

IN THE MATTER OF FORFEITURE AND/)
OR ABANDONMENT OF WATER RIGHTS)
UNDER PERMIT 18520, CERTIFICATE)
6515, PERMIT 18521, CERTIFICATE)
6516, PERMIT 18522, CERTIFICATE)
6783 AND PERMIT 22200, CERTIFI-)
CATE 6787 TO APPROPRIATE THE)
WATERS OF AN UNDERGROUND SOURCE)
IN DIAMOND VALLEY, EUREKA COUNTY,)
NEVADA.)

R U L I N G

153

GENERAL:

I

Application 18520 was filed by Alfred W. Krueger on January 13, 1960 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the E $\frac{1}{2}$ of Section 33, T.21 $\frac{1}{2}$ N., R.54E., M.D.B.& M. A permit was issued under application 18520 on October 5, 1960 for irrigation and domestic purposes. Certificate 6515 was issued under said permit on February 9, 1968.1/ There is a series of assignments of interest in permit 18520. By deed dated March 17, 1977 filed in the State Engineer's office on June 10, 1977, the permit was transferred to TTTT, Inc.

II

Application 18521 was filed by Grace Edith Krueger on January 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 33, T.21 $\frac{1}{2}$ N., R.54E., M.D.B.& M. A permit was issued under application 18521 on October 6, 1960 for irrigation and domestic purposes. Certificate 6516 was issued under said permit on February 9, 1968.2/ There is a series of assignments of interest in permit 18521. By a deed dated March 17, 1977 filed in the State Engineer's office on June 10, 1977, permit 18521 was transferred to TTTT, Inc.

III

Application 18522 was filed by Joan Olive Krueger on January 13, 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 32, T.21 $\frac{1}{2}$ N., R.54E., M.D.B.& M. A permit was issued under application 18522 on October 6, 1960 for irrigation and domestic purposes. Certificate 6783 was issued under said permit on October 1, 1968.3/ There is a series of assignments of interest in permit 18522. By a deed dated March 17, 1977 filed in the State Engineer's office on June 10, 1977, permit 18522 was transferred to TTTT, Inc.

GENERAL:

IV

Application 22200 was filed by Russell Frank Krueger on August 24, 1964 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$ of Section 32, T.21 $\frac{1}{2}$ N., R.54E., M.D.B. & M. A permit was issued under application 22200 on February 9, 1966. Certificate 6787 was issued under said permit on October 1, 1968.^{4/} There is a series of assignments of interest under permit 22200. By a deed dated March 17, 1977 filed in the State Engineer's office on June 10, 1977, permit 22200 was transferred to TTTT, Inc.

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 Sections 32 and 33, T.21 $\frac{1}{2}$ N., R.54E., 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 16, 1977 in the matter of the forfeiture and/or abandonment of the subject rights.^{6/}

III

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.^{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. Counsel for Byron A. Brockbank, then owner of record of the subject permits 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....."^{9/}

FINDINGS (Continued)

Mr. James W. Johnson, Attorney at Law, representing Byron A. Brockbank, 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 statutes change which would in any way effect 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."10/ The motion for continuance was granted.11/

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 534.090.12/

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.13/ Extensive evidence, testimony and arguments were presented at the hearing.14/

VIII

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office testified that he had knowledge and familiarity with Sections 32 and 33, T.21 $\frac{1}{2}$ N., R.54E., M.D.B. & M. dating back to 1972. He testified that upon his inspection of the land under permits 18521, 18522 and 22200 during the period 1972 through 1976 that there was no evidence of crops or application of water on the described property. He testified that in 1975, 80 acres of alfalfa were grown under permit 18520 on the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 33, T.21 $\frac{1}{2}$ N., R.54E. The water was pumped from the well under permit 18520, Certificate 6515 by a 30 horse power GE motor and an Aurora pump. Mr. Gamboa testified that he had never seen a motor or gearhead on the well under permit 18521, Certificate 6516. He testified that the well under permit 22200, Certificate 6787 was equipped with a pump but he had never seen a gearhead or motor on it or water used to irrigate a crop from that well.15/ Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973.16/ His testimony was that said photograph showed no signs of crop on the described property.17/

FINDINGS (Continued)

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 Certificate 6515, Certificate 6516, Certificate 6783 and Certificate 6787, 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.18/

X

There was no information, evidence or testimony submitted that would in any way indicate, infer or confirm that water was applied to the land for irrigation of crops under the subject permits during the period 1972 through 1976 with the exception of the 80 acres of alfalfa that was irrigated under permit 18520 in 1975.19/

