

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF FORFEITURE )  
OF THE WATER RIGHTS FROM AN )  
UNDERGROUND SOURCE UNDER )  
PERMIT 22621, CERTIFICATE )  
7061, AND PERMIT 22622, )  
CERTIFICATE 7062, IN STONE )  
CABIN VALLEY, NYE COUNTY, )  
NEVADA )

RULING

GENERAL

Application 22621 was filed on June 9, 1965, by Carroll D. Rasmussen to appropriate 5.4 c.f.s. of water from an underground source for irrigation and domestic purposes on 320 acres of land within the E $\frac{1}{2}$  SE $\frac{1}{4}$  Section 8; W $\frac{1}{2}$  SE $\frac{1}{4}$ , N $\frac{1}{2}$  SW $\frac{1}{4}$ , S $\frac{1}{2}$  NW $\frac{1}{4}$  Section 9; T.3N., R.48E., M.D.B.&M. The point of diversion was described as being within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 9, T.3N., R.48E., M.D.B.&M. A permit was issued on April 14, 1966 and Certificate 7061 was issued on June 18, 1969, for 4.11 c.f.s. for the irrigation of the 320 acres stated as the place of use shown above. Permit 22621, Certificate 7061, was transferred through a series of assignments to a certain trust specified in the last will and testament of Gino F. Moroni, deceased.<sup>1</sup>

Application 22622 was filed on June 9, 1965, by Lawvon D. Rasmussen to appropriate 5.4 c.f.s. of water from an underground source for irrigation and domestic purposes on 320 acres of land within the S $\frac{1}{2}$  SW $\frac{1}{4}$  Section 9; W $\frac{1}{2}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 16; E $\frac{1}{2}$  NE $\frac{1}{4}$  Section 17; T.3N., R.48E., M.D.,B.&M. The point of diversion was described as being within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  Section 9, T.3N., R.48E., M.D.B.&M. A permit was issued on April 14, 1966, and Certificate 7062 was issued on June 18, 1969, for 2.52 c.f.s. for the irrigation of the 320 acres stated as the place of use shown above. Permit 22622, Certificate 7062, was transferred through a series of assignments to a certain trust specified in the last will and testament of Gino F. Moroni, deceased.<sup>1</sup>

FINDINGS OF FACT

I.

By letter dated September 13, 1984, the parties of interest were noticed that a hearing in the matter of forfeiture of the water rights under Certificates 7061 and 7062 was scheduled for October 10, 1984.<sup>2</sup> The issue presented was if forfeiture as set forth under NRS 534.090 had occurred during the period between March, 1979 and March, 1984. Extensive evidentiary testimony and evidence were presented at the hearing.<sup>3</sup>

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<sup>1</sup>Public record in the office of the State Engineer under Permits 22621 and 22622.

<sup>2</sup>State Exhibit No. 1, October 10, 1984, hearing.

<sup>3</sup>Transcript of Proceedings-Hearing, Wednesday, October 10, 1984. Public record in the office of the State Engineer.

II.

Personnel from the Division of Water Resources testified that on March 14, 1979, March 12, 1980, April 16, 1981, April 21, 1982, July 14, 1982, September 22, 1983 and March 6, 1984, they field investigated the well sites and the places of use of Certificates 7061 and 7062. Testimony was such that no irrigation from either well was taking place on the aforementioned dates and further, in the witnesses opinion, there was no clear evidence of irrigation from one year to the next.<sup>4</sup>

III.

Testimony of the witnesses for the owner of record revealed that during a portion of 1980, the subject lands were irrigated. Further evidence indicated that the well under Certificate 7061 pumped 260 acre-feet of water during 1980 and the well under Certificate 7062 pumped 240 acre-feet of water during 1980.<sup>5</sup>

IV.

The Nevada Supreme Court in entering judgment<sup>6</sup> 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 right caused by failure of the holder of appropriation to utilize the resource as required by statute.<sup>7</sup>

The court held that:

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

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<sup>4</sup>Transcript of Proceedings, October 10, 1984. See testimony of Larry C. Reynolds, DeLyle Danner and Thomas J. Smales pp.72-82, and State's Exhibits 2 and 3.

