

IN THE MATTER OF FORFEITURE AND OR)
ABANDONMENT OF WATER RIGHTS UNDER)
PERMIT 19012, CERTIFICATE 5991 AND)
PERMIT 19013, CERTIFICATE 5992 TO)
APPROPRIATE THE WATERS OF AN UNDER-)
GROUND SOURCE IN DIAMOND VALLEY,)
EUREKA COUNTY, NEVADA.)

R U L I N G

153

GENERAL:

I

Application 19012 was filed by Tessie M. Tynes on July 13, 1960 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the east half of Section 16, T.21N., R.53E., M.D.B. & M. A permit was issued under application 19012 on May 19, 1961, for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 5991 was issued under said permit on March 9, 1966.1/ There is a series of assignments of interest in permit 19012. The current owner of record is Johnnie Woods, a widow.

II

Application 19013 was filed by Tessie M. Tynes on July 13, 1960 to appropriate water from an underground source for irrigation and domestic purposes. The proposed place of use is the east half of Section 16, T.21N., R.53E., M.D.B. & M. A permit was issued under application 19013 on May 19, 1961 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 5992 was issued under said permit on March 19, 1966.2/ There is a series of assignments of interest in permit 19013. The current owner of record is Johnnie Woods, a widow.

FINDINGS

I

In a letter of January 6, 1977 to the State Engineer, Kenneth B. 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 B. and Earlene Stenton requested initiation of proceedings to declare water permits issued for the east half of Section 16, T.21N., R.53E., forfeited and or abandoned.4/

FINDINGS (Continued)

III

By letter of January 28, 1977, parties of interest were notified that a field investigation would be held on February 17, 1977 in the matter of the forfeiture and abandonment of the subject rights.5/

IV

A field investigation was held on February 17, 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 the forfeiture and or abandonment of subject water rights was scheduled for Thursday, April 19, 1977 in the Eureka County Court House, Eureka, Nevada.7/

VI

The hearing was convened as scheduled. Counsel for Johnnie Woods joined counsel for other parties present in a request and motion that the hearing be continued until another date on the basis "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 that 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....."8/ Mr. James W. Johnson, Attorney at Law, representing Johnnie Woods made the following statement in support of the motion for continuance. "I would have to join in the continuance under those circumstances, because I wouldn't want to be placed in the position of having the hearing and then having the statute change, which would in any way affect any evidence that might be presented or the method or manner of presenting it. I would feel under the circumstances I would be in an entirely different position than any of the others, any of the rest of the individuals involved in it, and under those circumstances I would have to go along with them."9/ The motion for continuance was granted.10/

FINDINGS (Continued)

VII

By letter of April 19, 1977, Kenneth B. 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 Court House, Eureka, Nevada.12/ Extensive evidence, testimony and arguments were presented at the hearing.13/

IX

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office testified that he had knowledge and familiarity with the east half of Section 16, T.21N., R. 53E., M.D.B. & M. dating back to 1972. He testified that upon his inspection of the subject property in 1972, 1975 and 1976 that there was no evidence of crops or application of water on the described property. He testified that in 1972 and 1975 the well under permit 19013 was equipped with a Lane and Bowler pump but there was no motor or gearhead. In 1976 there was a test pump on the well with a General Motors V8. However no crop had been planted or raised. The well under permit 19012 was equipped with a Lane and Bowler pump but no motor or gearhead on any of the inspections.14/ Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973.15/ 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 Certificate 5991 and Certificate 5992, the lack of crops and application of water for the period of 1972 through 1976 and interpretation of the aerial photograph of the area in question.17/

XI

Mr. Laverne Machacek testified that the only crop that was ever grown on that property was to prove beneficial use on the wells in 1963 or 1964.18/

FINDINGS (Continued)

XII

Mr. Jerry Machacek testified that to the best of his knowledge there was never anything done on the property since beneficial use in the early 60's.19/

XIII

Mr. Richard Kephart testified that he was purchasing that half section of land from the present owner, Johnnie Woods. He stated that in July of 1976 in a conversation with employees of the Division of Water Resources, he was informed that the well permits were in good standing.20/

XIV

There was no information, evidence or testimony submitted that would in any way indicate, infer or confirm that water was applied to the east half of Section 16, for the irrigation of crops during the period of 1972 through 1976.21/

XV

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, 1975.22/

XVI

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".23/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975, January 3, 10, 17 and 24, 1976.24/

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 19012, Certificate 5991 and permit 19013, Certificate 5992 is underground water.

CONCLUSIONS (Continued)

III

NRS 534.090 provides 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."

IV

The water rights under permit 19012, Certificate 5991 and permit 19013, Certificate 5992 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 State Legislature amended NRS 534.090 to provide that forfeiture would apply to both undetermined and determined rights.^{26/}

VI

NRS 534.090 clearly sets forth and provides that forfeiture shall apply whether such rights be initiated after or before March 25, 1939.

CONCLUSIONS (Continued)

VII

The 1977 Nevada State Legislature was fully aware of the issue regarding forfeiture of underground 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 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 533.450.27/

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 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 the 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.28/ The current owners of permit 19012, Certificate 5991 and permit 19013, Certificate 5992 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 5 successive years water has not been beneficially used for the purposes for which the water rights were acquired under permit 19012, Certificate 5991 and permit 19013, Certificate 5992.

RULING

It is hereby ruled and declared that rights to appropriate water under permit 19012, Certificate 5991 and permit 19013, Certificate 5992 have been forfeited because of failure for in excess of 5 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/bl

Dated this 8th day
of September 1977.

FOOTNOTES

1. State Exhibit No. 24,, June 15 Transcript.
2. State Exhibit No. 25,, June 15 Transcript.
3. State Exhibit No. 21,, June 15 Transcript.
4. State Exhibit No. 22,, June 15 Transcript.
5. State Exhibit No. 23,, June 15 Transcript.
6. State Exhibit No. 28,, June 15 Transcript.
7. State Exhibit No. 1,, April 19 Transcript.
8. Reporters Transcript of Proceedings Upon the Hearing of Testimony and Evidence in the Matter of a Request to Declare Rights Forfeited and or Abandoned, April 19, 1977, (Hereinafter referred to as April 19 Transcript), Page 6, Lines 10 through 16.
9. April 19 Transcript, Page 17; Lines 20 through 26 and Page 18, Lines 1 and 2.
10. April 19 Transcript, Page 22, Lines 17 through 19.
11. State Exhibit No. 3,, June 15 Transcript.
12. State Exhibit No. 2,, June 15 Transcript.
13. Reporters 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, 1977 Transcript).
14. June 15, 1977 Transcript, Pages 75, 76 and 77.
15. State Exhibit No. 29,, June 15 Transcript.
16. June 15, 1977 Transcript, Pages 76 and 77.
17. June 15, 1977 Transcript, Pages 77, 78 and 79.
18. June 15, 1977 Transcript, Page 79.
19. June 15, 1977 Transcript, Page 79 and 80.
20. June 15, 1977 Transcript, Page 82 and 83.
21. June 15, 1977 Transcript and Public Records Located Within the State Engineer's Office.
22. Public Records Within the Office of the State Engineer.
23. State Exhibit No. 57,, June 15 Transcript.

FOOTNOTES (Continued)

24. Public Records Within the Office of the State Engineer.
25. NRS 534.090.
26. Statutes of Nevada, 1967 Regular Session, Volume 2, Page 1053.
27. NRS 534.090.
28. NRS 533.385.