according to Ruling No. 4547, the State Engineer took administrative notice of its own

records and implicitly made the 1990 inventory part of the agency record.[3] In this, the State Engineer found that inventories taken from 1985 through 1992 showed no water use from the certificated irrigation well during that time frame.

Russell Avery, a water rights holder, also testified and introduced a 1973 letter addressed to him from the Division of Water Resources, which dealt with the review of water rights for the Amargosa Ranch Acres subdivision. The letter requested further information on the domestic water supply for the subdivision and remarked on the long-term status of the water rights in the subdivision.

Additionally, water rights holders presented the affidavit of James Albitre, a former owner of land and water rights in the subdivision. The affidavit stated that from 1981 to 1992 he cultivated a substantial portion of his property with crops, trees, and pasture, and that he also raised livestock. Attached to his affidavit were several pictures purporting to show the cultivation.

On May 29, 1997, Dr. Fortier provided the State Engineer with his affidavit and the affidavit of David Stubbs, an employee engaged by Dr. Fortier to clear, plant and irrigate the property. Mr. Stubbs'

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[3]Bill Quinn, a former State Engineer employee, conducted the 1990 inventory. Although, according to the State Engineer, the 1990 inventory was part of the record upon which he made his decision in Ruling No. 4547, we note that the joint appendix does not contain documentation of the 1990 inventory. This inventory may have been contained within an exhibit presented at an earlier public hearing in 1994 before the State Engineer. The hearing officer at the 1996 hearing took administrative notice of the exhibits from the 1994 hearing and noted that the State Engineer was consolidating the 1994 and 1996 hearing records into a single record, upon which he would make his decision.

affidavit stated that he and his family began clearing Dr. Fortier's property in May 1993 and started irrigation two days after Dr. Fortier paid the power company to restore power to the well on the property in June 1993. Dr. Fortier attached several checks as exhibits to a supplemental affidavit to demonstrate when Mr. Stubbs began irrigation. The State Engineer also noted the unsworn statement of Shane Stubbs that water for cultivation took place in May of 1993, prior to the notice of commencement of forfeiture proceedings.

On July 9, 1997, the State Engineer issued Ruling No. 4547, finding that clear and convincing evidence supported his conclusion that Dr. Fortier's water rights, among others, were forfeited for lack of use exceeding five years. In particular, Ruling No. 4547 determined that no credible evidence was produced demonstrating any irrigation from the certificated well following subdivision approval in 1973. Dr. Fortier then sought judicial review of the ruling, which the district court denied by decision and order entered May 15, 2001. Dr. Fortier appeals.

DISCUSSION

Substantial evidence

In water rights forfeiture proceedings, a petitioner must prove non-use of water for the statutory period by clear and convincing evidence.[4] Notwithstanding this level of proof at the administrative level, on review a "decision of the State Engineer shall be prima facie correct, and the burden of proof shall be on the party attacking the same."[5]

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[4]See Town of Eureka v. State Engineer, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992).

[5]NRS 533.450(9).

Judicial review by a district court of a decision of the State Engineer is "informal and summary,"[6] and this court is "bound by the same standard of review as the lower court."[7] Therefore, this court "will not pass upon the credibility of the witnesses nor reweigh the evidence, but [will] limit [the review] to a determination of whether substantial evidence in the record supports the State Engineer's decision."[8] In making this determination, we note that our review must take into consideration the more exacting burden of proof, i.e., that non-use be proved by clear and convincing evidence.

Dr. Fortier argues that, in the absence of direct proof of a 1990 pumpage inventory, the State Engineer lacked clear and convincing evidence to support the forfeiture ruling. Because of this gap, Dr. Fortier asserts that a maximum of four consecutive years of non-use were shown, to wit: from some time in 1985 to some time in 1989, followed by a separate period from 1991 to June, 1993.[9] He further argues that the affidavit of Mr. Albitre supported a finding of beneficial use of water from 1981 to 1992, but the State Engineer entirely dismissed that evidence. Additionally, Dr. Fortier contends the State Engineer's inventory witnesses did not testify with sufficient specificity concerning non-use during the years in which they conducted the inventories. From this he

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[6]NRS 533.450(2).

[7]State Engineer v. Morris, 107 Nev. 699, 701, 819 P.2d 203, 205 (1991).

[8]Revert v. Ray, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) (abandonment of water rights).

[9]See n.3, supra.

reasons that the absence of evidence of beneficial use of the land did not necessarily demonstrate, "clearly and convincingly," that beneficial use of the water on the land had not occurred.

Notwithstanding the lack of direct evidence concerning the 1990 inventory, we conclude that the forfeiture ruling was supported by clear and convincing evidence.