<sup>5</sup>Transcript of Proceedings, October 10, 1984. Testimony of Mary Moroni, Richard W. Arden and Marlene Ettl pp 84-156, and Moroni Exhibits 1 through 25.

<sup>6</sup>In re Manse Spring and Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 Pac. (2nd) 311 (1940).

<sup>7</sup>NRS 534.090.

"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 of the Western States.<sup>8</sup> The State Engineer

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<sup>8</sup>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).  
(Continued)

finds no disparity or confusion in this definition. 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.

V.

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<sup>9</sup> 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<sup>10</sup> is upon whomever seeks the

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8 (Continued) Anson v. Arnett, 250 S.W. (2d) 450, 454 (Tex. Civ. App. 1952, error refused n.r.e.). Desert Live Stock Co. v. Hooppiania, 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). Valcalda v. Silver Peak Mines, 86 Fed. 90, 95 (9th Cir. 1898). Franktown v. Marlette, 77 Nev. 348, 354 Pac. 1069 (1961). Revert v. Ray, 95 Nev. 783, 603 Pac. (2d) 262 (1979).

<sup>9</sup>Revert v. Ray, 95 Nev. 782, 603 P.2d 262 (1979).

<sup>10</sup>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. 348, P.2d 1069 (1961). Revert v. Ray, 95 Nev. 783, 603 P.2d 262 (1979).

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.

VI.

There was no substantial or conclusive evidence or testimony<sup>11</sup> presented at the administrative hearing before the State Engineer to support a finding of abandonment of the existing water rights under the subject permits.

VII.

In the case of ground water, a finding of forfeiture would require five successive years of non-use after April 15, 1967.<sup>12</sup> 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 a certificate are subject to forfeiture. An important statutory procedure<sup>13</sup> is set forth that provides for certain time periods to show beneficial use under approved applications to appropriate (permits). Cancellation<sup>14</sup> 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. A certificated permitted right is then a determined right and becomes subject to the forfeiture statute.<sup>15</sup> A permit which has not been perfected through beneficial use to a certificate is not subject to a determination of forfeiture.

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<sup>11</sup>Transcript of proceedings, October 10, 1984.

<sup>12</sup>NRS 534.090.

<sup>13</sup>NRS 533.380.

<sup>14</sup>NRS 533.390, 533.395, 533.410.

<sup>15</sup>NRS 534.090.

CONCLUSIONS

I.

The State Engineer has jurisdiction in the subject matter of this action.<sup>16</sup>

II.

The source of water under Permit 22621, Certificate 7061, and Permit 22622, Certificate 7062, is underground water.

III.

NRS 534.090 states:

"1. Except as provided in subsections 2 and 3, failure for 5 successive years after April 15, 1967, on the part of the holder of any right, whether it is an adjudicated right, an unadjudicated right, or a permitted right, and further whether the right is initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed, works a forfeiture of both undetermined rights and determined rights to the use of that water to the extent of the nonuse. Upon the forfeiture of a right to the use of ground water, the water reverts to the public and is 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, that 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."

IV.

The water rights under Certificate 7061 and Certificate 7062, are "permitted rights" and "determined rights" as described in NRS 534.090 and are, therefore, subject to the provisions of that statute.

V.

Marginal evidence and supporting testimony show that irrigation of 320 acres with 260 acre-feet of water under Certificate 7061, and 320 acres with 240 acre-feet of water under Certificate 7062, did occur during the period between March 1979 and March 1984. The evidence and testimony showed that said irrigation occurred in June, July and August of 1980.

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<sup>16</sup>NRS 533 and NRS 534.

RULING

The record of evidence demonstrates that 1,040 acre-feet of underground water appropriated and set forth under Permit 22622, Certificate 7062, has not been placed to beneficial use over a continuous 5 year period. This amount of water under this right is hereby declared forfeited under the provisions of NRS 534.090.

The record of evidence demonstrates that 1,020 acre-feet of underground water appropriated and set forth under Permit 22621, Certificate 7061, has not been placed to beneficial use over a continuous 5 year period. This amount of water under this right is hereby declared forfeited under the provisions of NRS 534.090.

Respectfully submitted,



Peter G. Morros  
State Engineer

PGM/bc

Dated this 8th day of  
OCTOBER, 1985.