

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

IN THE MATTER OF U.S. DISTRICT COURT)
ORDER DATED JULY 27, 1990, REMANDING)
138 TRUCKEE CARSON IRRIGATION DISTRICT)
APPLICATIONS TO THE NEVADA STATE)
ENGINEER FOR A DECISION REGARDING)
PERFECTION, FORFEITURE AND ABANDONMENT.)
THE APPLICATIONS AFFECTED ARE: 47861,)
48670, 48826, 49108, 49109, 49110,)
49111, 49112, 49113, 49114, 49115,)
49116, 49117, 49118, 49119, 49120,)
49121, 49122, 49208, 49224, 49282,)
49283, 49284, 49285, 49286, 49287,)
49288, 49393, 49394, 49395, 49396,)
49397, 49398, 49563, 49564, 49565,)
49566, 49567, 49568, 49569, 49570,)
49638, 49689, 49742, 49880, 49998,)
49999, 50001, 50002, 50003, 50004,)
50005, 50006, 50007, 50008, 50009,)
50010, 50011, 50012, 50013, 50014,)
50029, 50333, 50334, 50523, 50524,)
51006, 51037, 51038, 51039, 51040,)
51041, 51042, 51043, 51044, 51045,)
51046, 51047, 51048, 51049, 51050,)
51051, 51052, 51054, 51055, 51056,)
51057, 51058, 51059, 51060, 51061,)
51082, 51136, 51137, 51138, 51139,)
51217, 51225, 51226, 51227, 51228,)
51229, 51230, 51231, 51232, 51233,)
51234, 51235, 51236, 51237, 51238,)
51368, 51369, 51370, 51371, 51372,)
51373, 51374, 51375, 51376, 51377,)
51378, 51379, 51380, 51381, 51382,)
51384, 51599, 51600, 51601, 51602,)
51604, 51605, 51606, 51607, 51645,)
51732 AND 51734.)

SUPPLEMENTAL RULING
ON REMAND

#3778

GENERAL

I.

United States District Court Judge Bruce R. Thompson, by Order dated July 25, 1990, remanded to the State Engineer those applications to change the place of use within the Truckee-Carson Irrigation District that were decided in the State Engineer's Rulings dated February 12, 1987 (24 Applications), June 2, 1988

(52 Applications), and April 14, 1989 (62 Applications).¹ The State Engineer is ordered to decide the issues of perfection, forfeiture, and abandonment with respect to these applications.

II.

An administrative hearing was set to begin on November 7, 1990, and the parties involved were notified by Notice of Hearing, dated August 30, 1990.¹ The applicants then requested a pre-hearing conference.² The State Engineer granted the request and a pre-hearing conference was held on November 7, 1990, with the hearing scheduled to begin immediately thereafter.³

III.

At the pre-hearing conference, administrative notice was taken of all testimony and exhibits from past administrative hearings as they pertain to the issues of perfection, forfeiture and abandonment in these proceedings.⁴ In addition, all parties, including the applicants, represented by Truckee Carson Irrigation District, the protestant, the Pyramid Lake Paiute Tribe of Indians, and the intervenor, the U.S. Department of the Interior, were given the opportunity to present new evidence that they felt was relevant to the issues of perfection, forfeiture and abandonment.

¹ State of Nevada Exhibit No. 1, administrative pre-hearing conference before the State Engineer, November 7, 1990.

² State of Nevada Exhibit No. 2, pre-hearing conference before the State Engineer, November 7, 1990.

³ State of Nevada Exhibit No. 3, pre-hearing conference before the State Engineer, November 7, 1990.

⁴ Transcript of administrative pre-hearing conference before the State Engineer, November 7, 1990, p. 6.

FINDINGS OF FACT

I.

At the pre-hearing conference, none of the parties submitted new evidence for consideration on the issues of perfection, forfeiture, and abandonment.⁵ A review of the record shows that no party was ever denied the opportunity to present testimony or evidence relating to these issues at the appropriate time during previous administrative hearings. The State Engineer will rely on testimony and evidence on the record from previous administrative hearings involving applications to change the place of use within the Truckee-Carson Irrigation District. Furthermore, the State Engineer finds that a new evidentiary hearing is not required to decide these issues.

II.

The procedure that the State Engineer follows in the initial review of all applications is to verify that the existing place of use, that is, the parcel of land from which a water right is to be removed, has an existing, perfected water right. With the applications at issue, this is accomplished by comparing the application and its supporting map ^{6, 7, 8} to Truckee-Carson Irrigation District maps showing existing water-righted acreage. These Truckee-Carson Irrigation District maps were prepared from government contracts and certificates issued by the Bureau of Reclamation. These maps have undergone extensive review and have been found to correctly show that a water right exists and was

⁵ Transcript of administrative pre-hearing conference before the State Engineer, Novmeber 7, 1990, pp. 6, 37 and 63.