First, Mr. Albitre claimed to have extensively cultivated his property in the subdivision from 1981 to 1992.[10] This implies that he used water to do so. However, the pumpage inventories showing zero use from 1985 to 1989 and from 1991 to 1992 conflict with Mr. Albitre's claims of extensive water use during that period. Thus, the State Engineer concluded that the use Mr. Albitre made of the water was for domestic, not irrigation purposes, i.e., that water use by Mr. Albitre did not originate from the certificated well (Certificate No. 6818). We conclude that the State Engineer could have properly discounted Mr. Albitre's affidavit as unreliable.

Additionally, the State Engineer's employees testified that they usually, although not always, noted any apparent beneficial use in the written inventories. Because they testified that they made no remarks regarding beneficial use of the land from 1985 to 1989, and 1991 to June 1993, and because the evidence in the record is consistent with the ruling that any water use by Mr. Albitre in 1990 was restricted to domestic well

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[10]The State Engineer specifically found that no credible evidence supported Mr. Albitre's contention that a substantial portion of his property was cultivated.

water, the State Engineer could legitimately infer that no beneficial use of the water of the certificated well occurred in 1990.[11]

Finally, although Mr. Quinn did not testify to his 1990 inventory, the parties were given access to him via written questions and the State Engineer took administrative notice of his own records. From this, the State Engineer was entitled to find, as he did, that the annual pumpage inventories "for the years 1985 through 1992 shows that no water was used from the certificated well as authorized . . . under Permit 24369, Certificate 6818 . . . ." We also note that Dr. Fortier never attempted to prove beneficial use between 1985 and 1992.

Thus, we conclude that the record contained substantial evidence to support the State Engineer's conclusion that the certificated well was not used for a period of at least five years, despite the lack of direct testimony concerning the 1990 pumpage inventory.

Cure

In Town of Eureka v. State Engineer, this court held that "forfeiture applies when the State proves non-use over the statutory period, unless resumed [substantial] use has 'cured' or resuscitated the defect in the water rights."[12] Here, substantial evidence supports the proposition that Dr. Fortier did not "cure" his non-use before June 19, 1993, the date he received notice of the commencement of forfeiture proceedings.

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[11]Additionally, we can infer that Dr. Fortier did not use his water for a period of five years from 1985 through 1989. The record does not contain any evidence of water use for irrigation purposes in this period.

[12]108 Nev. 163, 168, 826 P.2d 948, 951.

First, the inventory record from June 1993 showed zero water use and contained no remarks regarding cleared land. The fall 1993 inventory also showed zero use, but contained a remark that sixty acres had been cleared and sprinklers were on the ground. The State Engineer could legitimately have inferred that Dr. Fortier did not use the certificated well for irrigation purposes until some time after he received notice of the commencement of forfeiture proceedings on June 19, 1993.

Second, Dr. Fortier's evidence that he used water from the certificated well before June 1993 to irrigate crops did not rebut the evidence in support of forfeiture. Mr. Stubbs' affidavit states he began irrigating Dr. Fortier's land two days from the time he saw Dr. Fortier pay the power company to turn on the power for the certificated well. However, the check to Valley Electric is dated "6/93," with a time stamp noting receipt by the bank on June 29, 1993. Thus, the State Engineer could have properly disregarded Dr. Fortier's claims that he attempted to "cure" his non-use prior to the commencement of proceedings on June 19, 1993.

We therefore conclude that Dr. Fortier is not eligible for relief under Town of Eureka.

Estoppel

Dr. Fortier argues that the State Engineer should be estopped from forfeiting his water rights in light of the 1973 letter written by the State Engineer's office to Mr. Avery in connection with the subdivision approval. The letter stated in relevant part:

> Notice is hereby made that this office would not give a favorable consideration to any transfer of the above referenced water right from the existing place of use after approval of the Amargosa Ranch Acres subdivision for individual domestic wells on

> each parcel as the source of water supply. Further, that quantity of water beneficially used within the subdivision will be required to be deducted from the combined total amount granted under the subject water right in any proposal to transfer this right.

Under NGA #2 Ltd. Liab. Co. v. Rains,[13] a party seeking an estoppel must satisfy a four-part test:

> (1) [T]he party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true facts; [and] (4) he must have relied to his detriment on the conduct of the party to be estopped.[14]

First, the letter referred to above provides no assurances that non-use of the certificated irrigation well would not result in forfeiture under the Nevada statutory scheme governing the regulation of groundwater usage.[15] Second, the record contains no evidence that Dr. Fortier detrimentally relied upon the letters in deciding not to make use of his water rights. To the contrary, his affidavit states that he did not use his water because he believed that he possessed absolute ownership of the water, just as he had when he lived in Massachusetts.[16] Dr. Fortier also

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[13]113 Nev. 1151, 946 P.2d 163 (1997).

[14]Id. at 1160, 946 P.2d at 169 (quoting Cheqer, Inc. v. Painters & Decorators, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982)).

[15]We note that Ruling No. 4547 does not work a forfeiture of Dr. Fortier's domestic water rights.

