

Case No. 8961

LEE WARD BOLMAN,
Petitioner,

VS.

WILLIAM J. NEWMAN,
Nevada State Engineer,
and THE STATE OF NEVADA,

Respondents.

STATE ENGINEER'S
S U P P L E M E N T A L R U L I N G
O N R E M A N D

Applications to Appropriate 35900, 35902
36461

THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

GENERAL

I

Application 35900 1/ was filed on September 20, 1978 by Lee Ward Bolman to appropriate 0.5 c.f.s. of water from Middle Indian Springs for mining and domestic purposes. The point of diversion is described as being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26, T. 11 S., R. 46 E., M.D.B.&M. The place of use is described as mining claims located within Sections 25, 26, 35 and 36, T. 11 S., R. 46 E., M.D.B.&M. The period of use is to be from January 1st to December 31st of each year.

Application 35902 2/ was filed on September 20, 1978 by Lee Ward Bolman to appropriate 1.0 c.f.s. of water from Lower Indian Springs for mining and domestic purposes. The point of diversion is described as being within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 26, T. 11 S., R. 46 E., M.D.B.&M. The place of use is described as mining claims located within Sections 25, 26, 35 and 36, T. 11 S., R. 46 E., M.D.B.&M. The period of use is to be from January 1st to December 31st of each year.

Application 36461 3/ was filed on January 15, 1979 by Lee Ward Bolman to appropriate 1.0 c.f.s. of water from Upper Indian Springs for mining and domestic purposes. The point of diversion is described as being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 26, T. 11 S., R. 46 E., M.D.B.&M. The place of use is described as mining claims located in Sections 25, 26, 35 and 36, T. 11 S., R. 46 E., M.D.B.&M. The period of use is to be from January 1st to December 31st of each year.

II

On February 7, 1980, the State Engineer held a public hearing 4/ in Beatty, Nevada in the matter of Applications 35900, 35902 and 36461 and other pending applications. The transcript of the hearing is available in the office of the State Engineer as a matter of public record.

III

On April 11, 1980, the State Engineer denied 5/ Applications 35900, 35902 and 36461 on the grounds there is no unappropriated water on the source.

IV

On May 12, 1980, Lee Ward Bolman filed a Notice of Petition for Review and Petition for Review of the Ruling of the State Engineer relating to the denial of Applications 35900, 35902 and 36461 in the Fifth Judicial District Court in and for the County of Nye, State of Nevada.

V

On March 5, 1981, the court issued a verbal ruling 6/ remanding the matter of the denial of Applications 35900, 35902 and 36461 to the State Engineer for further findings as set forth.

VI

On November 4, 1981, the State Engineer issued a pre-hearing order 7/ No. 777 in the matter of the remand for further proceedings on Applications 35900, 35902 and 36461. The pre-hearing order was issued by the State Engineer for the express purpose of providing a due process administrative procedure to any holder of a certified water right that might be subjected to a determination of forfeiture or abandonment of that right. The procedure set forth in the pre-hearing order provided substantial time limits for compliance as well as provision for extension of time.

VII

On August 2, 1983, after due notice, an administrative public hearing 8/ was held before the State Engineer. The transcript of the hearing is available in the office of the State Engineer as a matter of public record.

VIII

Existing rights of record 9/ on the waters of Upper, Middle and Lower Indian Springs are summarized as follows:

Upper Indian Springs

Permit 1305, Certificate 592.

Amount - 50,000 gallons per day.

Use - mining, milling and domestic.

Place of use - Bullfrog Mining District and town of Rhyolite.

Owner of record - Indian Springs Water Company.

*Permit 6083, Certificate 1167.

Amount - 0.004 c.f.s.

Use - stockwatering (125 head of cattle).

Place of use - same as point of diversion.

Owner of record - Lotta M. Martin and Mildred A. Childress.

Permit 17328, Certificate 5654.

Amount - 0.055 c.f.s., not to exceed 12.975 million gallons annually.

Use - quasi-municipal and domestic.

Place of use - SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 9, T. 12 S., R. 64 E., M.D.B.&M.

Owner of record - Mrs. H. H. Heisler.

Middle Indian Springs

Permit 6083, Certificate 1167.

Amount - 0.004 c.f.s.

Use - stockwatering (125 head of cattle).

Place of use - same as point of diversion.

Owner of record - Lotta M. Martin and Mildred A. Childress.

Permit 17327, Certificate 5653.

Amount - 0.055 c.f.s., not to exceed 12.975 million gallons annually.

Use - quasi-municipal and domestic.

Place of use - SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 9, T. 12 S., R. 46 E., M.D.B.&M.

