

IN THE MATTER OF FORFEITURE AND/)
OR ABANDONMENT OF WATER RIGHTS)
UNDER PERMIT 22857, CERTIFICATE)
6319 TO APPROPRIATE THE WATERS)
OF AN UNDERGROUND SOURCE IN DIA-)
MOND VALLEY, EUREKA COUNTY,)
NEVADA.)

R U L I N G

GENERAL:

I

Application 22857 was filed on November 19, 1965 by G. S. Wiggains for permission to change the point of diversion of waters heretofore appropriated under Permit 19237. The water was to be used for irrigation and domestic purposes. The proposed place of use was the N $\frac{1}{2}$ of Section 5, T.22N., R.54E., M.D.B. & M. A permit was issued under Application 22857 on March 22, 1967 for 3.473 c.f.s. of water for irrigation and domestic purposes. Certificate 6319 was issued under said permit on June 28, 1967.^{1/} By a deed dated May 8, 1974 and filed in the State Engineer's office on June 4, 1974, said permit was assigned to James A. Moncur and Leo Parker.

FINDINGS

I

In a letter of January 31, 1977, Kenneth P. and Earlene Stenton requested initiation of proceedings to declare water permits issued for Lots 1, 2, 3 and 4 and the S $\frac{1}{2}$ of the N $\frac{1}{2}$ of Section 5, T.22N., R.54E., M.D.B. & M., forfeited and/or abandoned.^{2/}

II

By a letter of April 5, 1977, parties of interest were notified that a field investigation would be held on April 27, 1977 in the matter of the forfeiture and/or abandonment of the subject rights.^{3/}

III

By a letter of April 11, 1977, parties of interest were notified that the date of the field investigation had been changed to April 26, 1977.^{4/}

IV

A field investigation was held on April 26, 1977 and was attended by parties of interest and representatives of the Division of Water Resources. A Report of Field Investigation dated May 10, 1977 was filed in the State Engineer's Office.^{5/}

V

By letter of April 19, 1977, Kenneth P. and Earlene Stenton demanded that the State Engineer withdraw all of the protests the Stentons had made against the subject water rights. The letter included a similar demand for the State Engineer to enforce NRS 534.090.6/

VI

Parties of interest were given notice by letter of May 20, 1977 that the hearing in the matter of the determination of forfeiture and/or abandonment of the subject rights was scheduled for Tuesday, June 28, 1977 in the Eureka County Court House, Eureka, Nevada.7/ Extensive evidence, testimony and arguments were presented at the hearing.8/

VII

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office testified that he had knowledge and familiarity with the N½ of Section 5, T.22N., R.54E., M.D.B. & M., dating back to 1972. He testified that during the period 1972 through 1976 that he had never seen a crop on the N½ of said Section 5. During that period the well had never been equipped with a pump or motor.9/ Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973.10/ His testimony was that said photograph showed no signs of crop on the described property.11/

VIII

Mr. Wayne Testolin, Water Commissioner for the State Engineer's office testified in concurrence with Mr. Gamboa regarding the status of equipment on the well under Permit 22857, the lack of crops and application of water for the period 1972 through 1976 and interpretation of the aerial photograph of the area in question.12/

IX

There was a determination and ruling of forfeiture of certificated water rights to appropriate underground water in Diamond Valley, Eureka County, Nevada as of December 3, 1975.13/

X

Order No. 541 was issued by the State Engineer on December 22, 1975 entitled "Notice of Curtailment of Water Appropriation within the Diamond Valley Ground Water Basin". This order included a paragraph indicating that "all applications filed to appropriate water for irrigation purposes on lands in Diamond Valley that had a previous water right lost through forfeiture will be considered for approval on an individual basis and on their own merits".14/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975; January 3, 10, 17 and 24, 1976.15/

CONCLUSIONS

I

The State Engineer has jurisdiction of the parties in the subject matter of this action.16/

II

The source of water under Permit 22857, Certificate 6319 is underground water.

III

NRS 534.090 provides as follows:

"1. Failure for 5 successive years on the part of the holder of any right, whether it be an adjudicated right, an unadjudicated right, or permitted right, and further whether such right be initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which such right shall be acquired or claimed, shall work a forfeiture of both undetermined rights and determined rights of the right to the use of such water to the extent of such nonuse. Upon the forfeiture of a right to the use of ground water, such water shall revert to the public and shall be available for further appropriation, subject to existing rights. If, upon notice by registered or certified mail to the person of record whose right has been declared forfeited, such person fails to appeal such ruling in the manner provided for in NRS 533.450, and within the time provided for therein, the forfeiture becomes final.

