

IN THE MATTER OF FORFEITURE AND/)
OR ABANDONMENT OF WATER RIGHTS)
UNDER PERMIT 19146, CERTIFICATE)
5786 AND PERMIT 20320, CERTIFI-)
CATE 6714 TO APPROPRIATE THE)
WATERS OF AN UNDERGROUND SOURCE)
IN DIAMOND VALLEY, EUREKA COUNTY,)
NEVADA.)

R U L I N G

153

GENERAL:

I

Application 19146 was filed by Clifford Eugene Fisher on August 24, 1960 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$ of Section 27, T.21N., R.53E., M.D.B.& M. A permit was issued under application 19146 on June 23, 1961 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 5786 was issued under said permit on November 27, 1964.1/

II

Application 20320 was filed by Dr. Clifford E. Fisher on February 26, 1962 to appropriate water from an underground source for irrigation and domestic purposes. The proposed place of use is the NW $\frac{1}{4}$ of Section 27, T.21N., R.53E., M.D.B.& M. A permit was issued under application 20320 on April 4, 1963 for 2.7 c.f.s. of water for irrigation purposes. Certificate 6714 was issued under said permit on August 9, 1968.2/

FINDINGS

I

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 W $\frac{1}{2}$ of Section 27, T.21N., R.53E., forfeited and/or abandoned.3/

II

By letter of March 23, 1977 parties of interest were notified that the previously scheduled field investigation in the matter of the forfeiture and abandonment of the subject rights had been rescheduled for April 5, 1977.4/

III

A field investigation was held on April 5, 1977 and was attended by parties of interest and representatives of the Division of Water Resources. A Report of Field Investigation dated April 11, 1977 was filed in the State Engineer's office.5/

FINDINGS (Continued)

IV

Parties of interest were given notice by letter of May 20, 1977 that a hearing in the matter of the forfeiture and/or abandonment of subject water rights was scheduled for Tuesday, June 28, 1977 in the Eureka County Court House, Eureka, Nevada.6/ Extensive evidence, testimony and arguments were presented at the hearing.7/

V

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 534.090.8/

VI

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office testified that he had knowledge and familiarity with the W $\frac{1}{2}$ of Section 27, 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, 1974, 1975 and 1976 that there was no evidence of crop or application of water on the described property. He testified that the well under permit 19146, Certificate 5786 had not been equipped with pump, motor or gearhead on any of his inspections. The well under permit 20320, Certificate 6714 was equipped with a U.S. gearhead on a Lane and Bowler pump but did not have the motor on any of those dates.9/ Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September 27, 1973.10/ His testimony was that said photograph showed no signs of crop on the described property.11/

VII

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 5786 and Certificate 6714, the lack of crops and application of the water for the period 1972 through 1976 and interpretation of the aerial photograph of the area in question.12/

VIII

Mr. Laverne Machacek testified that to his knowledge, the only crop that was grown on the SW $\frac{1}{4}$ of Section 27, was in 1963 or 1964. He also testified that to his knowledge the well in the NW $\frac{1}{4}$ of Section 27 had never been pumped.13/

FINDINGS (Continued)

IX

Mr. Jerry Machacek testified that as far as he knew there had been no beneficial use of water on the property since the mid or late 60's. He testified that the last harvested crop was by Mr. Turner in 1961 or 1962. On cross examination by Mr. Hartman, Attorney for the Fishers, Jerry Machacek testified that an individual by the name of Mr. Wallack did not pre-water the property which he had under lease from Fishers in 1974.14/

X

Mr. Steve Hartman, Attorney for the Fishers, submitted as Fisher Exhibit "A" an affidavit of Dr. Clifford E. Fisher. Included in the affidavit was a statement that Dr. Fisher had received written correspondence from an employee of the State Engineer's office by letter dated April 26, 1974 that the rights under Certificate 5786 and Certificate 6714 were in good standing as of that date. The affidavit also contained a statement that in 1974 the Fisher's entered into a lease agreement with a Mr. Lynn Wallack and his wife Mary Beth Wallack for the W $\frac{1}{2}$ of Section 27, T.21N., R.53E. He stated that "Mr. Wallack requested permission from your affient to pre-water the land prior to planting and while waiting on his financing. Additionally, he sought to raise sheep on the property. Mr. Wallack was unable to secure his financing and did not continue to farm after the pre-watering".15/