Owner of record - Mrs. H. H. Heisler.

Lower Indian Springs

**Permit 1306, Certificate 593.

Amount - 150,000 gallons per day.

Use - mining, milling and domestic.

Place of use - Bullfrog Mining District and town of Ryolite.

Owner of record - Indian Springs Water Company.

Permit 5998, Certificate 1166.

Amount - 0.004 c.f.s. (125 head of cattle).

Use - stockwatering.

Place of use - same as point of diversion.

Owner of record - Lotta M. Martin and Mildred A. Childress.

Permit 25628, Certificate 8454.

Amount - 0.0051 c.f.s., not to exceed 1.2 million gallons annually.

Use - quasi-municipal and domestic.

Place of use - NE $\frac{1}{4}$ Section 9, T. 12 S., R. 46 E., M.D.B.&M.

Owner of record - Mrs. H. H. Heisler.

*Permit 6083, Certificate 1167, describes the point of diversion as Spring No. 1 and Spring No. 2. The supporting map places these two points of diversion at approximately Upper and Middle Indian Springs.

**Permit 1306, Certificate 593, describes the point of diversion as two springs identified as East Spring and Lower Spring. The supporting map places these two points of diversion at approximately Middle and Lower Indian Springs.

FINDINGS OF FACT

I

DISTINCTIONS BETWEEN ABANDONMENT AND FORFEITURE

The Nevada Supreme Court, in entering judgment in a water right case, 10/ devoted considerable attention to the basic and fundamental distinctions between abandonment and statutory forfeiture as well as establishing precedent for criteria to be considered in making findings on loss of water rights. The court has clearly held that abandonment is a voluntary matter, the relinquishment of the right by the owner with the intention of forsaking and deserting it. Forfeiture on the other hand is the involuntary or forced loss of the right caused by failure of the holder of appropriation to utilize the resource as required by statute.

The court held that:

"In that statute both the words 'abandonment' and 'forfeiture' are used and said terms are entirely different in their operation."

"Although the terms 'abandonment' and 'forfeiture' are oftentimes used interchangeably, even by the courts, upon the subject of the loss of water rights, and other rights used in connection therewith, there is a decided distinction in their legal significance and one which, in view of the forfeiture clauses enacted by recent legislation should be observed. While upon the one hand, abandonment is the relinquishment of the right by the owner with the intention to forsake and desert it, forfeiture, upon the other hand, is the involuntary or forced loss of the right caused by the failure of the appropriation or owner to do or perform some act required by the statute. Forfeiture is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interests therein."

"The element of intent, therefore, so necessary in the case of abandonment, is not a necessary element in the case of forfeiture. In fact, a forfeiture may be worked directly against the intent of the owner of the right to continue in the possession and the use of the right. Therefore, forfeiture as applied to water rights and other rights in this connection is the penalty fixed by statute for the failure to do, or the unnecessary delay in doing, certain acts tending toward the consummation of a right within a specified time, or, after the consummation of the right, the failure to use the same for the period specified by the statute."

"We think it will be conceded that loss by forfeiture presents a much stricter and more absolute procedure than loss by abandonment."

Both the relinquishment of possession and the intent are essential to a finding of abandonment and are well defined and set in case law 11/ of the Western States. Mere non-use of the water to which an appropriator is entitled under valid rights without substantial and conclusive evidence of intent to abandon and relinquish possession is not sufficient for a finding of abandonment.

Additionally, distinction must be made between NRS 533.060 (4) and NRS 534.090 in making a determination as to whether abandonment and/or forfeiture has occurred as relates to "surface" waters and "underground" waters. The State Engineer finds that by strict interpretation of the statute a determination of forfeiture of rights in the absence of abandonment cannot be made on "surface" waters, whereas "groundwaters" are subject to a finding of forfeiture in the absence of abandonment.

II

BURDEN OF PROOF IN DETERMINATION OF FORFEITURE OR ABANDONMENT

There is no requirement in statute or case law that mandates as a condition precedent to denying an application to appropriate that the State Engineer must first determine that prior rights have been forfeited or abandoned, though it may be argued that if grounds for denial are that there are no unappropriated waters in the source, that constitutes a determination that all prior rights are in good standing. This argument is rejected by the basic fact that the avoidance of the chaos which the present water law in this state was designed to prevent would result, particularly if the act of filing an application to appropriate required in-depth investigation of all prior rights on the source. This squarely places the burden on the applicant to raise the question of possible abandonment or forfeiture to support his application. Revert vs. Ray 12/ clearly establishes that if an applicant or party raises a relevant issue, then a determination should be made. This is not to be misinterpreted as any contention that the State Engineer should not or may not initiate a determination. The burden 13/ is upon whomever seeks the declaration, be it the State Engineer, a private party, or protestant, or an applicant to establish by conclusive and substantial evidence that the act of forfeiture or abandonment has occurred. It then becomes incumbent upon the holder of the right to meet the burden of proof on continuous use.

