

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF THE DETERMINATION)
OF THE FORFEITURE OF PERMIT 23371)
ISSUED TO APPROPRIATE THE PUBLIC)
WATERS OF AN UNDERGROUND SOURCE IN)
LAS VEGAS VALLEY, CLARK COUNTY,))
NEVADA.)

RULING

FINDINGS OF FACT

I.

Application 23371 was filed on September 2, 1966, by Harold P. Stewart to appropriate 1.0 c.f.s. of water from an underground source for industrial (gravel plant) and domestic purposes¹ within the N1/2 NE1/4 SE1/4, W1/2 SE1/4 and SW1/4 Section 17, T.19S., R.60E., M.D.B.&M. The point of diversion is described as being within the NE1/4 SE1/4 Section 17, T.19S., R.60E., M.D.B.&M. The period of use was described as being from January 1st to December 31st of each year. Application 23371 became ready for action on February 9, 1967, after completion of the statutory publication and protest periods.²

II.

A permit was granted under Application 23371 on April 11, 1967,³ in the amount of 1.0 c.f.s. not to exceed 235 million gallons annually for industrial and domestic purposes. The permit was issued subject to existing rights and "further subject to revocation if and when water can be furnished by an entity such as a water district or a municipality engaged in furnishing water". Subsequent to the issuance of the permit, the proofs of commencement of work and completion of work were timely filed with the office of the State Engineer as required by the terms of the permit.⁴

¹ See Permit 23371, public record in the office of the State Engineer. See also Permittee Exhibit No. 1, public administrative hearing, September 4, 1986.

² NRS 533.360, NRS 533.365.

³ See Permit 23371, public record in the office of the State Engineer. See also Permittee Exhibit No. 1, public administrative hearing, September 4, 1986.

⁴ Id., NRS 534.120.

III.

On December 10, 1970, the proof of beneficial use was submitted and filed in the State Engineer's office under Permit 23371. The proof of beneficial use indicated a maximum diversion rate of 380 gallons per minute (0.85 c.f.s.). A subsequent field investigation resulted in an estimated consumptive use of approximately 50.0 acre-feet in 1967 and 1968 and no inventoried beneficial use in 1969 and 1970.⁵

IV.

A public administrative hearing in the matter of a forfeiture determination under Permit 23371 was held before the State Engineer on September 4, 1986, in Las Vegas, Nevada. The permittee made evidentiary presentations and testimony was received from witnesses. A post hearing brief was submitted by the permittee setting forth points and authorities supporting their position.⁶

V.

Pumpage inventories of actual ground water pumpage in the Las Vegas Ground Water Basin have been completed by the State Engineer's office on an annual basis since 1967.⁷ Pumpage inventories have been maintained on Permit 23371 since 1967 and reflect beneficial use of 50.0 acre-feet in 1967 and 1968 and no pumpage or beneficial use of water for a continuous period from 1969 through 1985.⁸

VI.

The Nevada Supreme Court in entering judgment in a water right case 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 right⁹ caused by failure of the holder of the right to utilize the resource as required by statute.

⁵ See Permit 23371, public record in the office of the State Engineer. See also Permittee Exhibit No. 1, public administrative hearing, September 4, 1986.

⁶ See transcript of public administrative hearing, public record in the office of the State Engineer.

⁷ Public record in the office of the State Engineer. See also State of Nevada Exhibit No. 2, public administrative hearing, September 4, 1986, pp. 5 through 7, p. 65.

⁸ Id. There was testimony by witnesses Darrell Thornton (p. 41) and Dana Stewart (p. 61-64) that some usage of water occurred in 1970.

⁹ In re Manse Spring and Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 P2d 311 (1940). NRS 534.090.

Both the relinquishment of possession and the intent are essential to a finding of abandonment and are well defined and set in case law of the Western States. The State Engineer finds no disparity or confusion in definition. Mere non-use of the water to which an appropriator is entitled under valid rights without substantial evidence of intent to abandon and relinquish possession is not sufficient for a finding of abandonment.¹⁰

VII.

In the case of ground water, a finding of forfeiture would require five successive years of non-use after April 15, 1967.¹¹ Additionally, a determination must be made as to what rights the forfeiture statute is applicable. NRS 534.090(1) would apply the forfeiture provisions to "any right, whether it is an adjudicated right, an unadjudicated right, or permitted", regardless of the date that the right was initiated.

It would then follow that "permitted" rights which are the subject of beneficial use are subject to forfeiture. An important statutory procedure is set forth that provides for certain time periods to show beneficial use under approved applications to appropriate (permits).¹² Cancellation of a permit may be considered the parallel counterpart to forfeiture and requires not only due diligence but the same policy of beneficial use of the public waters as does forfeiture.¹³ A permitted right where beneficial use has occurred or been demonstrated then becomes a determined right and subject to the forfeiture statute. A permit which has not been perfected through beneficial use is not subject to a determination of forfeiture.

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- ¹⁰ 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 Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 P2d 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 (1980).
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 P2d 124, 102 P2d 745 (1940).
Valcalda v. Silver Peak Mines, 86 Fed. 90, 95 (9th Cir. 1898).
Franktown v. Marlette, 77 Nev., 354 P2d 1069 (1961).
Revert v. Ray, 95 Nev. 783, 786 P2d 262 (1979).

¹¹ NRS 534.090.

¹² NRS 533.380.

¹³ NRS 533.390, 533.395, 533.410.

In Manse, the Court held that because of the public importance of the resource, circumstances of that particular case:

"will not cause to be forfeited or taken away valuable rights when the non-use of water was occasioned by justifiable causes...."

To provide defense against a forfeiture on the grounds that circumstances prevent usage would require the circumstance to be such as to apply to all appropriators. The question of whether one water user should be allowed justifiable causes related to circumstances or causes that are not available to other appropriators would only serve to create exemptions to the forfeiture statute and weaken the wise policy of beneficial use as the limit and extent of the right. The State Engineer finds that the record does not support justifiable circumstances that would bar forfeiture of Permit 23371. The record clearly defines a continuous period of non-use substantially in excess of the statutory 5-year minimum.

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.¹⁴

II.

The record clearly establishes the limit and extent of the beneficial use under Permit 23371 as 50.0 acre-feet annually.

III.

Beneficial use under Permit 23371 was last demonstrated in 1970.

IV.

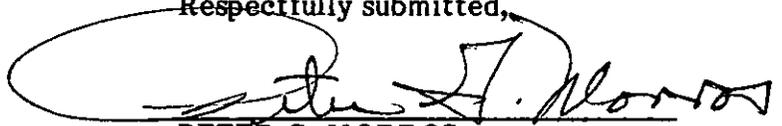
The record establishes a period of continuous non-use exceeding 5 years under Permit 23371 which constitutes a forfeiture of the right under Permit 23371.

¹⁴ NRS Chapters 533 and 534, NRS 232.100.

RULING

Based on a record of substantial evidence, Permit 23371 has not demonstrated beneficial use for a continuous period in excess of 5 years, therefore, Permit 23371 is declared forfeited under the provisions of NRS 534.090.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter G. Morros", is written over a horizontal line. The signature is enclosed in a large, hand-drawn oval.

PETER G. MORROS
State Engineer

PGM/bl

Dated this 14th day of
July, 1987.