

IN THE MATTER OF FORFEITURE AND/OR)
ABANDONMENT OF WATER RIGHTS UNDER)
PERMIT 18848, CERTIFICATE 5962,)
PERMIT 18849, CERTIFICATE 5963,)
PERMIT 19016, CERTIFICATE 5964 AND)
PERMIT 19017, CERTIFICATE 5965 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 18848 was filed by Felix D. Glass, Jr. on May 16, 1960 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$ of Section 20, T.21N., R.54E., M.D.B.& M. A permit was issued under application 18848 on February 9, 1961 for 4.0 c.f.s. of water for irrigation and domestic purposes. Certificate 5962 was issued under said permit on January 3, 1966.^{1/} There is a series of assignments of interest in permit 18848. The current owners of record are Dalton and Penelope A. Wilson.

II

Application 18849 was filed by Josephine Glass on May 16, 1960 to appropriate water from an underground source for irrigation and domestic purposes. The proposed place of use was the E $\frac{1}{2}$ of Section 20, T.21N., R.54E., M.D.B.& M. A permit was issued under application 18849 on February 9, 1961 for 4.0 c.f.s. of water for irrigation and domestic purposes. Certificate 5963 was issued under said permit on January 3, 1966.^{2/} There is a series of assignments of interest in permit 18849. The current owners of record are Dalton and Penelope A. Wilson.

III

Application 19016 was filed by Josephine Glass on July 13, 1960 for permission to appropriate water from an underground source for irrigation and domestic purposes. The proposed place of use was the E $\frac{1}{2}$ of Section 20, T.21N., R.54E., M.D.B.& M. A permit was issued under application 19016 on October 16, 1961 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 5964 was issued under said permit on January 3, 1966.^{3/} There is a series of assignments of interest in permit 19016. The current owners of record are Dalton and Penelope A. Wilson.

IV

Application 19017 was filed by Felix D. Glass, Jr. on July 13, 1960 to appropriate water from an underground source for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$ of Section 20, T.21N., R.54E., M.D.B.& M. A permit was issued under application 19017 on June 13, 1961 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 5965 was issued under said permit on January 3, 1966.^{4/} There is a series of assignments of interest in permit 19017. The current owners of record are Dalton and Penelope A. Wilson.

FINDINGS

I

In a letter of January 19, 1977 to the State Engineer, Kenneth E. and Earlene Stenton requested initiation of proceedings to declare water (permits) issued for Section 20, T.21N., R.54E., M.D.B. & M. forfeited and or abandoned.5/

II

By letter of January 28, 1977 parties of interest were notified that a field investigation would be held on February 15, 1977 in the matter of the forfeiture and abandonment of the subject rights.6/

III

A field investigation was held on February 15, 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.7/

IV

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.8/

V

The hearing was convened as scheduled. Ross Eardley, Attorney at Law, counsel for Dalton and Penelope A. Wilson made 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....."9/ The motion for continuance was granted.10/

VI

By letter of April 19, 1977, Kenneth B. and Earlene Stenton demanded that the State Engineer withdraw all of the protests the Stentons had made against the subject water rights. The letter included a similar demand for the State Engineer to enforce NRS 534.090.11/

VII

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/

FINDINGS (Continued)

VIII

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office testified that he had knowledge and familiarity with Section 20, T.21N., R.54E., M.D.B. & M. dating back to 1972. He testified that upon his inspection of the subject property in 1972, 1973, 1974, 1975 or 1976 he had never seen a crop on the land or a motor on any of the wells.^{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 crop on the described property.^{16/}

IX

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 5962, 5963, 5964 and 5965, the lack of crops and application of water for the period 1972 through 1976 and interpretation of the aerial photograph for the area in question.^{17/}

X

Mr. Laverne Machacek testified that the only crop that was ever grown on the property was to prove beneficial use on the well.^{18/}

XI

Mr. Jerry Machacek testified that there had not been anything farmed on that land since the late 1960's.^{19/}

XII

There was no information, evidence or testimony submitted that would in any way indicate, infer or confirm that water was applied to Section 20, T.21N., R.54E., for the irrigation of crops during the period 1972 through 1976.^{20/}

XIII

Mr. Dalton Wilson testified that in conversations with representatives of the State Engineer's office he had been told that his water rights were in good standing.^{21/}

