

IN THE MATTER OF FORFEITURE AND/)
OR ABANDONMENT OF WATER RIGHTS)
UNDER PERMIT 19145, CERTIFICATE)
6719 AND PERMIT 23813, CERTIFI-)
CATE 6724 TO APPROPRIATE THE)
WATERS OF AN UNDERGROUND SOURCE)
IN DIAMOND VALLEY, EUREKA COUNTY,)
NEVADA.)

By letter of May 20, 1977, the State Engineer of Nevada advised the determination of forfeiture and abandonment of the subject rights was based on the fact that the Eureka County Court House, Eureka, Nevada, has no evidence, testimony and assignments of interest in Permit 19145.

Application 19145 was filed by Rudolph Doell on August 24, 1960 to appropriate underground water for irrigation and domestic purposes. The proposed place of use was the W $\frac{1}{2}$ Section 32, T. 23N., R. 54E., M.D.B. & M. A permit was issued under Application 19145 on June 7, 1961 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 6719 was issued under said permit on August 16, 1968 for irrigation and domestic purposes. There is a series of assignments of interest in Permit 19145. The current owners of record are James L. and Nancy Jane Moyle.

II

Application 23813 was filed by Carol W. Anderson on April 17, 1967 for permission to change the point of diversion of waters heretofore appropriated under Permit 19144. The proposed place of use was the E $\frac{1}{2}$ of Section 32, T. 23N., R. 54E., M.D.B. & M. A permit was issued under Application 23813 on September 18, 1967 for 5.4 c.f.s. of water for irrigation and domestic purposes. Certificate 6724 was issued under Permit 23813 on August 16, 1968. There is a series of assignments of interest in Permit 23813. The current owners of record are James L. and Nancy Jane Moyle.

The well had been equipped with a 100 horse power General Electric motor and electric meter in 1967. The well was located on the E $\frac{1}{2}$ of Section 32, T. 23N., R. 54E., M.D.B. & M. In a letter of February 2, 1977, Richard E. and Mari Kephart requested initiation of proceedings to declare water permits issued for portions of the S $\frac{1}{2}$ of Section 32, T. 23N., R. 54E., M.D.B. & M., forfeited and/or abandoned pursuant to NRS 534.090.3/.

II

By letter of April 5, 1977, parties of interest were notified that a field investigation would be held on April 26, 1977 in the matter of the forfeiture and/or abandonment of the subject rights. A field investigation was held on April 26, 1977 at the location of the well and application of water to the permit 19145 area at 10:00 and interpretation of the permit was made at the time of the investigation.

III

A field investigation was held on April 26, 1977 and was attended by parties of interest and representatives of the Division of Water Resources. A Report of Field Investigation dated May 10, 1977 was filed in the State Engineer's office.^{5/}

IV

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 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, Richard E. and Mari Kephart demanded that the State Engineer withdraw all of the protests the Kepharts 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 S $\frac{1}{2}$ of Section 32, T.22N., R.54E., M.D.B. & M., dating back to 1973. He testified that during the period 1973 through 1975 that he had never seen a crop on the S $\frac{1}{2}$ of said Section 32. During that period, the well under Permit 19145 had been equipped with an AC pump but no motor or gearhead. The well under Permit 23813 was not equipped with pump, motor or gearhead during that time. Mr. Gamboa testified that in 1976, approximately 160 acres of grain was raised on the S $\frac{1}{2}$ of said Section 32, that crop being irrigated by the well under Permit 19145. The well had been equipped with a 100 horse power General Electric motor and electric meter 57-A91507. The well under Permit 23813 was not equipped in 1976 or 1977 either. The location of the 160 acres of grain grown in 1976 was in approximately the center of the S $\frac{1}{2}$ of Section 32, T.23N., R.54E., being the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$.^{9/} Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973.^{10/} His testimony was that said photograph showed signs of cultivation of 160 acres in the S $\frac{1}{2}$ of said Section 32. That 160 acres being within the E $\frac{1}{2}$ SW $\frac{1}{4}$ and W $\frac{1}{2}$ SE $\frac{1}{4}$.^{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 Permits 19145 and 23813, the lack of crops and application of water for the period 1973 through 1975 and interpretation of the aerial photograph of the area in question.^{12/}

VIII

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.^{13/}

IX

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".^{14/} Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975; January 3, 10, 17 and 24, 1976.^{15/}

CONCLUSIONS

The State Engineer has jurisdiction of the parties in the subject matter of this action.^{16/}

II

The source of water under Permit 19145 and Permit 23813 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 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."17/

IV

The water rights under Permit 19145, Certificate 6719 and Permit 23813, Certificate 6724 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.18/

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 the forfeiture of underground water rights as provided in NRS 534.090. Representatives of persons interested in Diamond Valley 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 in NRS 534.450.19/

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 within the office of the State Engineer".20/ The current owners of Permit 19145, Certificate 6719 and Permit 23813, Certificate 6724 therefore are bound by their predecessors' action or inaction as it relates to the possible forfeiture of said rights.

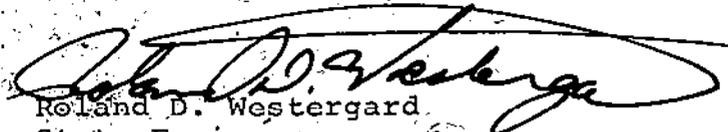
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Evidence, information and data available clearly and conclusively establish that for a period of in excess of five successive years water has not been beneficially used for irrigation of crops for the purpose for which the water rights were acquired under Permit 23813, Certificate 6724. Evidence and information available establish that water was beneficially used under Permit 19145, for approximately 160 acres in 1976 on portions of the S $\frac{1}{2}$ of Section 32, T.23N., R.54E., M.D.B. & M.

RULING

It is hereby ruled and declared that rights to appropriate water under Permit 23813, Certificate 6724 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. It is also ruled that rights to appropriate water under Permit 19145, Certificate 6719 are declared to be not forfeited or abandoned at this time.

Respectfully submitted,


Roland D. Westergard
State Engineer

RDW/BR/bl

Dated this 20th day
of December, 1977.

FOOTNOTES

1. State Exhibit No. 47 in the 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. 48, June 28, 1977 Transcript.
3. State Exhibit No. 46, June 28, 1977 Transcript.
4. State Exhibit No. 49, June 28, 1977 Transcript.
5. State Exhibit No. 50, June 28, 1977 Transcript.
6. State Exhibit No. 1, June 28, 1977 Transcript.
7. June 28, 1977 Transcript.
8. State Exhibit No. 2, June 28, 1977 Transcript.
9. June 28, 1977 Transcript, pages 110 through 113.
10. State Exhibit No. 51, June 28, 1977 Transcript.
11. June 28, 1977 Transcript, page 111.
12. June 28, 1977 Transcript, page 113.
13. Public Records within the Office of the State Engineer.
14. State Exhibit No. 4, June 28, 1977 Transcript.
15. Public Records within the Office of the State Engineer.
16. NRS 534.090.
17. NRS 534.090.
18. Statutes of Nevada, 1967 Regular Session, Volume 2, page 1053.
19. NRS 534.090.
20. NRS 533.385.