

IN THE OFFICE OF THE STATE ENGINEER

IN THE MATTER OF THE COMPLAINT FOR)
ABANDONMENT OF PERMIT 4762,))
CERTIFICATE 463, AND PERMIT 41881 FILED)
TO APPROPRIATE THE PUBLIC WATERS OF)
COLD SPRINGS IN COLD SPRINGS VALLEY,))
WASHOE COUNTY, NEVADA, AND IN THE)
MATTER OF APPLICATION 46230 FILED TO)
CHANGE THE POINT OF DIVERSION, PLACE)
OF USE AND MANNER OF USE OF THE)
WATERS OF COLD SPRINGS HERETOFORE)
APPROPRIATED UNDER PERMIT 4762,))
CERTIFICATE 463, IN WASHOE COUNTY,))
NEVADA.)

RULING ON REMAND

GENERAL

I.

Application 4762 was filed on December 8, 1917, by Paris F. Johnson to appropriate 1.5 c.f.s. of water from Cold Springs in Cold Springs Valley for irrigation and domestic purposes on 120 acres of land within the E1/2 SE1/4, NW1/4 SE1/4 Section 4, T.21N., R.18E., M.D.B.&M. The point of diversion is described as being within the SE1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M. A permit was issued under Application 4762 on March 26, 1918, for 1.2 c.f.s. of water and Certificate of Appropriation No. 463 was subsequently issued on October 30, 1919, for 0.27 c.f.s. of water for irrigation of a total of 27 acres within the NE1/4 SE1/4, SE1/4 SE1/4 Section 4, T.21N., R.18E., M.D.B.&M. The present owners of record under Permit 4762 are P. Joan Vierra, David F. Evans and John B. Evans.¹

Application 41881 was filed on July 25, 1980, by Donnell J. Richards, Virginia Richards and Donna Howell to appropriate 1.0 c.f.s. of water from Colds Springs in Cold Springs Valley for irrigation purposes on 160 acres of land within the S1/2 NW1/4, SW1/4 NE1/4, NW1/4 SE1/4 Section 16, T.21N., R.18E., M.D.B.&M. The point of diversion is described as being within the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M. A permit was issued on October 29, 1981, for 1.0 c.f.s. of water.¹

Application 46230 was filed on October 15, 1982, by David B. Evans, Executor of Estate of David F. Evans, John B. Evans and Joan Vierra, to change the point of diversion, manner of use and place of use of 0.27 c.f.s. of water from Cold Springs in Cold Spring Valley heretofore appropriated under Permit 4762, Certificate 463. The proposed use is for ground water recharge and domestic purposes within portions of the W1/2 W1/2 Section 11; portions of the W1/2 Section 2; all of Section 3; NW1/4 SE1/4, NE1/4 SE1/4, SE1/4 SE1/4 Section 4, T.21N., R.18E., M.D.B.&M. The proposed point of diversion is described as being within the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M.¹

¹ Public record in the office of the State Engineer.

Application 46230 was timely protested by Donnell J. Richards on the following grounds:

"Obvious and intentional abandonment of the original intended use:

- a) Evidence of domestic use and/or cultivation has not existed over the past 20 years.
 - 1) Buildings and fences have been removed.
 - 2) Brush and range grasses and weeds replaced the cultivated crop area.
 - 3) Cattle and wildlife are and have been the principal water users."

FINDINGS OF FACT

I.

On July 16, 1985, a complaint was received under the signature of Donnell J. Richards requesting an administrative hearing and alleging that Permit 4762, Certificate 463 had been abandoned.²

II.

After notice to all parties, a hearing was held before the State Engineer in Reno, Nevada, on April 17, 1986, at which time the complainant, represented by counsel, and the current owner of Permit 4762, Certificate 463, represented by counsel, appeared in person. The hearing was noticed as a public hearing in the matter of the alleged abandonment of Permit 4762, Certificate 463, as provided under NRS 533.060.

III.

