

IN THE OFFICE OF THE STATE ENGINEER
OF THE STATE OF NEVADA

IN THE MATTER OF THE POSSIBLE)
FORFEITURE OF PERMIT 4613,)
CERTIFICATE 1656 FILED TO)
APPROPRIATE THE SURFACE WATERS OF)
UNDERWOOD CANYON WITHIN THE GRASS)
VALLEY HYDROGRAPHIC BASIN (138),)
LANDER COUNTY, NEVADA.)

RULING

5030

GENERAL

I.

Application 4613 was filed on October 1, 1917, by Thomas Brackney to appropriate 5.0 cubic feet per second of water from Underwood Canyon. The proposed manner and place of use was described as being for irrigation, stock watering and domestic purposes within 160 acres of land located within the S $\frac{1}{2}$ NW $\frac{1}{4}$ and the N $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, T.22N., R.47E., M.D.B.&M. The proposed point of diversion was described as being located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 12. Application 4613 was permitted by the State Engineer on February 25, 1919, with Certificate 1656 issued for irrigation and domestic purposes under Permit 4613 on June 17, 1930.¹

FINDINGS OF FACT

I.

The State Engineer maintains a formal permitting process that allows a permitted water right to be perfected in accordance with the provisions of NRS chapter 533.² The submittal of the Proof of Beneficial Use under Permit 4613 on March 8, 1927, documented the degree in which the water right granted under Permit 4613 had been placed to its intended beneficial use.

¹ File Number 4613, official records in the office of the State Engineer.

² NRS § 533.425.

The information derived from this proof formed the basis from which Certificate 1656 was issued.¹ The State Engineer finds that Permit 4613 represents a certificated water right.

II.

Permit 4613, Certificate 1656 was issued to appropriate the waters of a surface source located within Underwood Canyon.¹ The State Engineer finds that Permit 4613 also represents a certificated water right permit, which appropriates water from a surface source.¹

III.

A Petition for a Declaration of Forfeiture of a Water Right filed on behalf of the United States Bureau of Land Management, Battle Mountain Field Office ("BLM"), was received in the office of the State Engineer on January 24, 2001. This petition requested the State Engineer to declare the water right issued under Permit 4613, Certificate 1656 forfeited as a matter of law. The BLM's claim of forfeiture is based upon a period of non-use that is alleged to have occurred from 1986 through 1994. It is the BLM's contention that this period of non-use predates the 1999 amendment to NRS § 533.060, which exempted the forfeiture of surface water rights. Also contained within the BLM's forfeiture petition was the argument that five successive years of non-use had occurred prior to the 1999 amendments; therefore, the water right granted under Permit 4613, Certificate 1656 had already been forfeited and subsequently ceased to exist prior to 1999.¹ The State Engineer finds that no declaration of forfeiture had been issued by the State Engineer prior to the 1999 legislative change applicable to forfeiture of surface waters.

IV.

Certificate 1656, was issued to appropriate surface water for irrigation, and domestic purposes. It is the duty of the State Engineer to regulate this appropriation of water in accordance with the provisions found within the Nevada Revised Statutes chapter 533. The records of the office of the State Engineer currently contain in excess of 66,000 water right files, with surface water filings representing a large percentage of the filings submitted prior to the Second World War. Many of the applications that requested new appropriations of surface water or changes in existing surface water rights have been denied or cancelled in addition to a smaller number of permits that have been deemed abandoned by the State Engineer. A more specific accounting of these inactive surface water rights indicates that 3,084 surface water applications have been denied, 6,281 permits have been cancelled and the State Engineer has ruled 11 surface right permits abandoned.³ Two surface water sources have been declared relinquished, abandoned and forfeited by the State Engineer, but these water rights were not forfeited due to the statutory non-use provision found under NRS § 533.060, but rather the water rights were relinquished to the control of the State of Nevada.⁴ The State Engineer finds that until the 9th Circuit Court of Appeals decided in the Alpine cases⁵ that the forfeiture law was applicable to surface water rights, during the 98 years that the office of the State Engineer has been in operation, no water right that derives its appropriation of water from a surface source had ever been forfeited due to statutory non-use of the water.

³ Nevada Division of Water Resources water rights data base, April 5, 2001.

⁴ File Nos. 9936 and 9937, official records in the office of the State Engineer.

⁵ U.S. v. Alpine Land and Reservoir Co., 983 F.2d 1487 (9th Cir. 1992).

v.

The office of the State Engineer was created during the legislative session of 1903 to enable the state of Nevada to form a centralized agency that would regulate and protect the state's limited water resources. During the 98 years that have passed since its inception, the office of the State Engineer has recognized a clear distinction between the manner in which surface and underground water rights can be lost due to non-use. Prior to 1999, Nevada Revised Statute § 533.060, stated that if the owners of any ditch, canal, reservoir, or any other means of diverting any of the public water failed to use the water therefrom for beneficial purposes for which the right of use exists during any five successive years, the right to so use shall be deemed as having been abandoned and any such owner thereupon forfeited all water rights, easements and privileges appurtenant thereto acquired. Although this language may be interpreted to describe a means by which a surface water right may be subjected to a forfeiture determination, the State Engineer has never applied this statute to surface water rights until the Alpine Court's decision in 1992.³ During the 1999 Nevada State Legislative session, it was proposed that new language be developed to make this provision more consistent with the State Engineer's long history of limiting forfeiture to underground water rights. This effort culminated in the 1999 amendments to NRS § 533.060, which exempted surface water rights from forfeiture determinations. The State Engineer finds that the changes made in NRS § 533.060 during the 1999 legislative session were enacted to clarify the language found within the forfeiture statute to a point where it more accurately reflected the State Engineer's well established policy of exempting surface water rights from forfeiture.

CONCLUSIONS

I.

The State Engineer has jurisdiction over the parties and the subject matter of this action and determination.⁶

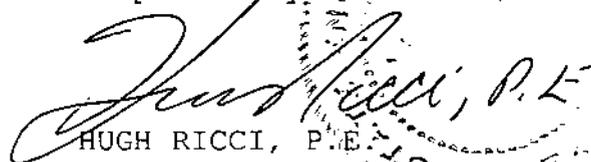
II.

A permitted water right that appropriates water from a surface source is not subject to the forfeiture under the provisions found within the current version of the Nevada Revised Statutes § 533.060. The State Engineer concludes, since no declaration of forfeiture was made by the State Engineer prior to the 1999 legislative amendment, a declaration of forfeiture is not proper now.

RULING

The Petition for Declaration of Forfeiture of Permit 4613, Certificate 1656 submitted on behalf of the Bureau of Land Management is hereby rejected on the grounds that the forfeiture of a water right permit that appropriates water from a surface source is exempt from forfeiture in accordance with NRS § 533.060.

Respectfully submitted,


HUGH RICCI, P.E.

State Engineer

HR/MDB/dl

Dated this 31st day of
May, 2001.

⁶ NRS chapter 533.