III

WATER RIGHTS SUBJECT TO FORFEITURE AND/OR ABANDONMENT

An important statutory procedure 14/ is set forth that provides for certain time periods to show beneficial use under approved applications to appropriate (permits). Cancellation of a permit may be considered the parallel counterpart to forfeiture and/or abandonment and requires not only due diligence but the same policy of beneficial use of the public waters as does forfeiture and/or abandonment. A certificated permitted right is then a determined right and becomes subject to the forfeiture and/or abandonment statutes. A permit which has not been perfected through beneficial use to a certificate is not subject to a determination of forfeiture and/or abandonment.

IV

AVAILABILITY OF WATER AT THE SOURCES

Evidence and testimony 15/ provided at the administrative hearings establish conclusively that the flows of water at the springs are minimal and variable. Fluctuating flows of surface waters are not uncommon because of the close interrelationship with climatological and hydrological conditions. The record has also established that the flow at Upper Indian Spring has ceased, probably due to pumping underground water under Permit 38126 held by Beatty Water and Sanitation District which is in close proximity to the spring source. Water is presently being made available by the District to satisfy existing rights on Upper Indian Spring. The availability of water at the sources is not adequate to satisfy existing rights at the present time.

V

SUCCESSORS IN INTEREST TO EXISTING RIGHTS

1. Permit 1305, Certificate 592, and Permit 1306, Certificate 593.

Indian Springs Water Company was incorporated on May 31, 1905, and the charter of the corporation was revoked on the first Monday of March, 1924, for failure to pay the annual license tax then assessed against corporations. There is no correspondence of record 16/ between the State Engineer's Office and the Indian Springs Water Company or representatives after March 21, 1910. Nye County assessment records 17/ indicate that no further assessment was made against Indian Springs Water Company after the year 1919. Field investigations 18/ at the spring sites revealed no evidence of continuous beneficial use of the water under the Indian Springs rights. There is evidence 19/ of an old pipeline which apparently has been replaced by a new pipeline from the spring area to the town of Ryolite. This new pipeline was installed by users under subsequent rights. 20/ Attempts to serve the Indian Springs Water Company by certified mail 21/ regarding the pre-hearing order and the time and place of the administrative hearing were unsuccessful.

2. Permit 5988, Certificate 1166, Permit 6083, Certificate 1167.

Evidence and testimony 22/ established that the Colvin Land and Cattle Company is the grazing lessee in the Indian Springs area and that those grazing privileges are being exercised at the present time. Clear title establishing the Colvin Land and Cattle Company as successor in interest to Certificates 1166 and 1167 has not been established on the records 23/ of the State Engineer's office; therefore, any transfer of ownership of these rights is binding only between the parties involved. 24/

3. Permit 17327, Certificate 5653, Permit 17328, Certificate 5654, Permit 25628, Certificate 8454.

Evidence and testimony 25/ clearly established that the town of Ryolite is dependent on and has received domestic water from Upper, Middle and Lower Indian Springs. Testimony also indicates that at the present time the water supply being delivered to Ryolite is insufficient to meet the needs of fire protection and culinary demand. The supply is being supplemented by water from a well drilled under Permit 38126 (Beatty Water and Sanitation District) and the pumping of that well which is located in close proximity to Upper Indian Spring may be effecting the flow of the spring. Permit 38126 was issued with the express condition that should the diversion of water impair existing rights, then Permit 38126 would be subject to curtailment, or in the alternative, an agreement could be reached between the parties involved to provide water of reasonably acceptable quantity to existing quasi-municipal and stockwatering rights. The record also establishes that there are existing facilities in Ryolite that rely on the water from the springs for quasi-municipal use.

Documents 26/ were introduced into evidence that establish Mrs. H. H. Heisler is deceased and the estate is presently being probated. There was no evidence of intent to abandon or relinquish possession of the water rights held by Mrs. H. H. Heisler. Testimony 27/ to contrary indicates that Mrs. H. H. Heisler has used the water continuously within the town of Ryolite and that the flows available from the springs vary with climatological conditions.

VI

NRS 533.367

NRS 533.367 provides:

"Before a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, he must insure that wildlife which customarily uses the water will have access to it. The State Engineer may waive this requirement for a domestic use."