The complainant testified that, in the process of filing for surface water sources within Section 4, T.21N., R.18E., M.D.B.&M., a spring was located within the SE1/4 NE1/4 Section 4 which identifies with the source of water under Permit 4762, Certificate 463. According to the testimony, the spring source of Permit 4762, Certificate 463, which has been identified as "Evans Cold Spring", has been abandoned and is no longer being used for irrigation purposes as specified in the certificate of appropriation.³ The complainant contends that the Nevada water law provides that, "when a permit holder fails to use water for beneficial purposes during five successive years, the right shall be deemed to have been forfeited (abandoned)".⁴

² Public record in the office of the State Engineer under Proof of Appropriation No. 04225. See also additional letter from Donnell J. Richards alleging abandonment dated February 18, 1982, and August 10, 1982.

³ Transcript of public administrative hearing, April 17, 1986, pp. 24-50.

⁴ Complainant's Exhibit No. 1, public administrative hearing, April 17, 1986.

To support his position of abandonment, he submits that:⁴

1. water is no longer being diverted from Evans Cold Springs for irrigation;
2. fences and barbed wire surrounding the former cultivated area has been removed;
3. farmstead buildings have been removed;
4. place of use for Permit 4762 has been invaded by black sage brush for more than 30 years;
5. irrigation facilities have been removed;
6. current owners of Permit 4762, Certificate 463, have, by filing Application 46230, shown that they believe the true point of diversion to be "Richards Cold Springs" is located in the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M.;
7. the Evans family has leased the property without the requirement for the lessee to divert water or farm the formerly cultivated area.

IV.

Witnesses for the owners of Permit 4762, Certificate 463, maintained that the water right applied to what is described as Richards Cold Springs located within the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M., and that water was put to beneficial use from that source since 1919.⁵

The source of water for Permit 4762, Certificate 463, was described as being at the location of Evans Cold Springs and was regarded as a surveyors error which was to be corrected by filing Application 46230 to change the point of diversion.⁶ Evans Cold Springs, although not recommended as a source of water, was viewed as possibly a seep that flowed periodically.⁷

Although the manner of use has changed somewhat over the years, the owners insisted that there has never been an intent to abandon their right to the water.⁸

⁵ Transcript of public administrative hearing, April 17, 1986, pp. 102-103.

⁶ Transcript of public administrative hearing, April 17, 1986, pp. 94-95.

⁷ Transcript of public administrative hearing, April 17, 1986, pp. 137, 145.

⁸ Transcript of public administrative hearing, April 17, 1986, pp. 102-103.

V.

Subsequent to the hearing and after a review of the evidence and testimony of record, a ruling was issued by the State Engineer on June 17, 1986, rejecting the complaint that Permit 4762, Certificate 463, had been abandoned and also denying Application 46230 to change the point of diversion, manner of use and place of use of Permit 4762, Certificate 463.

VI.

A Petition for Judicial Review of the Order of the State Engineer was filed on or about July 16, 1986, in the Second Judicial District Court, State of Nevada, and on September 10, 1986, an Order remanding the matter to the Respondent State Engineer for the purpose of receiving additional evidence and argument was issued by the court.

VII.

After proper notice to all parties, a subsequent hearing was held before the State Engineer in Reno, Nevada, on April 8, 1987, to take additional evidence and argument in the matter of the alleged abandonment of Permit 4762, Certificate 463, and to receive evidence and testimony in the matter of protested Application 46230.

VIII.

Witnesses for the owners of Permit 4762, Certificate 463, did not offer any new evidence concerning the alleged abandonment of said permit but concentrated upon Paris Johnson's apparent reasons for filing an application for a point of diversion in an adjacent subdivision from where "Richards Cold Spring" is located. Their main point being, there was only one Cold spring reportedly used by a railroad for the steam engines in the 1880's. According to testimony, when Johnson filed his application in 1917, his surveyor did not file on the source of Cold Spring but supposedly on a "break in a pipeline that ran from the spring to a water tank used by the railroad".

To support their contention, a page from "Railroads of Nevada and Eastern California, by David F. Myrich, was offered into evidence as Exhibit "7"⁹ which contained a description of a trip on the N & O train stopping at "Cold Springs" for water before proceeding into California. In subsequent review of the submitted document, it was determined that the "s" in Cold Springs had been obliterated to give the impression that only one spring existed under that name.

