

IN THE MATTER OF THE DETERMINATION)
OF FORFEITURE AND/OR ABANDONMENT OF)
WATER RIGHTS UNDER PERMIT 18980,)
CERTIFICATE 6519 TO APPROPRIATE THE)
WATERS OF AN UNDERGROUND SOURCE IN)
DIAMOND VALLEY, EUREKA COUNTY,)
NEVADA.)

R U L I N G

753

GENERAL

I

Application 18980 was filed by Ermyle R. Cooper on July 6, 1960 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the S1/2 of Section 4, T.21N., R.53E., M.D.B.&M. A permit was issued under Application 18980 on March 1, 1961 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 6519 was issued under said permit on February 9, 1968. 1/

FINDINGS

I

Parties of interest were given notice by letter of January 11, 1978 that a hearing in the matter of determination of forfeiture and/or abandonment of the subject rights was scheduled for February 16 and 17, 1978 in the Eureka County Court House, Eureka, Nevada. 2/ Extensive evidence testimony and arguments were presented at the hearing. 3/

II

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office testified that he had knowledge and familiarity with the SW1/4 of Section 4, T.21N., R.53E., M.D.B.&M. dating back to 1973. He testified that during the period 1973 through 1977 there had been crop on portions of the SW1/4 of said Section 4 with the exception of approximately 90 acres on the W1/2 of the SW1/4. There had never been any crop during that period on those 90 acres. Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973. 4/ His testimony was that the photograph showed no crop on approximately 90 acres in the western half of the SW1/4 of said Section 4. Under the direction of Mr. Bilyeu, Mr. Gamboa outlined the area that had not had a crop on it on the aerial photograph. 5/

III

Mr. Wayne Testolin, Water Commissioner for the State Engineer's office testified in concurrence with Mr. Gamboa regarding the use of water on the SW1/4 of Section 4, T.21N., R.53E., M.D.B.&M. for the period 1973 through 1977 and in interpretation of the aerial photograph of the area in question. 6/

IV

A determination of the acreage shown on State Exhibit No. 39 that is not irrigated in the SW1/4 of Section 4, T.21N., R.53E., M.D.B.&M. was made in the office of the State Engineer with the use of a planimeter. The calculations show that 80 acres in the W1/2 of the SW1/4 and the west 5 acres in the NE1/4 of the SW1/4, Section 4, were not irrigated.

V

There was no evidence, information or testimony submitted that would confirm that water was applied to the W1/2 SW1/4 and west 5 acres of the NE1/4 SW1/4, Section 4, T.21N., R.53E., M.D.B.&M. for irrigation of crops during the period 1973 through 1977. 7/

VI

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. 8/

VII

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". 9/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975, January 3, 10, 17 and 24, 1976. 10/

CONCLUSIONS

I

The State Engineer has jurisdiction of the parties in the subject matter of this action. 11/

II

The source of water under Permit 18980, Certificate 6519 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." 12/

IV

The water rights under Permit 18980, Certificate 6519 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. 13/

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 Nevada State Legislature was fully aware of the issue regarding forfeiture of underground 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 of appeal of a ruling declaring such right forfeited as provided for in NRS 533.450. 14/

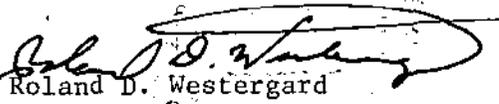
IX

Evidence, information and data available clearly and conclusively establish that for a period of in excess of 5 successive years water has not been beneficially used for the purpose for which water rights were acquired under Permit 18980, Certificate 6519 on the W1/4 SW1/4 and the west 5 acres of the NE1/4 SW1/4 Section 4, T.21N., R.53E., M.D.B.&M. Evidence, information and data available establish that water was used beneficially for the purposes for which rights were established under Permit 18980, Certificate 6519 on the east 35 acres of the NE1/4 SW1/4 and 39 acres in the SE1/4 SW1/4 of said Section 4 during the last five years.

RULING

It is hereby ruled and declared that that portion of the rights to appropriate water under Permit 18980, Certificate 6519 appurtenant to the W1/2 SW1/4 and the west 5 acres of the NE1/4 SW1/4 Section 4, T.21N., R.53E., M.D.B.&M. have been forfeited because of failure for in excess of 5 successive years on the part of the holder of the rights to use beneficially the underground water for the purposes for which said rights were acquired. That portion of the rights under Permit 18980, Certificate 6519 appurtenant to the east 35 acres of the NE1/4 SW1/4 and 39 acres in the SE1/4 SW1/4 Section 4, T.21N., R.53E., M.D.B.&M. are declared to be not forfeited at this time.

Respectfully submitted,


Roland D. Westergard
State Engineer

RDW/BLR/bl

Dated this 29th day

of SEPTEMBER, 1978.

FOOTNOTES

1. State Exhibit No. 39, in the Transcript of the Public Hearing in the Matter of the Consideration for Forfeiture and/or Abandonment Pursuant to NRS 534.090 of Various Water Rights in Diamond Valley, Eureka County, Nevada, February 16, 1978. (Hereinafter referred to as February 16, 1978 Transcript.)
2. State Exhibit No. 1, February 16, 1978 Transcript.
3. February 16, 1978 Transcript.
4. State Exhibit No. 39, February 16, 1978 Transcript.
5. February 16, 1978 Transcript, Pages 93 through 100.
6. February 16, 1978 Transcript, Page 100.
7. February 16, 1978 Transcript.
8. Public records in the Office of the State Engineer.
9. State Exhibit No. 3, February 16, 1978 Transcript.
10. Public records in the Office of the State Engineer.
11. NRS 534.090
12. NRS 534.090
13. Statutes of Nevada, 1967 Regular Session, Volume II, Page 1053.
14. NRS 534.090