

IN THE MATTER OF FORFEITURE AND/OR )  
ABANDONMENT OF WATER RIGHTS UNDER )  
PERMIT 19969 (CERTIFICATE 6856) AND )  
PERMIT 19970 (CERTIFICATE 6858), )  
TO APPROPRIATE THE WATERS OF AN )  
UNDERGROUND SOURCE IN DIAMOND )  
VALLEY, EUREKA COUNTY, NEVADA. )

R U L I N G

GENERAL:

I

Application 19969 was filed by Crannell Tolliver on July 3, 1961 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$  of Section 12, T.21N., R.53E., M.D.B.& M. A permit was issued under Application 19969 on June 6, 1962 for 5.4 c.f.s. for irrigation and domestic purposes. Certificate 6856 was issued under said permit on November 6, 1968. 1/ There were a series of assignments of interest in Permit 19969. The current owners of record are Joseph L. and Ellen M. Rand, as joint tenants.

II

Application 19970 was filed by Crannell Tolliver on July 3, 1961 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$  of Section 12, T.21N., R.53E., M.D.B.& M. A permit was issued under Application 19970 on June 6, 1962 for 5.4 c.f.s. for irrigation and domestic purposes. Certificate 6858 was issued under said permit on November 6, 1968. 2/ There were a series of assignments of interest in Permit 19970. The current owners of record are Joseph L. and Ellen M. Rand, as joint tenants.

FINDINGS:

I

In a letter of January 6, 1977 to the State Engineer, Kenneth P. Stenton requested initiation of proceedings to declare certain water rights forfeited and abandoned. 3/

II

In a letter of January 19, 1977 to the State Engineer, Kenneth P. and Earlene Stenton requested initiation of proceedings to declare water permit issued for the W $\frac{1}{2}$  Section 12, T.21N., R.53E., forfeited and abandoned. 4/

III

By letter of January 28, 1977, parties of interest were notified that a field investigation would be held on February 16, 1977 in the matter of forfeiture and abandonment of the subject water rights. 5/

IV

A field investigation was held on February 16, 1977 and was attended by parties of interest and representatives of the Division of Water Resources. A report of field investigation, dated February 25, 1977, was filed in the State Engineer's office. 6/

V

Parties of interest were given notice by letter of April 1, 1977 that a hearing in the matter of forfeiture and/or abandonment of subject water rights was scheduled for Thursday, April 19, 1977 in the Eureka County Courthouse, Eureka, Nevada. 7/

VI

The hearing was convened as scheduled. Counsel for Joseph L. and Ellen Rand joined counsel for other parties present in a request and motion that the hearing be continued until another date on the basis "that there is legislation pending that if it passes would greatly change the forfeiture statutes and would introduce into the concept of forfeiture several new factors and the testimony that would be taken at this hearing would be quite different if the legislation should pass, and many other things that could be introduced as evidence . . ." Mr. Stewart Wilson, Attorney at Law representing the Rands, made the following statement in support of the motion for continuance. "...As you know, the concept of statutory forfeiture is not a common law concept,

and it depends entirely on the intention of the legislature and we have before us evidence in the form of Senate Bill 402, which clearly indicates that the intention of the legislature may be changing. You or an officer of the state are charged with carrying out state legislation, and we would feel that it would be certainly within the exercise of your good discretion to determine whether or not the feelings of the legislature were going to change before proceeding with the hearing of this sort. I realize it has been inconvenient to come all this distance to have the hearing here in Eureka, an inconvenience for all of us, but the matters at stake are extremely important for the livelihood of the people involved, and we are dealing with a statutory concept and that concept may be changing, and if it does change and in the meantime this hearing were held and it resulted in a forfeiture of the rights of our clients, it would be a travesty in a sense that I think we can forego. . . " 8/ Mr. Wilson also made the following statement. "I would join with Mr. Eardley. I think the law is substantially changed, although Mrs. Stenton doesn't feel that way, and it totally changes the type of case we would have to present or may be inclined to present.