XI

Mr. Stephen Hartman, Attorney for the Fishers, introduced into evidence as Fisher Exhibit "B" a Memorandum of Points and Authorities in Opposition to Determination of Forfeiture and Abandonment. Included in Mr. Hartman's memorandum are statements similar to those of Dr. Fisher's affidavit concerning pre-watering of the land and correspondence from the State Engineer's office concerning the status of the water rights on the Fisher property.16/

XII

There was no information, evidence or testimony submitted that would in any way indicate, infer or confirm that water was applied to irrigate crops on the W $\frac{1}{2}$ of Section 27, T.21N., R.53E., during the period 1972 through 1976.17/

XIII

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, 1975.18/

FINDINGS (Continued)

XIV

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".^{19/} Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975; January 3, 10, 17 and 24, 1976.^{20/}

CONCLUSIONS

I

The State Engineer has jurisdiction of the parties in the subject matter of this action.^{21/}

II

The source of water under permit 19146, Certificate 5786 and permit 20320, Certificate 6714 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. 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

CONCLUSIONS (Continued)

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."22/

IV

The water rights under permit 19146, Certificate 5786 and permit 20320, Certificate 6714 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."23/

VI

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

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 a water right does not become final until expiration of a time for appeal of the ruling declaring such water forfeited as provided for in NRS 533.450.24/

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.

CONCLUSIONS (Continued)

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."25/ The current owners of permit 19146, Certificate 5786 and permit 20320, Certificate 6714 therefore are bound by their predecessors or lessees action or inaction as it relates to the possible forfeiture of said rights.

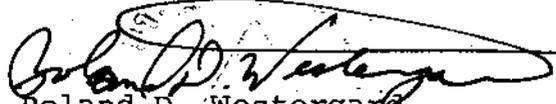
XII

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 purpose for which the rights were acquired under permit 19146, Certificate 5786 and permit 20320, Certificate 6714.

RULING

It is hereby ruled and declared that rights to appropriate water under permit 19146, Certificate 5786 and permit 20320, Certificate 6714 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 purposes for which said rights were acquired. No finding is made or entered regarding the abandonment of said rights.

Respectfully submitted,


Roland D. Westergard
State Engineer

RDW/bl

Dated this 16th day
of September, 1977.

FOOTNOTES

1. State Exhibit No. 6, Transcript of Public Hearing in the Matter of the Investigation into the Alleged Forfeiture and/or Abandonment of Various Water Rights in Diamond Valley, Eureka County, Nevada pursuant to NRS 534.090 held on June 28, 1977. (Hereinafter referred to as June 28, 1977 Transcript)
2. State Exhibit No. 7, June 28, 1977 Transcript.
3. State Exhibit No. 5, June 28, 1977 Transcript.
4. State Exhibit No. 8, June 28, 1977 Transcript.
5. State Exhibit No. 9, June 28, 1977 Transcript.
6. State Exhibit No. 1, June 28, 1977 Transcript.
7. See June 28, 1977 Transcript.
8. State Exhibit No. 2, June 28, 1977 Transcript.
9. June 28, 1977 Transcript, Pages 8 through 15.
10. State Exhibit No. 10, June 28, 1977 Transcript.
11. June 28, 1977 Transcript, Pages 10 and 11.
12. June 28, 1977 Transcript, Pages 16 through 21.
13. June 28, 1977 Transcript, Pages 22 through 27.
14. June 28, 1977 Transcript, Pages 28 through 31.
15. Fisher Exhibit "A", June 28, 1977 Transcript.
16. Fisher Exhibit "B", June 28, 1977 Transcript.
17. June 28, 1977 Transcript and Public Records Located within the State Engineer's Office.
18. Public Records within the State Engineer's Office.
19. State Exhibit No. 4, June 28, 1977 Transcript.
20. Public Records within the State Engineer's Office.
21. NRS 534.090.
22. NRS 534.090
23. Statutes of Nevada, 1967 Regular Session, Volume 2, Page 1053.
24. NRS 534.090.
25. NRS 533.385.