XIV

Mr. Ross Eardley, Attorney for Dalton Wilson, introduced into evidence Wilson Exhibit A which is a list of monies expended by Dalton Wilson in preparing the land for irrigation. The exhibit indicates that the total amount of money spent on Section 20 by Mr. Dalton Wilson is \$44,451.36. The exhibit does not indicate dates that these monies were expended.^{22/}

FINDINGS (Continued)

XV

Mr. Ross Eardley, Attorney for Dalton Wilson, introduced into evidence Wilson Exhibit B. Wilson's Exhibit B is a letter from Mr. E. C. Johnston of Eastland, Texas who was the owner of said Section 20 prior to its purchase by Mr. Wilson. The basis of the letter was that for a period of several years beginning in 1968 the Johnston's had attempted to get lessee's to farm and operate said Section 20 but had been unable to do so until Mr. Wilson took over the property in 1976.23/

XVI

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, 1975.24/

XVII

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".25/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975; January 3, 10, 17 and 24, 1976.26/

CONCLUSIONS

I

The State Engineer has jurisdiction of the parties and the subject matter of this action.27/

II

The source of water under permit 18848, Certificate 5962; permit 18849, Certificate 5963; permit 19016, Certificate 5964 and permit 19017, Certificate 5965 is underground water.

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.

CONCLUSIONS (Continued)

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."28/

IV

The water rights under permit 18848, Certificate 5962; permit 18849, Certificate 5963; permit 19016, Certificate 5964 and permit 19017, Certificate 5965 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.29/

VI

NRS 534.090 clearly sets forth and provides 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 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 in NRS 533.450.30/

IX

Representatives and/or employees of the State Engineer's office are neither required nor qualified to provide legal advise. They are responsible

CONCLUSIONS (Continued)

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 right as reflected in the 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".^{31/} The current owners of permit 18848, Certificate 5962; permit 18849, Certificate 5963; permit 19016, Certificate 5964 and permit 19017, Certificate 5965 therefore are bound by their predecessors' action or inaction as it relates to the possible forfeiture of said rights.

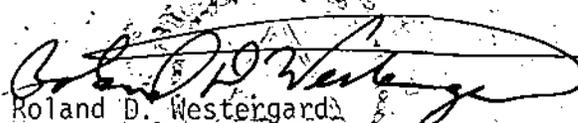
XII

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 18848, Certificate 5962; permit 18849, Certificate 5963; permit 19016, Certificate 5964 and permit 19017, Certificate 5965.

RULING

It is hereby ruled and declared that rights to appropriate water under permit 18848, Certificate 5962; permit 18849, Certificate 5963; permit 19016, Certificate 5964 and permit 19017, Certificate 5965 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 purpose 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/b1

Dated this 13th day
of September 1977

FOOTNOTES

1. State Exhibit No. 40, June 15 Transcript.
2. State Exhibit No. 41, June 15 Transcript.
3. State Exhibit No. 42, June 15 Transcript.
4. State Exhibit No. 43, June 15 Transcript.
5. State Exhibit No. 39, June 15 Transcript.
6. State Exhibit No. 44, June 15 Transcript.
7. State Exhibit No. 45, June 15 Transcript.
8. State Exhibit No. 1, April 19 Transcript.
9. 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, April 19, 1977. (Hereinafter referred to as April 19 Transcript) Page 6, Lines 10 through 16)
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 Transcript)
14. June 15 Transcript, Page 114.
15. State Exhibit No. 46, June 15 Transcript.
16. June 15 Transcript, Pages 114 and 115.
17. June 15 Transcript, Pages 120 through 122.
18. June 15 Transcript, Pages 122 and 123.
19. June 15 Transcript, Pages 123 and 124.
20. June 15 Transcript and Public Records Located within the State Engineer's Office.
21. June 15 Transcript, Page 130, Lines 17 through 21.
22. Wilson Exhibit A, June 15 Transcript.
23. Wilson Exhibit B, June 15 Transcript.
24. Public Records within the Office of the State Engineer.

FOOTNOTES (Continued)

④

25. State Exhibit No. 57, June 15 Transcript.
26. Public Records within the Office of the State Engineer.
27. NRS 534.090.
28. NRS 534.090.
29. Statutes of Nevada, 1967 Regular Session, Volume 2, Page 1053.
30. NRS 534.090.
31. NRS 533.385.