"Furthermore, if we went ahead here on the present law and it were changed and we received a decision today that was adverse and we appealed that decision, it raises a whole host of legal questions whether on the appeal the so-called trial de novo you can introduce evidence of a concept that intervened, a legal change that intervened, the evidence pursuant to that, and we are jeopardized by having to make those arguments then, and yet if we wait here for just a few weeks, we will know whether or not this law has changed or not, and if it has changed, then we are not jeopardized because we know then that this is a matter that is pending during the change of the law and the law would apply to it." 9/ The motion for continuance was granted. 10/

## VII

By letter of April 19, 1977, Kenneth P. and Earlene Stenton demanded that the State Engineer withdraw all of the protests the Stenton's had made against the subject water rights. The letter included a similar demand for the State Engineer to enforce NRS 534.090. 11/

VIII

Parties of interest were given notice by letter of May 20, 1977 that the hearing in the matter of the determination of forfeiture and/or abandonment of the subject water rights was rescheduled for June 15, 1977 in the Eureka County Courthouse, Eureka, Nevada.12/ Extensive evidence, testimony and arguments were presented at that hearing.13/

IX

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office, testified that he had knowledge and familiarity with the W $\frac{1}{2}$  Section 12, T.21N., R.53E., M.D.B. & M., dating back to 1972. He testified that upon his inspection of the subject property in 1972, 1973, 1975 and 1976, that there was no evidence of crops or application of water on the described property. He also testified that in those same years there were no motors installed on either of the wells under Certificates 6856 or 6858.14/ Mr. Gamboa identified and interpreted an aerial photograph of the property in question.15/ Said photo is dated September, 1973. His testimony was that said photograph showed no signs of crops on the described property.16/

X

Mr. Wayne Testolin, Water Commissioner for the State Engineer's office testified in concurrence with Mr. Gamboa regarding the status of equipment on the wells under Certificates 6856 and 6858, the lack of crops and application of water for the period 1972 through 1976 and interpretation of the aerial photograph of the area in question.17/

XI

Mr. Jerry Machacek testified that he had seen no crops grown on or water applied to the W $\frac{1}{2}$  of Section 12, T.12N., R.53E., since the year 1964.18/

XII

There was no information, evidence or testimony submitted to in any way indicate, infer, or confirm that water was applied to the W $\frac{1}{2}$  of said Section 12 for the irrigation of crops during the period 1972 through 1976.19/

XIII

Mr. Rand testified that in a conversation with representatives of the State Engineer's office, that he had been informed that water rights appurtenant to the W $\frac{1}{2}$  of said Section 12 were valid and in good standing.20/

XIV

There was a determination and ruling of forfeiture of certificated water rights to appropriate underground water in Diamond Valley, Eureka County, Nevada, as of December 3, 1975.21/

XV

Order No. 541 was issued by the State Engineer on December 22, 1975 entitled "Notice of Curtailment of Water Appropriation within the Diamond Valley Ground Water Basin". This Order included a paragraph indicating that "All applications filed to appropriate water for irrigation purposes on lands in Diamond Valley that had a previous water right lost through forfeiture will be considered for approval on an individual basis and on their own merits."22/ Notice of this Order was published in the Eureka Sentinel on the following dates, December 22, 1975, January 3, 10, 17, 24, 1976.23/

XVI

Senate Bill 402 (1977 Legislative session) failed to be approved.24/

CONCLUSIONS:

I

The State Engineer has jurisdiction of the parties and the subject matter of this action.25/

II

The source of water under Permit 19969 (Certificate 6856) and Permit 19970 (Certificate 6858) is underground water.

III

Nevada Revised Statutes 534.090 provide as follows:

"1. Failure for 5 successive years on the part of the holder of any right, whether it be an adjudicated right, an unadjudicated right, or permitted right, and further whether such right be initiated after or before March 25, 1939, to use beneficially all or any part of the underground water for the purpose for which such right shall be acquired or claimed, shall work a forfeiture of both undetermined rights and determined rights of the right to the use of such water to the extent of such nonuse. Upon the forfeiture of a right to the use of ground water, such water shall revert to the public and shall be 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, such 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.

2. A right to use underground water whether it be vested or otherwise may be lost by abandonment. If the state engineer, in investigating a ground water source, upon which there has been a prior right, for the purpose of acting upon an application to appropriate water from the same source, is of the belief from his examination that an abandonment has taken place, he shall so state in his ruling approving the application. If, upon notice by registered or certified mail to the person of record who had the prior right, such person fails to appeal such ruling in the manner provided for in NRS 533.450, and within the time provided for therein, the alleged abandonment declaration as set forth by the state engineer becomes final."26/

IV

The water rights under Permit 19969 (Certificate 6856) and Permit 19970 (Certificate 6858) are "permitted rights" and determined rights" as described in NRS 534.090 and are, therefore, subject to the provisions of that statute.