The record 28/ establishes the presence of wildlife in the area of the springs. The record 29/ also establishes the scarcity of water at the sources and the arid conditions that prevail. Watering sources are indispensable to the survival of wildlife under these conditions.

CONCLUSIONS

I

"Surface" waters are not subject to forfeiture in the absence of abandonment.

II

The record establishes that there is sufficient evidence of intent to abandon and relinquish possession by the owner of record under Permit 1305, Certificate 592, and Permit 1306, Certificate 593.

III

There is no evidence of intent to abandon or relinquish possession under Permit 6083, Certificate 1167, Permit 17328, Certificate 5654, Permit 17327, Certificate 5653, Permit 5988, Certificate 1166, and Permit 25628, Certificate 8454, although the diversion works and distribution system to the town of Ryo-lite are in a state of disrepair and non-use at the present time.

IV

The record clearly supports the necessity for the use of water as required under NRS 533.045 within the limit and extent of the existing rights. In addition, water availability is mandated by NRS 533.367 for wildlife purposes.

V

The record establishes that the owner of record, Mrs. H. H. Heisler, under Permit 17327, Certificate 5653, Permit 17328, Certificate 5654, and Permit 25628, Certificate 8454, is deceased and the estate is presently being probated.

VI

The record establishes a claimed successor in interest under Permit 5988, Certificate 1166, and Permit 6083, Certificate 1167, and that the claimed successor in interest has grazing privileges in the area of the springs.

VII

The record establishes that there is insufficient water available at the sources to support existing rights at the present time as well as wildlife needs.

VIII

The State Engineer is prohibited by statute 30/ from granting a permit under an application to appropriate the public waters where:

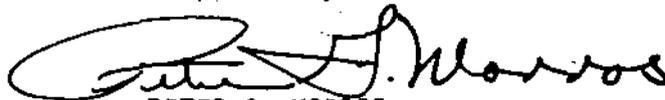
- (A) There is no unappropriated water at the proposed source or,
- (B) the proposed use conflicts with existing rights, or
- (C) the proposed use threatens to prove detrimental to the public interest.

RULING

The denial of Applications 35900, 35902 and 36461 by Ruling of the State Engineer on April 11, 1980 is hereby affirmed on the grounds that the granting thereof would conflict with existing rights, that there is no unappropriated water at the sources, and that approval would be detrimental to the public interest.

Permit 1305, Certificate 592, and Permit 1306, Certificate 593, are found to be abandoned and all rights thereunder are deemed forfeited as provided under NRS 533.060 (4).

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/br

Dated this 13th day of
SEPTEMBER, 1983.

FOOTNOTES

1. State Exhibit No. 4, Administrative Hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
2. State Exhibit No. 4, Administrative Hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
3. State Exhibit No. 4, Administrative Hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
4. State Exhibit No. 5, Transcript of Administrative Hearing before the State Engineer on February 7, 1980. Public record in the office of the State Engineer.
5. Public record in the office of the State Engineer under Applications 35900, 35902 and 36461. See also Petition for Review of Ruling of State Engineer Denying Applications 35900, 35902 and 36461. Fifth Judicial District Court of the State of Nevada, in and for the County of Nye, Case No. 8961.
6. State Exhibit No. 3, Administrative hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
7. State Exhibit No. 2, Administrative Hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
8. State Exhibit No. 1, Administrative Hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
9. State Exhibit No. 4, Administrative Hearing before the State Engineer, on August 2, 1983. Public record in the office of the State Engineer.
10. In re Manse Spring and Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2nd) 311 (1940).