IX.

No further evidence was offered at the remand hearing. In addition to the abandonment reasoning, the protestant still feels there was no error in locating the original spring under Permit 4762, Certificate 463, and that the spring for the new point of diversion has already been fully appropriated under the protestant's permit.

⁹ Exhibit "7" is a public record in the office of the State Engineer under public administrative hearing, April 8, 1987, Reno, Nevada.

X.

The source of water under Permit 4762, Certificate 463, is shown as being within the SE1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M. Further evidence shows the same spring source depicted in the supporting map of Permit 5026, Certificate 555, in the name of David F. Evans.¹⁰

XI.

In 1919, the spring source under Permit 4762, Certificate 463, was measured between 0.25 c.f.s. and 0.50 c.f.s. A certificate of appropriation was issued for 0.27 c.f.s. of water for irrigation of 27 acres of land on May 27, 1921.¹

XII.

In 1986, the spring source under Permit 4762, Certificate 463, was estimated to be flowing approximately 5 gallons per minute (.011 c.f.s.).¹¹ Evidence shows the water is now irrigating a meadow area of approximately 200 square feet.¹² Testimony establishes that there are remnants of the pipeline, old homesite, reservoir and an irrigation ditch as represented on the cultural map under Permit 4762, Certificate 463.

XIII.

The current owners and/or their predecessors under Permit 4762, Certificate 463, have designated the waters of Cold Springs, aka Richards Cold Springs, located in the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M., to be the source of water for their permitted right as a result of survey error.¹³ The flow of the Evans Cold Spring has decreased since the certificate was issued.¹³ There was no claim of vested right or application to appropriate of record filed for Richards Cold Springs until 1980.¹

XIV.

Exhibit "7" received as evidence at the April 8, 1987, hearing has been falsified by the obliteration of the letter "s" in the term "Cold Springs" in an attempt to give the impression there was only one spring at this location when the N & O Railroad used the water for their steam engines.¹⁴ It is further found that said evidence together with the

¹⁰ State of Nevada Exhibit No. 4, public administrative hearing, April 17, 1986. The supporting map under Permit 5026, Certificate 555 is a public record in the office of the State Engineer.

¹¹ Transcript of public administrative hearing, April 17, 1986, p. 34. Report of field investigation dated May 28, 1986 filed under Permit 4762 in the office of the State Engineer.

¹² Complainant's Exhibit "3", Photo No. 13, public administrative hearing, April 17, 1986; report of field investigation dated May 28, 1986 filed under permit 4762 in the office of the State Engineer.

¹³ Transcript of public administrative hearing, April 17, 1986, p. 96.

¹⁴ Evans Ranch Exhibit No. 7, received as evidence at public administrative hearing, April 8, 1987, filed under Cold Springs abandonment in the office of the State Engineer.

applicate's testimony pertaining thereto is totally lacking in credibility and, accordingly, unpersuasive in supporting it position.

XV.

Cold Springs is identified as a single spring within the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M., on the U.S. Quadrangle map, 7.5 minute series entitled Reno, N.W. 1967 (471B).

XVI.

Proof of Appropriation 04225, in the name of Ruth D. Mathews, was filed on October 29, 1984, claiming a vested right for 0.5 c.f.s. of water from Cold Springs, aka Richard Springs, for stockwatering purposes. The point of diversion is described as being within the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M. A priority date of "prior to 1905" is claimed.¹

XVII.

Evidence and testimony indicate that the Evans family has used the entire east half of Section 4, T.21N., R.18E., M.D.B.&M., for stockwatering and cattle grazing since Permit 4762, Certificate 463, was transferred to Mary A. Evans in 1919.¹⁵

Evidence also supports the fact that improvements to both Richards and Evans Cold Spring have allowed meadow grass and water to be available to livestock during this time period.

XVIII.

A substantial loss of flow from a spring or other surface water source does not in itself constitute abandonment or loss of the water right.¹⁶

XIX.