2. A right to use underground water whether it be vested or otherwise may be lost by abandonment. If the State Engineer, in investigating a ground water source, upon which there has been a prior right, for the purpose of acting upon an application to appropriate water from the same source, is of the belief from his examination that an abandonment has taken place, he shall so state in his ruling approving the application. If, upon notice by registered or certified mail to the person of record who had the prior right, such person fails to appeal such ruling in the manner provided for in NRS 533.450, and within the time provided for therein, the alleged abandonment declaration as set forth by the state engineer becomes final."17/

IV

The water rights under Permit 22857, Certificate 6319 are "permitted rights" and "determined rights" as described in NRS 534.090 and are therefore subject to the provisions of that statute.

V

The 1967 State Legislature amended NRS 534.090 to provide that forfeiture would apply to both undetermined and determined rights.18/

VI

NRS 534.090 clearly sets forth and provides that forfeiture shall apply whether such rights be initiated after or before March 25, 1939.

VII

The 1977 Nevada State Legislature was fully aware of the issue regarding forfeiture of underground water rights as provided in NRS 534.090. Representatives of persons interested in the Diamond Valley area and holders of rights to appropriate water for irrigation purposes in that area gave testimony before legislative committees regarding a possible amendment to NRS 534.090. No amendments to that statute were adopted by the 1977 Legislature.

VIII

Forfeiture of a water right does not become final until expiration of a time for appeal of a ruling declaring such water forfeited as provided in NRS 533.450.^{19/}

IX

"Any application for a permit or any permit to appropriate water may be assigned subject to the conditions of the permit but no such assignment shall be binding except between the parties thereto unless filed for record in the office of the State Engineer."^{20/} The current owners of Permit 22857, Certificate 6319 therefore are bound by their predecessors action or inaction as it relates to the possible forfeiture of said rights.

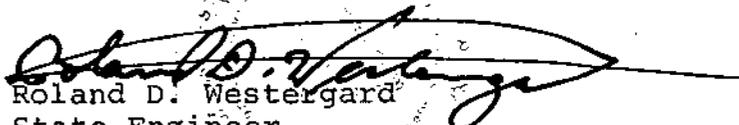
X

Evidence, information and data available, clearly and conclusively establish that for a period of in excess of five successive years, water has not been beneficially used for the irrigation of crops for the purposes for which the water rights were acquired under Permit 22857, Certificate 6319.

RULING

It is hereby ruled and declared that rights to appropriate water under Permit 22857, Certificate 6319 have been forfeited because of failure for in excess of five successive years on the part of the holder of the rights to use beneficially the underground water for the purpose for which said rights were acquired. No finding is made or entered regarding abandonment of said rights.

Respectfully submitted,


Roland D. Westergard
State Engineer

RDW/BR/bl

Dated this 15th day of

October, 1977.

FOOTNOTES

1. State Exhibit No. 53 in the Transcript of Public Hearing in the Matter of the Investigation into the Alleged Forfeiture and/or Abandonment of Various Water Rights in Diamond Valley, Eureka County, Nevada pursuant to NRS 534.090 held on June 28, 1977. (Hereinafter referred to as June 28, 1977 Transcript)
2. State Exhibit No. 52, June 28, 1977 Transcript.
3. State Exhibit No. 54, June 28, 1977 Transcript.
4. State Exhibit No. 55, June 28, 1977 Transcript.
5. State Exhibit No. 56, June 28, 1977 Transcript.
6. State Exhibit No. 2, June 28, 1977 Transcript.
7. State Exhibit No. 21, June 28, 1977 Transcript.
8. June 28, 1977 Transcript.
9. June 28, 1977 Transcript, Pages 119 and 120.
10. State Exhibit No. 51, June 28, 1977 Transcript.
11. June 28, 1977 Transcript, Page 120.
12. June 28, 1977 Transcript, Page 121.
13. Public Records within the Office of the State Engineer.
14. State Exhibit No. 4, June 28, 1977 Transcript.
15. Public Records within the Office of the State Engineer.
16. NRS 534.090
17. NRS 534.090
18. Statutes of Nevada, 1967 Regular Session, Volume 2, Page 1053.
19. NRS 534.090
20. NRS 533.385