XI

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, 1975.20/

XII

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".21/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975; January 3, 10, 17 and 24, 1976.22/

CONCLUSIONS

I

The State Engineer has jurisdiction of the parties in the subject matter of this action.23/

II

The source of water under permit 18520, Certificate 6515; permit 18521, Certificate 6516; permit 18522, Certificate 6783 and permit 22200, Certificate 6787 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."24/

IV

The water rights under permit 18520, Certificate 6515; permit 18521, Certificate 6516; permit 18522, Certificate 6783 and permit 22200, Certificate 6787 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.25/

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 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 533.450.26/

IX

"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."^{27/} The current owners of permit 18520, Certificate 6515; permit 18521, Certificate 6516; permit 18522, Certificate 6783 and permit 22200, Certificate 6787 therefore are bound by their predecessors action or inaction as it relates to the possible forfeiture of said rights.

X

Evidence, information and data available clearly and conclusively establish that for a period of in excess of 5 successive years water has not been beneficially used for the purposes for which water rights were acquired under permit 18521, Certificate 6516; permit 18522, Certificate 6783; permit 22200, Certificate 6787. Evidence, information and data available indicate that water was beneficially used for irrigation purposes under permit 18520 on approximately 80 acres within the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 33, T.21 $\frac{1}{2}$ N., R.54E., M.D.B. & M. Water was not beneficially used on the remainder of the acreage allowed under Certificate 6515 for a period of in excess of 5 successive years.

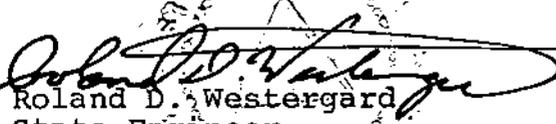
RULING

It is hereby ruled and declared that rights to appropriate water under permit 18521, Certificate 6516; permit 18522, Certificate 6783; and permit 22200, Certificate 6787 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

RULING (Continued)

underground water for the purposes for which said rights were acquired. It is also ruled that rights to appropriate water for irrigation purposes under permit 18520, Certificate 6515 for that portion appurtenant to Lot 2, the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 33, T.21 $\frac{1}{2}$ N., R.54E., have been forfeited because of failure for excess of 5 successive years on the part of the holder of the right to use beneficially the underground water for the purposes for which said rights were acquired. That portion of permit 18520, Certificate 6515 appurtenant to the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of said Section 33 being a total of 77 acres is declared to be not forfeited at this time. No finding is made or entered regarding abandonment of any of the above numbered water rights.

Respectfully submitted,


Roland D. Westergard
State Engineer

RDW/bl

Dated this 16th day
of September, 1977.

FOOTNOTES

1. State Exhibit No. 48, June 15, 1977 Transcript.
2. State Exhibit No. 49, June 15, 1977 Transcript.
3. State Exhibit No. 50, June 15, 1977 Transcript.
4. State Exhibit No. 51, June 15, 1977 Transcript.
5. State Exhibit No. 47, June 15, 1977 Transcript.
6. State Exhibit No. 52, June 15, 1977 Transcript.
7. State Exhibit No. 54, June 15, 1977 Transcript.
8. State Exhibit No. 1, April 19, 1977 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, 1977 Transcript), Page 6, Lines 10 through 16.
10. April 19, 1977 Transcript, Page 17, Lines 20 through 26 and Page 18, Lines 1 and 2.
11. April 19, 1977 Transcript, Page 22, Lines 17 through 19.
12. State Exhibit No. 3, June 15, 1977 Transcript.
13. State Exhibit No. 2, June 15, 1977 Transcript.
14. 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)
15. June 15, 1977 Transcript, Pages 140 through 147.
16. State Exhibit No. 56, June 15, 1977 Transcript.
17. June 15, 1977 Transcript, Page 144, Lines 16 through 18.
18. June 15, 1977 Transcript, Page 148.
19. June 15, 1977 Transcript and Public Records Located within the State Engineer's Office.
20. Public Records Located within the State Engineer's Office.
21. State Exhibit No. 57, June 15, 1977 Transcript.
22. Public Records within the Office of the State Engineer.
23. NRS 534.090.
24. NRS 534.090.

FOOTNOTES (Continued)

25. Statutes of Nevada, 1967 Regular Session, Volume 2, Page 1053.
26. NRS 534.090.
27. NRS 533.385.