[16]Dr. Fortier's affidavit referred to his dealings with a "water official" and the official's failure to inform him that his water was subject

continued on next page . . .

does not point to any evidence of his reliance on the 1973 letter in his argument before this court.

Given the failure of proof of detrimental reliance, Dr. Fortier has not demonstrated that the State Engineer is estopped to claim forfeiture of the water rights in question here.

Equitable relief

Dr. Fortier relies on Engelmann v. Westergard,[17] Bailey v. State,[18] and State Engineer v. American National Insurance Co.,[19] in support of his general claim for equitable relief from this forfeiture.

In Engelmann, Bailey, and American National Insurance Co., the State Engineer cancelled water rights permits because the permittees did not file timely proof of beneficial use with the State Engineer.[20] This court stated that when the State Engineer correctly cancels a permit, the cancellation does not "affect the power of the district court to grant

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. . . *continued*
to forfeiture. The official's failure to inform Dr. Fortier regarding the law of forfeiture in Nevada does not provide Dr. Fortier with sufficient grounds to assert detrimental reliance.

[17]98 Nev. 348, 647 P.2d 385 (1982).

[18]95 Nev. 378, 594 P.2d 734 (1979).

[19]88 Nev. 424, 498 P.2d 1329 (1972).

[20]See NRS 533.410 (cancellation of water rights for failure to file beneficial use statements); see also Engelmann, 98 Nev. at 351, 647 P.2d at 387; Bailey, 95 Nev. at 380, 594 P.2d at 735-36; American Nat'l Ins. Co., 88 Nev. at 425, 498 P.2d at 1330.

equitable relief to the permittee when warranted."[21] However, in Bailey and American National Insurance Co., the water permit holders made some substantial beneficial use of their water.[22] And, in Engelmann, we permitted the appellant to make a showing before the district court regarding his diligence in protecting his water rights because the district court had not made a finding of fact regarding such diligence.[23]

There being no indication in this record of beneficial use prior to the commencement of forfeiture proceedings, Dr. Fortier has failed to demonstrate eligibility for general equitable relief under the above-mentioned case authority.

Dr. Fortier also argues that the 1973 letters to Mr. Avery constitute an admission that misled him into believing that his water rights were indefeasibly vested. We disagree. Again, the letter upon which Dr. Fortier now relies did not indicate or in any way imply that the irrigation water rights under Certificate No. 6818, appurtenant to his parcels, were not subject to forfeiture.

Dr. Fortier's reliance on Desert Irrigation, Ltd. v. State of Nevada[24] is likewise misplaced. In Desert Irrigation, a water rights holder

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[21]Engelmann, 98 Nev. at 351, 647 P.2d at 387; see also Bailey, 95 Nev. at 383, 594 P.2d at 736; American Nat'l Ins. Co., 88 Nev. at 426, 498 P.2d at 1330.

[22]See Bailey, 95 Nev. at 380, 594 P.2d at 735-36; American Nat'l Ins. Co., 88 Nev. at 425-6, 498 P.2d at 1330.

[23]See Engelmann, 98 Nev. at 352, 647 P.2d at 388.

[24]113 Nev. 1049, 944 P.2d 835 (1997).

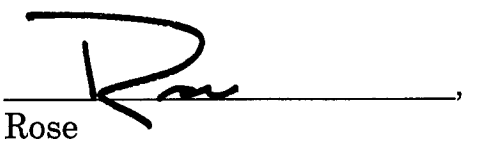
detrimentally relied on incorrect advice given by the State Engineer.[25] That advice was given in response to questions regarding procedures for the preservation of water rights.[26] As noted, the letters in question here did not advise Dr. Fortier that his water rights were not subject to forfeiture for lack of beneficial use.

The preeminent public policy concern in Nevada regarding water rights is beneficial use.[27] That public policy overrides Dr. Fortier's claims for equitable relief. We realize that this policy consideration may encourage waste rather than conservation of water. These competing considerations, however, are for the legislature to resolve.

CONCLUSION

We conclude that Ruling No. 4547 is supported by substantial evidence and that Dr. Fortier is not entitled to equitable relief from the ruling.

Accordingly, we ORDER the judgment of the district court AFFIRMED.



_____, J.
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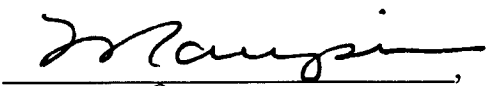

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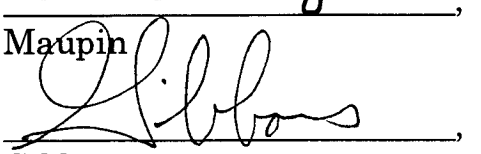

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Gibbons

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[25]Id. at 1060-61, 944 P.2d at 843.

[26]Id.

[27]Id. at 1059, 944 P.2d at 842.

cc: Hon. John P. Davis, District Judge
Lionel Sawyer & Collins/Reno
Attorney General Brian Sandoval/Carson City
Nye County Clerk