V

The 1967 Nevada State Legislature amended NRS 534.090 to provide that forfeiture would apply to both undetermined and determined rights.27/

VI

Nevada Revised Statutes 534.090 clearly set forth and provide that forfeiture shall apply whether such right be initiated after or before March 25, 1939.

VII

The 1977 Nevada State Legislature was fully aware of the issue regarding forfeiture of underground water rights as provided in NRS 534.090. Representatives of persons interested in the Diamond Valley area and holders of rights to appropriate water for irrigation purposes in that area gave testimony before legislative committees regarding a possible amendment to NRS 534.090. No amendments to that statute were adopted by the 1977 Legislature.

VIII

Forfeiture of a water right does not become final until expiration of a time for appeal of a ruling declaring such water forfeited as provided for in NRS 533.450.

IX

Representatives and/or employees of the State Engineer's office are neither required nor qualified to provide legal advice. They are responsible for making public records available and providing assistance where and when possible. Upon inquiry, they indicate to the best of their knowledge the status of any particular water right as reflected in records available to them.

X

Indications of the status of a water right by the employees of the State Engineer's office does not and cannot waive or jeopardize statutory provisions regarding the right to use or the right to continued use of water under any given right.

XI

"Any application for a permit or any permit to appropriate water may be assigned subject to the conditions of the permit, but no such assignment shall be binding except between the parties thereto, unless filed for record in

the office of the State Engineer."29/ The current owners of Permit 19969 (Certificate 6856) and Permit 19770 (Certificate 6858) therefore are bound by their predecessors action or inaction as it relates to the possible forfeiture of said rights.

XII

Evidence, information and data available clearly and conclusively establish that for a period in excess of five successive years, water has not been beneficially used for the purposes for which the water rights were acquired under Permit 19969 (Certificate 6856) and Permit 19970 (Certificate 6858).

RULING:

It is hereby ruled and declared that rights to appropriate water under Permit 19969 (Certificate 6856) and Permit 19970 (Certificate 6858) have been forfeited because of failure for in excess of five successive years on the part of the holder of the rights to use beneficially the underground water for the purposes for which said rights were acquired. No finding is made or entered regarding abandonment of said rights.

Respectfully submitted,

  
Roland D. Westergard  
State Engineer

RDW/dc

Dated this 26th day  
of August 1977.

## FOOTNOTES

1. State Exhibit #17, June 15, 1977 Hearing
2. State Exhibit #18, June 15, 1977 Hearing
3. State Exhibit #13, June 15, 1977 Hearing
4. State Exhibit #14, June 15, 1977 Hearing
5. State Exhibit #15, June 15, 1977 Hearing
6. State Exhibit #16, June 15, 1977 Hearing
7. State Exhibit #1, June 15, 1977 Hearing
8. Reporter's Transcript of proceedings upon the hearing of testimony and evidence in the matter of a request to declare water rights forfeited and/or abandoned, April 19, 1977. (hereinafter referred to as April 19 transcript, Page 7, lines 8 through 26.)
9. April 19 transcript, Page 10, Lines 10 through 25.
10. April 19 transcript, Page 22, Lines 17 through 19.
11. State Exhibit #3, June 15, 1977 Hearing
12. State Exhibit #2, June 15, 1977 Hearing
13. Reporter's Transcript of proceedings upon the hearing of testimony and evidence in the matter of a request to declare water rights forfeited and/or abandoned, June 15, 1977. (hereinafter referred to as June 15 transcript.)
14. June 15 transcript, Pages 46 through 53.
15. State Exhibit #20, June 15, 1977 Hearing
16. June 15 transcript, Pages 46 through 47.
17. June 15 transcript, Pages 54 through 55.
18. June 15 transcript, Pages 55 through 59.
19. June 15 transcript and public records located within State Engineer's office.

20. June 15 transcript, Pages 67 through 69.
21. Public records located within the State Engineer's office.
22. State Exhibit #57, June 15, 1977 Hearing
23. Public records located within the State Engineer's office.
24. State of Nevada public records and June 15 transcript, Pages 5 and 6.
25. NRS 534.090
26. NRS 534.090
27. Statutes of Nevada 1967 Regular Session, Volume 2 on Page 1053.
28. NRS 534.090
29. NRS 533.385