

IN THE MATTER OF FORFEITURE AND/OR)
ABANDONMENT OF WATER RIGHTS UNDER)
PERMIT 19376, CERTIFICATE 7351 TO)
APPROPRIATE THE WATERS OF AN UNDER-)
GROUND SOURCE IN DIAMOND VALLEY,)
EUREKA COUNTY, NEVADA.)

R U L I N G

53

GENERAL

I

Application 19376 was filed by Frances Virginia Machacek on December 5, 1960 to appropriate underground water for irrigation purposes. The proposed place of use was the SW1/4, N1/2 SE1/4 Section 24, T.21N., R.53E., M.D.B.&M. A permit was issued under Application 19376 on November 29, 1961 for 4.7 c.f.s. of water for irrigation and domestic purposes. Certificate 7351 was issued under said permit on May 19, 1970 to irrigate 27.521 acres within the N1/2 SE1/4 said Section 24. Permit 19376, Certificate 7351 now stands in the name of Joseph W. Tscheschke. 1/

FINDINGS

I

Parties of interest were given notice by letter of January 11, 1978 that a hearing in the matter of determination of forfeiture and/or abandonment of the subject rights was scheduled for February 16 and 17, 1978 in the Eureka County Court House, Eureka, Nevada. 2/ Extensive evidence, testimony and arguments were presented at the hearing. 3/

II

Mr. Ralph Gamboa, Water Commissioner for the State Engineer's office, testified that he had knowledge and familiarity with Section 24, T.21N., R.53E., M.D.B.&M., dating back to 1972. He testified that from 1973 through 1977 there were no crops grown on the N1/2 SE1/4 of said Section 24. Mr. Gamboa identified and interpreted an aerial photograph of the property in question. Said photo was dated September, 1973. 4/ His testimony was that the photograph showed no crop in the N1/2 of the SE1/4 of said Section 24. 5/

III

Mr. Wayne Testolin, Water Commissioner for the State Engineer's office testified in concurrence with Mr. Gamboa regarding the use of water on Section 24 for the period 1973 through 1977 and in the interpretation of the aerial photograph of the area in question. 6/

IV

Mr. Wiers testified that he planted and irrigated a crop of winter wheat after the July 1977 aerial photograph. 7/

V

There was no evidence, information or testimony submitted that would confirm that water was applied to the N1/2 SE1/4 Section 24, T.21N., R.53E., for the irrigation of crops during the period of 1973 through 1977. 8/

VI

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. 9/

VII

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." 10/ Notice of this order was published in the Eureka Sentinel on the following dates: December 27, 1975, January 3, 10, 17 and 24, 1976. 11/

CONCLUSIONS

The State Engineer has jurisdiction of the parties in the subject matter of this action. 12/

The source of water under Permit 19376, Certificate 7351 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. 13/

IV

The water right under Permit 19376, Certificate 7351 is a "permitted right" and "determined right" as described in NRS 534.090 and is 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. 14/

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 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 of appeal of a ruling declaring such right forfeited as provided for in NRS 533.450. 15/

IX

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 purpose for which the water rights were acquired under Permit 19376, Certificate 7351 on the N1/2 SE1/4 Section 24, T.21N., R.53E., M.D.B.&M. Evidence, information and data available establish that water was not used from the well described under the above permit on acreage within the N1/2 SE1/4 of said Section 24 during the years 1973 through 1977.

RULING

It is ruled and declared that that portion of the right to appropriate water under Permit 19376, Certificate 7351 appurtenant to the N1/2 SE1/4 Section 24, T.24N., R.53E., has been forfeited because of failure for in excess of five successive years on the part of the holder of the right to use beneficially the underground water for the purposes for which said right was acquired.

Respectfully submitted,



Roland D. Westergard
State Engineer

RDW/JC/bl

Dated this 19th day

of DECEMBER, 1978



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FOOTNOTES

1. Public records in the Office of the State Engineer.
2. State Exhibit No. 4, February 16, 1978 Transcript.
3. February 16, 1978 Transcript.
4. State Exhibit No. 9, February 16, 1978 Transcript.
5. February 16, 1978 Transcript, Pages 37 through 40.
6. Pages 41 and 42, June 28, 1978 Transcript.
7. February 16, 1978 Transcript, Pages 42, 43 and 44.
8. February 16, 1978 Transcript and Public Records located within the State Engineer's Office.
9. Public records in the Office of the State Engineer.
10. State Exhibit No. 3, February 16, 1978 Transcript.
11. Public records within the Office of the State Engineer.
12. NRS 534.090
13. NRS 534.090
14. Statutes of Nevada, 1967 Regular Session, Volume II, Page 1053.
15. NRS 534.090