NRS 533.060 provides for the abandonment of surface water rights if there is substantial evidence of intent to abandon and relinquish possession of the right of record.¹⁷ The burden of proof is upon the party who seeks the declaration of abandonment.¹⁸

¹⁵ Transcript of public administrative hearing, April 17, 1986, pp. 92-93, 103-104.

¹⁶ Tonkin v. Winzell, 27 Nev. 88, p. 100.

¹⁷ In re Manse Spring and Tributaries, 60 Nev. 280, 286-287, 289, 290, 108 P.2d, 311 (1940); Nevada State Engineer's Ruling No. 2804 dated April 15, 1983.

¹⁸ Thomas v. Ball, 66 Mont. 161, 168, 213 Pac. 597 (1923).

Ward v. Monrovia, 16 Cal. (2d) 815, 820-821, 108 Pac. (2d) 425 (1940).

Lema v. Ferrari, 27 Cal. App. (2d) 65, 73, 80 Pac. (2d) 157 (1938).

Cline v. McDowell, 132 Colo. 37, 42, 284 Pac. (2d) 1056 (1955).

Pouchoulou v. Heath, 137 Colo. 462, 463, 326 Pac. (2d) 657 (1958).

Carter v. Territory of Hawaii, 24 Haw. 47, 55 (1917).

Smithfield West Bench Irr. Co. v. Union Cent. Life Ins. Co., 113 Utah 356, 363, 195

XX.

There was no evidence presented at the public administrative hearing held before the State Engineer on April 17, 1986, and April 8, 1987, to support a finding of abandonment of Permit 4762, Certificate 463.

XXI.

Evidence and testimony presented at the hearing establishes the source of water under Permit 4762, Certificate 463, to be Evans Cold Springs located within the SE1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M., as originally described in said application.

XXII.

NRS 533.330 provides that "no application shall be for the water of more than one source to be used for more than one purpose, etc".

CONCLUSIONS

I.

The State Engineer has jurisdiction of the parties and the subject matter of this action and determination.¹⁹

II.

The record of testimony and evidence does not establish that the owners under Permit 4762, Certificate 463, intended to or have abandoned their right to irrigation and stockwater from a source within Section 4, T.21N., R.18E., M.D.B.&M.

III.

The present owners under Permit 4762, Certificate 463, wish to establish the source of water for said permit to be an improved spring located within the SW1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M., while the application and supporting documents describe the source to be from a verified existing source located within the SE1/4 NE1/4 Section 4, T.21N., R.18E., M.D.B.&M.

IV.

The State Engineer concludes that Exhibit "7" received as evidence at the April 8, 1987, hearing had been falsified. This evidence including all of the applicant's testimony pertaining to said exhibit is totally lacking in credibility and, accordingly, unpersuasive in supporting its position.

Pac. (2d) 249 (1948).
Miller v. Wheeler, 54 Wash. 429, 436, 103 Pac. 641 (1909).
Laramie Rivers Co. v. LeVasseur, 65 Wyo. 414, 449, 202 Pac. (2d) 680 (1949).
Lake DeSmet Res. v. Kaufmann, 75 Wyo. 87, 102, 292 Pac. (2d) 482 (1956).
Franktown v. Marlette, 77 Nev. 354, P.2d 1069 (1961).
Revert v. Ray, 95 Nev. 783, 786, 95 Nev. P.2d 262 (1979).

¹⁹ NRS Chapters 533 and 534.

V.

Approval of Application 46230 would allow a transfer of the source of water from one existing spring to a different existing spring contrary to the provisions of NRS 533.330.

RULING

The complaint alleging that Permit 4762, Certificate 463, has been abandoned as provided under the provisions of NRS 533.060 is hereby denied on the grounds that the complainant failed to establish a record of evidence supporting the intent of the owner of said right to forsake and desert the right.

The denial of Application 46230 by Ruling No. 3359 is hereby affirmed on the grounds that each application is limited to one source of water and that to approve the application would conflict with the provisions of NRS 533.060.

Respectfully submitted,



PETER G. MORROS
State Engineer

PGM/GC/bl

Dated this 4th day of
December, 1987.