11. McFarland v. Alaska Perseverance Min. Co., 3 Alaska 308, 337 (1907).
Gila Water Co. v. Green, 29 Arizona 304, 306, 241 Pac. 307 (1925).
Wood v. Etiwanda Water Co., 147 Cal. 228, 234, 81 Pac. 512 (1905).
Beaver Brook Res. and Canal Co. v. St. Vrain Res. and Fish Co., 6 Colo. App. 130, 136, 40 Pac. 1066 (1895).
Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 691 (1904).
Union Grain and Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 223, 240 Pac. 443 (1925).
Atchison v. Peterson, 1 Mont. 561, 565 (1872), affirmed, 87 U.S. 507, (1874).
State v. Nielsen, 163 Nebr. 372, 381, 79 N.W. (2d) 721 (1956).
In re Manse Spring and its Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2d) 311 (1940).
Borman v. Blackmon, 60 Oreg. 304, 308, 118 Pac. 848 (1911).
Edgemont Improvement Co. v. N.S. Tubbs Sheep Co., 22 S. Dak. 142, 145, 115 N.W. 1130 (1908).
Anson v. Arnett, 250 S.W., (2d) 450, 454, (Tex. Civ. App. 1952, error refused n.r.e.).
Desert Live Stock Co. v. Hooppiana, 66 Utah 25, 32, 239 Pac. 479 (1925).
Sander v. Bull, 76 Wash. 1, 6, 135 Pac. 489 (1913).
Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 400, 100 Pac. (2d) 124, 102 Pac. (2d) 745 (1940).
Valcada v. Silver Peak Mines, 86 Fed. 90, 95 (9th Cir. 1898).
Franktown v. Marlette, 77 Nev., 354 Pac. 1069 (1961).
Revert v. Ray, 95 Nev. 783, 786 Pac. 262 (1979).
12. Revert v. Ray, 95 Nev. 782, 606 Pac. (2d) 269 (1979).
13. Thomas v. Ball, 66 Mont. 161, 168, 213 Pac. 597 (1923).
Ward v. Monrovia, 16 Cal. (2d) 815, 820-821, 108 Pac. (2d) 425 (1940).
Lema v. Ferrari, 27 Cal. App. (2d) 65, 73, 80 Pac. (2d) 157 (1938).
Cline v. McDowell, 132 Colo. 37, 42, 284 Pac. (2d) 1056 (1955).
Pouchoulou v. Heath, 137 Colo. 462, 463, 326 Pac. (2d) 657 (1958).
Carter v. Territory of Hawaii, 24 Haw. 47, 55 (1917).
Smithfield West Bench Irr. Co., v. Union Cent. Life Ins. Co., 113 Utah 356, 363, 195 Pac. (2d) 249 (1948).
Miller v. Wheeler, 54 Wash. 429, 436, 103 Pac. 641 (1909).
Laramie Rivers Co. v. LeVasseur, 65 Wyo. 414, 449, 202 Pac. (2d) 680 (1949).
Lake DeSmet Res. v. Kaufmann, 75 Wyo. 87, 102, 292 Pac. (2d) 482 (1956).
Franktown v. Marlette, 77 Nev. 354, Pac. (2d) 1069 (1961).
Revert v. Ray, 95 Nev. 783, 786, 95 Nev. Pac. (2d) 262 (1979).

14. NRS 533.380, 533.390, 533.395, 533.410.
15. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
State Exhibit No. 5, Testimony of Tracy Phelps, pages 28 thru 37 (Administrative Hearing transcript on February 7, 1980).
State Exhibit No. 9, 10, Testimony of Thomas J. Smales, pages 25 thru 65.
Testimony of Elmo J. DeRicco, pages 66 thru 91.
Testimony of Patrick Coca, pages 95 thru 120.
Testimony of James J. Spencer, pages 121 thru 137.
16. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
Testimony of Thomas J. Smales, pages 33 thru 35.
17. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
State Exhibit No. 11, Testimony of Thomas J. Smales, pages 34, 35.
18. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
State Exhibits 9, 10 and 11.
Testimony of Thomas J. Smales, Pages 25 thru 65.
19. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
State Exhibit No. 9.
State Exhibit No. 4.
20. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
Heisler exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8.
State exhibits Nos. 9, 10, 11.

21. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.

State Exhibit No. 1.

See also testimony of George W. Abbott, pages 166 thru 169.

22. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.

Testimony of Thomas J. Smales, pages 35 thru 37, 50 thru 52.

State Exhibit No. 12.

Testimony of Ben Colvin, Pages 138 thru 146.

Bolman Exhibit No. 6.

State Exhibit No. 5 (transcript of Administrative Hearing before the State Engineer, on February 7, 1980), pages 37 thru 42.

23. Public records in the office of the State Engineer under Permit 5988, Certificate 1166, and Permit 6083, Certificate 1167.

24. NRS 533.385.

25. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.

Testimony of Thomas J. Smales, pages 25 thru 65.

Testimony of Elmo J. DeRicco, pages 66 thru 91.

Testimony of Patrick Coca, pages 95 thru 120, and pages 170 thru 178.

Testimony of James J. Spencer, pages 121 thru 137, and pages 179 thru 186.

Testimony of Arthur Babington Ray, pages 146 thru 165.

State Exhibits Nos. 4, 5, 14.

Heisler Exhibits Nos. 6, 7, and 8.

26. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
Heisler Exhibits Nos. 12, 13, and 14.
27. See footnote 25.
28. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
Testimony of Thomas J. Smales, pages 33 and 52.
Testimony of Arthur Babington Ray, page 151.
State Exhibit No. 10.
29. Transcript of Administrative Hearing before the State Engineer, on August 2, 1983.
State Exhibit No. 13.
30. NRS 533.370 (3).