⁶ State of Nevada Exhibit No's. 17 and 18, public administrative hearing before the State Engineer, January 16, 1986.

⁷ State of Nevada Exhibit No's. 45, 46, 47 and 48, public administrative hearing before the State Engineer, January 28, 1988.

⁸ State of Nevada Exhibit No's. 60 and 61, public administrative hearing before the State Engineer, February 16 and 22, 1989.

perfected on each parcel.⁹ Therefore, the State Engineer finds that each application at issue here has undergone a parcel by parcel analysis and that the parcel from which a water right is removed is covered by an existing, perfected water right.

III.

The protests to all of the applications at issue here, included a claim that the existing water rights have been abandoned or forfeited.¹⁰ The existing Truckee-Carson Irrigation District water rights were vested in the name of the United States when congress authorized the Newlands Project in 1902. Both the Alpine¹¹ and Orr Ditch¹² decrees recognize the Truckee-Carson Irrigation District rights as having a priority of 1902 and Alpine specifically recognized existing uses as late as 1980 and that these rights did exist in their entirety.¹³ In

⁹ Public records in the office of the State Engineer include reports by Clyde-Criddle-Woodward (1980), contracted by the U.S. Bureau of Indian Affairs and Intermountain Professional Services, Inc. (1985) under contract by the U.S. Bureau of Reclamation and a letter from Chilton Engineering (1985) under contract by the U.S. Bureau of Reclamation (Applicants' Exhibit Z). The conclusion reached in all these reports is that a water right was perfected on each parcel shown on the Truckee-Carson Irrigation District maps.

¹⁰ State of Nevada Exhibit Nos. 19, 24, 44 and 59, public administrative hearing before the State Engineer, January 16, 1986, February 21, 1986, January 28, 1988, and February 16 and 22, 1989, respectively.

¹¹ Final Decree in United States v. Alpine Land & Reservoir Co., et al., Civil No. D-183 BRT (D. Nevada 1980).

¹² Final Decree in United States v. Orr Water Ditch Co., et al., Equity, Docket No. A-3 (D. Nevada 1944).

¹³ Orr Ditch and Alpine, supra, (See footnotes 6 and 7); Nevada v. United States, 463 U.S. 110 (1983).

1902, no State law governed how the water was to be used nor was there any statutory provision for loss of water by abandonment or forfeiture.¹⁴

The Nevada Supreme Court, in Manse Springs,¹⁵ provides authoritative guidance on the 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 held that abandonment is a voluntary matter, the relinquishment of a water right by the owner with the intention of forsaking and deserting it. Forfeiture, on the other hand, is the involuntary or forced loss of a water right caused by failure of the holder to utilize the resource for the time fixed by statute. The court further held that the statutory forfeiture procedure did not apply to water rights vested prior to the enactment of the 1913 water law.

Both the relinquishment of possession and the intent are essential to a finding of abandonment and are well defined and set in Nevada Law.^{15, 16} 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.

Based on this record of evidence, the State Engineer finds that there was neither intent to abandon nor intent to forsake the water right.

¹⁴ NRS Chapter 533 was adopted in 1913, and NRS 533.060, also adopted in 1913 with amendments in 1917, 1949 and later, specifically pertains to forfeiture and abandonment.

¹⁵ In re waters of Manse Spring and Its Tributaries, 60 Nev. 280, 286-287, 288-289, 290, 108 P.2d 311 (1940).

¹⁶ Valcalda v. Silver Peak Mines, 86 F. 90, 95 (9th Cir. 1898).
Revert v. Ray, 95 Nev. 783, 786 P.2d 262 (1979).
Franktown v. Marlette 77 Nev. 348, 354, 364 P.2d 1069 (1961).

CONCLUSIONS

I.

The parties had the opportunity to present evidence regarding the issues of perfection, forfeiture and abandonment in this proceeding and in the previous administrative hearings involving change applications within the Truckee-Carson Irrigation District. No new evidence was submitted for consideration at the pre-hearing conference.

II.

The existing place of use in these applications was analyzed on a parcel by parcel basis. In every case, the existing place of use was covered by a perfected water right.

III.

The water rights covering the existing place of use in the applications at issue here are rights vested prior to the enactment of the 1913 water law, and therefore are not subject to forfeiture under the Nevada forfeiture statute.

IV.

The record in this proceeding and in the previous administrative hearings held before the State Engineer provides no substantial evidence to support a conclusion that the water rights proposed to be changed have been abandoned.

RULING

That portion of the protests on the issues of perfection, forfeiture and abandonment is hereby overruled and the approval of the subject applications is hereby affirmed.

Respectfully submitted,



R. MICHAEL TURNIPSEED, P.E.
State Engineer

RMT/JCP/pm

Dated this 8th day of
February, 1991